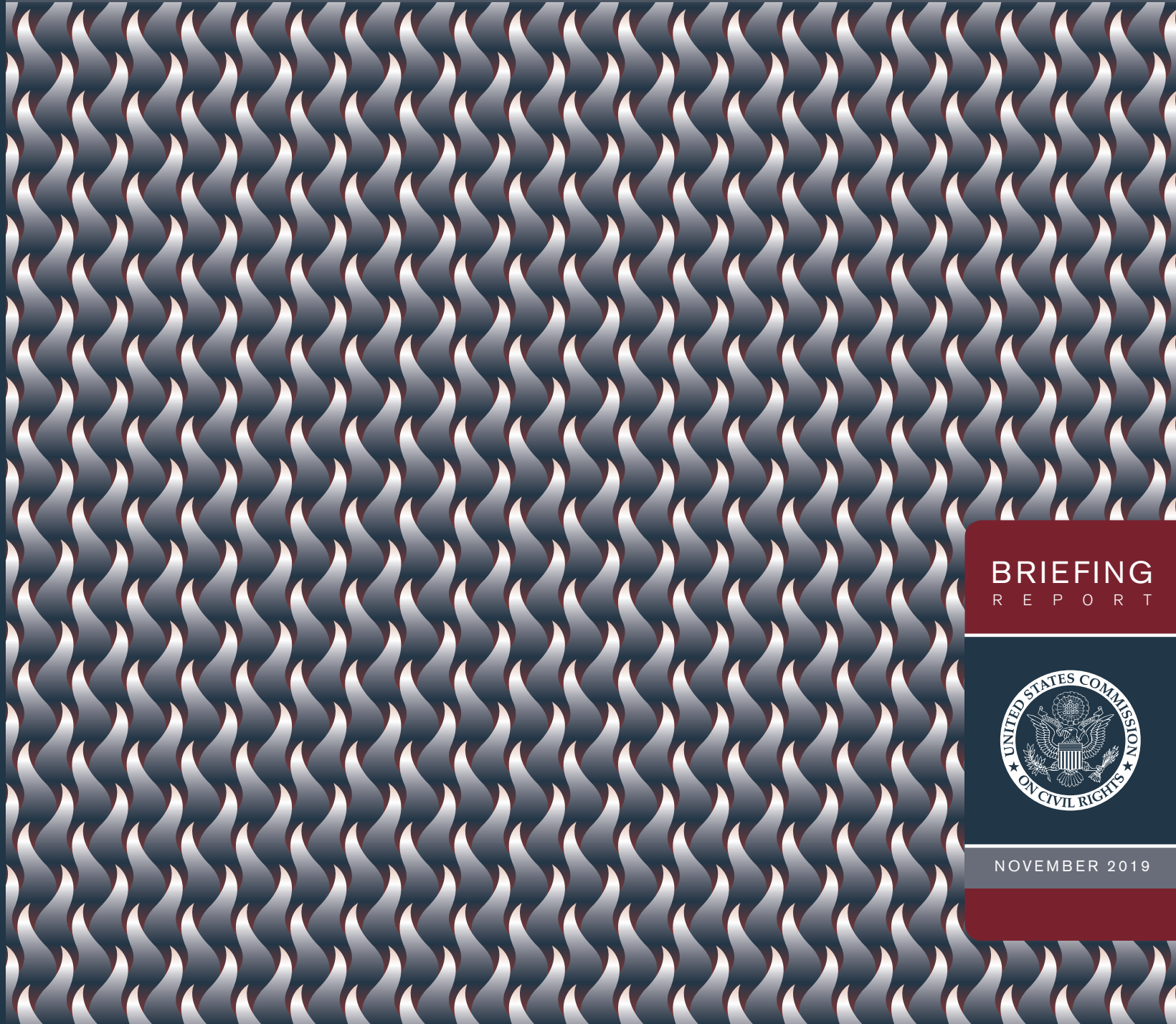


# IN THE NAME OF HATE:

Examining the Federal Government's  
Role in Responding to Hate Crimes



U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING  
REPORT



NOVEMBER 2019

## U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.<sup>1</sup>

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1331 Pennsylvania Avenue, NW  
Washington, DC 20425

(202) 376-8128 voice  
TTY Relay: 711

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<sup>1</sup> 42 U.S.C. §1975a.

# **In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes**

Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, D.C.

Briefing Report

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## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

November 13, 2019

President Donald J. Trump  
Vice President Mike Pence  
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes*. The report is also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

In response to increased recent reports of hate crimes including horrific acts of violence, the Commission voted to investigate the federal government’s role in combating hate crimes. Recent hate crimes resulting in the death of people of color, such as the mass shooting in El Paso, Texas in 2019, demonstrate the ongoing urgency and the work that is needed to prevent bias-based attacks on individuals and communities.

In this report, the Commission examined three areas: (1) federal law enforcement’s hate crimes reporting practices and local policies being developed to encourage greater reporting; (2) federal prosecution and enforcement of laws regarding hate crimes and bias-motivated incidents; and (3) prevention of federal crimes based on race, national origin, ethnicity, disability, religion, gender, sexual orientation, or gender identity. Further, the Commission also explored the increase in reported hate incidents in American schools and in the public realm, along with current and potential civil rights tools that may be used to protect students and others against hateful, hostile, or threatening speech, including online speech, within the bounds of the First Amendment.

The Commission majority approved key findings including the following: Available evidence suggests hate crimes are increasing in America. Many Americans are negatively impacted by hate crimes and are fearful of the heightened expression of hate and bigotry in the United States. As of the time of this writing, 46 states and the District of Columbia have some form of hate crime statute, leaving Arkansas, Georgia, South Carolina, and Wyoming as states without such statutes.

The highest percent of reported post-2016 election hate incidents were in K-12 schools, and the majority of these incidents involved racial discrimination. Educators, researchers, parents and students should pay attention to bullying and hate-related incidents in schools and actively work with students and school communities to prevent them.

The Commission majority voted for key recommendations, including the following: Congress should pass legislation and provide adequate funding that would incentivize local and state law enforcement to more accurately report hate crimes to the FBI, and promote greater transparency and accountability, which would aid in building community trust. Congress should also pass legislation to ensure that federal law enforcement agencies collect and report their hate crime data to the FBI. To ensure that states are accurately reporting hate crime data they receive from local law enforcement agencies in their jurisdiction, the federal government should condition federal funding on reporting and publication of data, undergoing data auditing for accuracy, and working with community groups to report hate crimes even where a victim does not want to move forward with criminal prosecution.

Additionally, the Commission recommends that the Trump Administration reinstate groups within the Department of Homeland Security who analyze the threat of domestic terrorism and reinstate grants awarded to groups who counter white supremacist terror. The DOJ should provide grants, training materials, and resources for police departments to receive cultural competency and sensitivity training related to hate crimes and bias-motivated incidents. Congress should allocate additional funding towards anti-bias training for law enforcement officers.

Congress should pass legislation that includes hate crime prevention and response programs at higher education institutions and ensures that students and faculty are aware of related safety concerns on and around campuses. The Department of Education's Office for Civil Rights must vigorously enforce the protections against harassment that federal civil rights laws guarantee to students and provide the necessary leadership for school officials and administrators at primary, secondary, and higher education institutions to protect their students from bias-related incidents.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon  
Chair

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Multiple State Advisory Committees (SACs) to the Commission including Wisconsin, Rhode Island, Massachusetts, and Virginia collected and provided testimony, findings, and recommendations to the Commission on hate crimes issues within their jurisdictions.

With the assistance of Attorney-Advisor Pilar Velasquez McLaughlin, Presidential Management Fellow Martha Marr, and Law Clerks Christine Kumar (J.D. Candidate 2020, George Washington University Law School), Lilian Ofili (J.D. Candidate 2021, George Washington University Law School), Benjamin Falstein (J.D. Candidate 2021, George Washington University Law School), and Brooke Schwartz (J.D. Candidate 2021, George Washington University Law School), the Commission's General Counsel Maureen E. Rudolph reviewed and approved the report for legal sufficiency.

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## EXECUTIVE SUMMARY

Reports of hate crimes have been steadily increasing over the past several years, particularly against certain groups; there were reports of 6,121 incidents in 2016 and 7,175 incidents in 2017 (a 17 percent increase) – making 2017 the highest year to date of reported incidents to the FBI since it began collecting data in 1995.<sup>1</sup> Hate crime experts are unsure if this increase reflects a rise in hate incidents, a willingness on the part of victims to report, or better reporting practices by law enforcement (or a combination of these factors); regardless, these crimes have lasting and far-reaching effects for victims, their communities, and for the nation.<sup>2</sup>

The Commission’s research shows that many Americans are negatively impacted by these heinous crimes and are fearful of a rising sentiment of hate and bigotry in the United States. In response to increased reports of hate crimes including horrific acts of violence<sup>3</sup> the Commission voted to investigate the federal government’s role in combating hate crimes. In particular, the Commission examined three areas: (1) local law enforcement’s reporting practices of hate crimes statistics and federal policies to encourage greater participation in reporting hate crimes; (2) federal prosecution and enforcement of hate crimes laws; and (3) the prevention of hate crimes. On May 11, 2018, the Commission held a briefing where it received written and oral testimony from impacted community members, legal and academic experts, federal and local law enforcement officials, and members from the public. The Commission also sent formal requests for information to relevant federal government officials at the U.S. Departments of Justice and Education, and to five local law enforcement agencies the Commission selected for the agencies’ hate crimes reporting practices. The Commission also conducted extensive qualitative and quantitative research regarding the impact of hate crimes and bias-motivated incidents on targeted communities in the United States since the passage of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA) in 2009.

The FBI defines a hate crime as “a traditional offense like murder, arson, or vandalism with an added element of bias.”<sup>4</sup> Federal hate crimes—also called bias crimes—are offenses where a perpetrator willfully causes bodily injury or through use of fire or a dangerous weapon or explosive device, willfully causes or attempts to cause bodily injury to any person because of the actual or perceived race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, or

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<sup>1</sup> See FBI, Uniform Crime Reporting, Hate Crimes, <https://ucr.fbi.gov/hate-crime> (last accessed August 8, 2019).

<sup>2</sup> Grant Smith and Daniel Trotta, “U.S. hate crimes up 20 percent in 2016 fueled by election campaign-report,” *Reuters*, Mar. 13, 2017, <https://www.reuters.com/article/us-usa-crime-hate-idUSKBN16L0BO>; Catherine Rentz, “Hate in Maryland: From racist taunts to swastikas to a campus stabbing, bias reports up sharply in state,” *Baltimore Sun*, Oct. 18, 2018, <https://www.baltimoresun.com/news/maryland/investigations/bs-md-two-years-of-hate-incidents-20180813-story.html>; Arjun Singh Sethi, “The FBI recorded a surge of hate crimes last year. But it undercounted – by a lot,” *The Washington Post*, Nov. 14, 2018, [https://www.washingtonpost.com/outlook/2018/11/14/fbi-recorded-surge-hate-crimes-last-year-it-undercounted-by-lot/?utm\\_term=.7db62dcb0e41](https://www.washingtonpost.com/outlook/2018/11/14/fbi-recorded-surge-hate-crimes-last-year-it-undercounted-by-lot/?utm_term=.7db62dcb0e41).

<sup>3</sup> See U.S. Dep’t of Justice, “Ohio Man Charged with Federal Hate Crime Related to August 2017 Rally in Charlottesville,” June 27, 2018, <https://www.justice.gov/opa/pr/ohio-man-charged-federal-hate-crimes-related-august-2017-rally-charlottesville>.

<sup>4</sup> See FBI, “Hate Crimes,” <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last accessed June 3, 2019).

disability status of any person.<sup>5</sup> Federal hate crimes law also prohibits bias-based damage to religious property or interference with the right to practice one's religion, using force or threats of force to interfere with federally protected activities (such as education and public accommodations) or to interfere with access to housing, because of bias-based motivation.<sup>6</sup> A majority of states have passed hate crime statutes that allow for an additional penalty or sentence enhancement if prosecutors prove beyond a reasonable doubt that the crime was motivated by bias.<sup>7</sup> These statutes can vary from state to state in terms of scope and coverage regarding, for example, which groups are protected, and whether the statutes mandate compiling of hate crime statistics by local law enforcement.<sup>8</sup>

Congress has determined that the reverberating injuries that hate crimes inflict in our democratic society justify a special response. The Supreme Court has held that the systemic effects of hate crimes are substantial enough to justify the use of enhanced sentences against offenders found guilty in hate crimes cases.<sup>9</sup> In addition to legal liability, from a policy standpoint, enhanced punishments for hate crimes are also often seen as symbolically important because these laws send a "message to society that criminal acts based upon hatred will not be tolerated."<sup>10</sup> Therefore, to address the gap in protection left by some states, Congress passed the HCPA in 2009, to protect victims who were targeted because of their actual or perceived race, color, religion, national origin, sexual orientation, ethnicity, gender identity, disability, or gender.<sup>11</sup>

Violent hate crimes are often more brutal than other crimes: compared to perpetrators of similar non-hate crimes, perpetrators of hate crimes use extreme violence more often.<sup>12</sup> During 2011-2015, about 90 percent of reported hate crimes involved violence and of those, 29 percent were serious violent crimes, compared to 25 percent of violent non-hate crime victimizations falling into the category of being serious.<sup>13</sup> When comparing hate crime victims to non-hate crime victims, researchers find that hate crime victims are significantly more likely to report being fearful, expect to be targeted for additional victimizations, are more likely to experience employment issues, suffer from health issues, have difficulties overcoming the victimization, and suffer from post-

<sup>5</sup> 8 U.S.C. § 249(a); *See also* IACP Law Enforcement Policy Center, "Investigation of Hate Crimes," IACP Law Enforcement Policy Center, Sept. 2016, p. 1, <https://www.theiacp.org/sites/default/files/2018-08/HateCrimesBinder2016v2.pdf>.

<sup>6</sup> 18 U.S.C. § 247 (Damage to Religious Property and Obstruction of Persons in the Free Exercise of Religious Beliefs); 18 U.S.C. § 245(b)(2) (Federally Protected Activities); 42 U.S.C. § 3631 (Fair Housing Act's criminal prohibition against interference with a housing rights because of bias).

<sup>7</sup> U.S. Department of Justice, Community Oriented Policing Services, *Hate Crimes: Problem-Oriented Guides for Police Problem-Specific Guides Series*, 2013, No. 72, p. 8, <https://ric-zai-inc.com/Publications/cops-p268-pub.pdf>.

<sup>8</sup> *Ibid.* *See also*, Carley Lanich, Ashley Hopko, and Justin Parham, "State Hate Crime Laws Vary, Often Leaving Out LGBTQ Protections," Center for Public Integrity, Sept. 5, 2018, <https://publicintegrity.org/federal-politics/state-hate-crime-laws-vary-often-leaving-out-lgbtq-protections/>.

<sup>9</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (holding that "bias-motivated crimes are more likely to provoke retaliatory crimes . . . and incite community unrest.").

<sup>10</sup> Valerie Jenness and Ryken Grattet, *Making Hate A Crime: From Social Movement to Law Enforcement*, 2002, (Russell Sage Foundation: New York), 3.

<sup>11</sup> 18 U.S.C. § 249. *See also infra* notes 70-92 (discussing federal jurisdiction).

<sup>12</sup> Steven Messner, Suzanne McHugh, and Richard B. Felson, "The Distinctive Characteristics of Assaults Motivated by Bias." *Criminology*, vol. 42, no. 3, (2004), pp. 585–618.

<sup>13</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Hate Crime Victimization, 2004-2015*, 2017, at 3, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

traumatic stress disorder.<sup>14</sup> Georgetown Law Professor Frederick Lawrence asserts that the subsequent effects of the crime may be heightened since “bias crime victim[s] cannot reasonably minimize the risk of future attacks because [they are] unable to change the characteristic that made [them] a victim.”<sup>15</sup> Since hate crimes are often intended “to not just harm the victim, but to send a message of intimidation to an entire community of people,” these targeted communities experience hate crime in “a manner that has no equivalent in the public response to a parallel crime.”<sup>16</sup> These crimes leave entire communities feeling threatened, attacked, and can also stoke tensions between and within communities following a crime.<sup>17</sup>

The Hate Crimes Coalition, a group of over 50 civil rights, religious, education, and professional organizations, contends that many hate crimes are the result of perpetrators holding white supremacy ideologies, and states that “[w]hite supremacy is un-American and unacceptable.”<sup>18</sup> The coalition discusses an increase of reported hate crimes and bias-motivated incidents over the past several years and that the acts of racism, anti-Semitism, Islamophobia, and hatred toward LGBT communities experienced by individuals and communities and “underline[] an essential fact ... that hate crimes are a national problem, deserving of priority attention... [and] the federal government has an essential leadership role to play in confronting acts of violence motivated by prejudice— and in promoting anti-bias initiatives for schools, communities, and law enforcement officials.”<sup>19</sup> The Civil Rights Division of the Department of Justice in the current Administration has stated its agreement with these principles, highlighting on its website and in Attorney General speeches and presentations a priority focus on hate crime enforcement.<sup>20</sup> It has also prosecuted a number of hate crimes cases.<sup>21</sup>

One of the greatest challenges to understanding the severity and magnitude of hate crimes is the lack of sufficient data. The passage of HCPA was an important step in confronting bigotry, increasing public awareness, and improving law enforcement’s responses to hate violence, but

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<sup>14</sup> See Jack McDevitt, Jennifer Balboni, Luis Garcia, and Joann Gu, “Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults.” *American Behavioral Scientist*, vol. 45, no. 4 (2001), at 697–713; Joshua D. Freilich and Steven M. Chermak, “Hate Crimes: Problem-Oriented Guides for Police,” U.S. Dep’t of Justice, Problem-Specific Guide Series,” U.S. Department of Justice, Community Oriented Policing Services, June 2013, No. 72, *supra* note 7 at 12, <https://ric-zai-inc.com/Publications/cops-p268-pub.pdf>.

<sup>15</sup> Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) p. 40.

<sup>16</sup> Carter Coker, *Hope-Fulfilling Or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64, no. 1, VAND. L. REV. 271276 (2011).

<sup>17</sup> *Ibid.*

<sup>18</sup> Hate Crimes Coalition, Policy Recommendations Letter to the U.S. Department of Justice following the Charlottesville’s “Unite the Right” Rally, Sept. 15, 2017, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>.

<sup>19</sup> *Ibid.*

<sup>20</sup> See, e.g., Robert Moossy, Written Statement to U.S. Commission on Civil Rights at 3; Memorandum: Attorney General Jeff Sessions, “Update on the Task Force on Crime Reduction and Public Safety,” Office of the Attorney General, April 5, 2017, <https://www.justice.gov/opa/press-release/file/955476/download>; U.S. Dep’t of Justice, Office of Public Affairs, “Deputy Attorney General Rosenstein Announces Funds and Technical Assistance Resources to Help Law Enforcement Investigate and Prosecute Hate Crimes at Law Enforcement Roundtable,” Oct. 29, 2018, <https://www.justice.gov/opa/pr/deputy-attorney-general-rostein-announces-funds-and-technical-assistance-resources-help>. See *infra* Tables 5-8 (discussion of DOJ litigation of federal hate crimes cases); and 140-156 (discussion of First Amendment issues related to hate crimes and incidents).

<sup>21</sup> See *infra* Tables 5-8.

without national data and police training to accurately identify and report hate crimes, preventing these incidents in the first place is substantially more challenging.<sup>22</sup> Currently, the best sources of data come through the annual FBI's Uniform Crime Reporting (UCR) Hate Crime Statistics and the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS). The UCR program relies upon voluntary reporting from local, state, and federal law enforcement, and as such, only provides a snapshot of the extent of hate crimes.<sup>23</sup> In contrast, the NCVS measures crimes perceived by victims to be motivated by an offender's bias against their actual or perceived identity or group characteristic.<sup>24</sup> While neither of these data sets are without limitations, this report discusses that, taken together, they provide some insight into the increase of hate violence in the United States.

Developing effective policies, procedures, and responses to hate crimes can reduce overall crime, while simultaneously building relationships and trust between law enforcement and communities who feel targeted by acts of hate. The Department of Justice states that “[o]f all crimes, hate crimes are [the] most likely to create or exacerbate tensions, which can trigger larger community-wide racial conflict, civil disturbances, and even riots.”<sup>25</sup> Furthermore, these crimes can then impede the work of law enforcement and prosecutors in investigating, prosecuting, and preventing all crime.<sup>26</sup> The “recognition and reporting of hate crimes and incidents is critical to raising awareness of the problem, acknowledging to victims the pain bias actions cause, and helping police and prosecutors better understand where and how such incidents occur.”<sup>27</sup> While policies alone cannot eradicate hate, effective laws and responses to hate violence by law enforcement officials send a message to targeted communities that these crimes and the threat they pose will be addressed and send a message to perpetrators that their actions are not condoned.<sup>28</sup> At the time of this writing, recent hate crimes resulting in the death of people of color, such as the mass shooting in El Paso, Texas,<sup>29</sup> demonstrate the ongoing urgency and the work that is needed to prevent bias-based attacks on individuals and communities. Further, the Commission also explored the increase in hate incidents in American schools and in the public realm, along with current and potential civil rights tools that

<sup>22</sup> Ken Schwencke, “Why America Fails at Gathering Hate Crime Statistics,” *ProPublica*, Dec. 4, 2017, <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>; Hate Crimes Coalition, Policy Recommendations Letter, *supra* note 17.

<sup>23</sup> “About Hate Crime Statistics,” FBI, <https://ucr.fbi.gov/hate-crime/2017/resource-pages/about-hate-crime>, (accessed May 3, 2019).

<sup>24</sup> U.S. Dep’t of Justice, *Hate Crimes Victimization, 2004-2015*, *supra* note at 10.

<sup>25</sup> U.S. Dep’t of Justice, Community Relations Service, *Hate Crime: The Violence of Intolerance*, Dec. 2001, ¶4, [https://www.justice.gov/archive/crs/pubs/crs\\_pub\\_hate\\_crime\\_bulletin\\_1201.htm](https://www.justice.gov/archive/crs/pubs/crs_pub_hate_crime_bulletin_1201.htm).

<sup>26</sup> U.S. Dep’t of Justice, Bureau of Justice Assistance, *A Policymaker’s Guide to Hate Crimes*, Dec. 1997, 1, <https://fas.org/irp/agency/doj/162304.htm>; International Assoc. of Chiefs of Police, 2018, “Hate Crime in America Policy Summit,” <https://www.theiacp.org/resources/hate-crime-in-america-policy-summit>; (last accessed May 3, 2019); DOJ, *Violence of Intolerance*, *supra*, note 23 at ¶4, [https://www.justice.gov/archive/crs/pubs/crs\\_pub\\_hate\\_crime\\_bulletin\\_1201.htm](https://www.justice.gov/archive/crs/pubs/crs_pub_hate_crime_bulletin_1201.htm).

<sup>27</sup> U.S. Dep’t of Justice, Office of Community Oriented Policing, *Building Stronger, Safer Communities: A Guide for Law Enforcement and Community Partners to Prevent and Respond to Hate Crimes*, 2013, at 13, <https://ric-zai-inc.com/Publications/cops-p270-pub.pdf>.

<sup>28</sup> See *infra* notes e.g., 1204-1218 (Seattle Police Department), 1189 (New York Police Department), 1318-1321 (Boston Police Department).

<sup>29</sup> See Annie Gowan, Mark Berman, Tim Craig and Hannah Natanson, “El Paso Shooting Suspect Could Face Federal Hate Crimes Charges,” *Washington Post*, Aug. 4, 2019, [https://www.washingtonpost.com/politics/2019/08/04/a501fb60-b6ce-11e9-bad6-609f75bfd97f\\_story.html](https://www.washingtonpost.com/politics/2019/08/04/a501fb60-b6ce-11e9-bad6-609f75bfd97f_story.html) (quoting U.S. Attorney for the Western District of Texas John F. Bash’s statements at a news briefing).

may be used to protect students and others against hateful, hostile, or threatening speech, including online speech, within the bounds of the First Amendment.<sup>30</sup>

Chapter 1 of the report examines relevant federal laws as well as developing policies regarding hate crimes (including their prevention) and hate incidents, policy arguments for and against federal and state hate crime laws, and some of the major relevant legal decisions about the constitutionality of hate crime laws. Chapter 2 examines data regarding communities who are most targeted by hate crimes and how they are targeted, as well as the significant challenges in hate crime reporting. Chapter 3 evaluates the federal government's role in investigating, reporting, and prosecuting hate crimes and incidents. Chapter 4 analyzes the practices of local law enforcement and evaluates some promising hate crime reporting and prevention practices, along with ongoing challenges. The report concludes with the Commission's findings and recommendations, which are highlighted below, and discussed in full in Chapter 5:

### **Findings:**

- Hate crimes are increasing in America according to available evidence. Much of the evidence reflects massive underreporting of hate crimes.
- Many Americans are negatively impacted by hate crimes and are fearful of the heightened expression of hate and bigotry in the United States.
- Effective laws for, reporting of, and responses to hate violence by law enforcement officials send a message to targeted communities that these crimes and the threat they pose will be addressed through appropriate training of law enforcement officers and increased availability of resources.
- As of the time of this writing, 46 states and the District of Columbia have some form of hate crime statute, leaving Arkansas, Georgia, South Carolina, and Wyoming as states without such statutes.
- While bullying does not necessarily reach the level of a hate crime, these incidents are significant for educators, researchers, parents, and students to pay attention to and actively work with students to prevent.

### **Recommendations:**

- Congress should pass legislation and provide adequate funding that would incentivize local and state law enforcement to more accurately report hate crimes to the FBI, and promote greater transparency and accountability, which would aid in building community trust.
- Congress should also pass legislation to ensure that federal law enforcement agencies collect and report their hate crime data to the FBI and that states are accurately reporting hate crime data they receive from local law enforcement agencies in their jurisdiction.
- The Trump Administration should reinstate groups within DHS who analyze the threat of domestic terrorism and reinstate grants awarded to groups who counter white supremacist terror.

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<sup>30</sup> See *infra* notes 176-78 (online speech), 331 (role of Department of Education), and 131-134 (developments in local jurisdictions regarding hate incidents).



- Law enforcement agencies that do not yet engage in this practice should start investigating “hate incidents” even if they do not escalate to meet the legal definition of a crime. Documenting and investigating hate and bias incidents may aid in the prevention of hate crimes and enhance public trust and safety.
- State legislators should pass legislation that clearly defines hate crimes and hate incidents.

## CHAPTER 1: INTRODUCTION AND OVERVIEW OF APPLICABLE LAWS

Throughout the 1980s and 1990s the term “hate crimes” was commonplace in public discourse, the law, and media reports.<sup>31</sup> According to the National Institute of Justice, the term “hate crime” was initially employed by journalists and activists who sought to label crimes that were specifically targeting black, Jewish, and Asian Americans.<sup>32</sup>

While the discussion of hate crime laws proliferated during this time, their origins go back much further. The United States has a long and pervasive history of engaging in acts of racialized terror and violence against many communities of color. These acts include the enslavement of thousands of African and Caribbean slaves; the forced removal of indigenous peoples from their native lands during, for example, the Trail of Tears; the lynching of Chinese Americans in California; and the “Zoot Suit Riots” against Mexican American youth, to name but a few examples of the historical legacy of racialized violence in the United States.<sup>33</sup> In 2017, the Senate unanimously passed a resolution taking notice of FBI statistics showing that “among single-bias hate crime incidents in the United States, 59.2 percent of victims reporting were targeted due to racial, ethnic, or ancestral bias, and among those victims, 52.2 percent were victims of crimes motivated by the offenders’ anti-Black or anti-African American bias.”<sup>34</sup>

Historically, “during the period between the Civil War and WW II, thousands of African Americans were lynched in the United States. Lynchings were public acts of torture that traumatized black communities and were largely tolerated by state and federal officials.”<sup>35</sup> In 2017,

<sup>31</sup> “Hate Crimes,” FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes>, (accessed May 3, 2019); James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* (New York: Oxford University Press; (1998); Steven Messner, Suzanne McHugh, and Richard Felson, “Distinctive Characteristics of Assaults Motivated by Bias,” *Criminology*, vol. 42, no. 3, (2004), pp. 585-618; Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, <https://www.thenation.com/article/hate-crime-laws-dont-prevent-violence-against-lgbt-people/>.

<sup>32</sup> National Institute of Justice, Hate Crime, Office of Justice Programs, last updated Feb. 27, 2018, <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx>.

<sup>33</sup> Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 2017, [EJI Introduction], <https://lynchinginamerica.eji.org/report/>; “Trail of Tears,” History. Com (last updated Mar. 5, 2019), <https://www.history.com/topics/native-american-history/trail-of-tears>; Gisely Ruiz, “How the Chinese Massacre of 1871 Became One of the Largest Lynchings in U.S. History,” *ATI*, Nov. 12, 2018, <https://allthatsinteresting.com/chinese-massacre-of-1871>; “The Zoot Suit Riots,” History.com (last updated Aug. 21, 2018), <https://www.history.com/topics/world-war-ii/zoot-suit-riots>.

<sup>34</sup> S. Res. 118, 115th Cong. (2017) (enacted), <https://www.congress.gov/bill/115th-congress/senate-resolution/118/text>. While federal anti-lynching legislation has stalled, in 2019, Maryland signed into law House Bill 307, “creating the nation’s first statewide truth commission empowered to investigate racial terror lynchings and address the legacy of racial terror.”<sup>34</sup> While the act acknowledges the historical violence of racialized terror inflicted against black Americans, it further recognizes that government officials at the local, state, and federal level “colluded in the commission of these crimes and conspired to conceal the identities of the parties involved.” See Maryland House Bill 307, April 18, 2019, <https://legiscan.com/MD/text/HB307/2019>; EJI, “Maryland Establishes First Statewide Commission on Racial Terror Lynchings,” Equal Justice Initiative, April 22, 2019, <https://eji.org/news/maryland-establishes-first-statewide-commission-on-racial-terror-lynchings?fbclid=IwAR3zfjonP9yExUDBxUmf5K5Wng6vrb7VwtvhQzHwFF8xo4m1y1xoNFB9mas>.

<sup>35</sup> Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 2017, [EJI Introduction], <https://lynchinginamerica.eji.org/report/>.

Equal Justice Initiative (EJI) found there were many more of these terrifying murders of black Americans than previously reported, documenting “4,084 terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950, which is at least 800 more lynchings in these states than previously reported.”<sup>36</sup> Summarizing the impact of governmental silence or collaboration, EJI quoted Maya Angelou in their report:

History, despite its wrenching pain,  
Cannot be unlived, but if faced  
With courage, need not be lived again.<sup>37</sup>

One historic strategy utilized to combat racially biased disregard for human life was to lobby Congress to enact new legislation to ensure that existing criminal laws were enforced. For instance, in the 1930s, when the lynching of black people was pervasive throughout the country—3,446 black people were lynched between 1882 and 1968, which is approximately one lynching every ten days—advocates for equality and justice led the Congressional lobbying effort to pass anti-lynching laws.<sup>38</sup> These proposed bills would have worked to prosecute lynchers on the federal level, and were meant to broaden the jurisdiction of the federal government to intervene when states would not prosecute.<sup>39</sup> But due to the resistance of southern Democrats, over 200 federal anti-lynching bills never passed, although one was proposed again in 2018.<sup>40</sup> It was not until the civil rights movement that advocates successfully challenged the legality of the racial animus that was largely ignored by local, state, and federal officials.<sup>41</sup> In the meantime, while the federal government failed to act, “99 percent of all perpetrators of lynching escaped from punishment by State or local officials.”<sup>42</sup> While other hate crimes laws have passed, many communities continue

<sup>36</sup> Ibid., [EJI Introduction].

<sup>37</sup> Ibid., [EJI Introduction], quoting Maya Angelou, *On the Pulse of Morning*.

<sup>38</sup> See NAACP, “History of Lynchings,” <https://www.naacp.org/history-of-lynchings/>; Vanessa Romo, “African-American Senators Introduce Anti-Lynching Bill,” *NPR*, June 29, 2018, <https://www.npr.org/2018/06/29/624847379/african-american-senators-introduce-anti-lynching-bill>; Office of the Historian, “Anti-Lynching Legislation Renewed,” History, Art, & Archives, United States House of Representatives, 2008, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Anti-Lynching-Legislation/>.

<sup>39</sup> Robert Siegel, “Anti-Lynching Law in U.S. History,” *NPR*, June 13, 2005, <https://www.npr.org/templates/story/story.php?storyId=4701576>; Office of the Historian, “Anti-Lynching Legislation Renewed,” History, Art, & Archives, United States House of Representatives, 2008, (For example, Representative Dyer in 1918 introduced a bill “to protect citizens of the United States against lynching in default of protection by the States.”), <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Anti-Lynching-Legislation/>.

<sup>40</sup> The Justice for Victims of Lynching bill passed the Senate unanimously in 2018, but to date it has not yet passed the House of Representatives, <https://www.congress.gov/bill/115th-congress/senate-bill/3178/all-actions?q=%7B%22search%22%3A%5B%22s+3178%22%5D%7D&r=1&overview=closed#tabs>. If passed, it would be added to the U.S. Code after the section on hate crimes, and provide criminal penalties if “two or more persons willfully cause bodily injury to any other person because of the actual or perceived, race, color, national origin or religion of any other person.” (S. 3178, 115<sup>th</sup> Cong. § 3(a)(1)(2018).

<sup>41</sup> See S. Res. 39, 109<sup>th</sup> Cong. (2005)(enacted); Vanessa Romo, “African-American Senators Introduce Anti-Lynching Bill,” *NPR*, June 29, 2018, (The proposed bill, “Justice for Victims of Lynching Act of 2018” notes that during the first half of the 20<sup>th</sup> century there were almost 200 attempts to pass anti-lynching legislation, but the bill failed to gain support from the Senate).

<sup>42</sup> Justice for Victims of Lynching Act of 2018, S. 3178, 115<sup>th</sup> Cong. § 2 (2018),

to have critical concerns over targeted violence against individuals, including for people of color, immigrants, LGBT individuals, communities of various faiths, and people with disabilities.

This chapter explores historic and more recent hate crimes laws as well as the seminal Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. It also considers federal law regarding protections against bias-related incidents in the area of education and provides a brief overview of state hate crimes laws.

## Laws Regarding Hate Crimes and Bias-Related Incidents

### Hate Crime Laws

As discussed above, despite the protections of the Thirteenth, Fourteenth, and Fifteenth Amendments (the “Reconstruction Amendments”), which provided for the eradication of slavery, for equal protection and due process under law, and for voting rights, respectively, the promises of the Reconstruction era were marred by racial segregation enforced by widespread violence against black Americans, particularly in the South.<sup>43</sup> Therefore, in 1870 and 1871 three Enforcement Acts were passed in order to provide federal power to enforce the promises of the Reconstruction Amendments.<sup>44</sup> By legislating protections of a targeted group, they included the first iterations of federal hate crimes laws. The Acts were “designed to eliminate extralegal violence and protect the civil and political rights of four million freed slaves.”<sup>45</sup> However, all three Enforcement Acts were undermined.

The Enforcement Act of 1870 was enacted to enforce the promise of the Fifteenth Amendment and the right to vote of every citizen and prohibited conspiracies to deprive anyone of their constitutional rights, but was undermined by aggressive, racially motivated state actions and litigation that prompted courts to dilute the federal government’s power to enforce it.<sup>46</sup> In 1873, after a Republican majority won elections in Louisiana, an armed militia of white Democrats attacked Republican black freedmen and killed 105 black people and 3 white people. Federal prosecutors brought charges under the Enforcement Act of 1870; however, in *United States v. Cruikshank*, the Supreme Court overturned the white perpetrators’ convictions, holding that based on principles of federalism, the Due Process and Equal Protection clauses of the Fourteenth Amendment only applied to state actors, not to individuals.<sup>47</sup>

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<sup>43</sup> See *supra* notes 46-49.

<sup>44</sup> Codified as amended at 42 U.S.C. §§ 1985- 1986 (1988).

<sup>45</sup> History, Art, & Archives, United States House of Representatives, 2008, “The Ku Klux Klan Act of 1871,” <http://history.house.gov/HistoricalHighlight/Detail/15032451486?ret=True>.

<sup>46</sup> See U.S. Comm’n on Civil Rights, An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report, p. 16, [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf) (“As historian Eric Foner has documented, “[b]y the early 1870s, biracial democratic government . . . was functioning effectively in many parts of the South, and [black] men only recently released from bondage were exercising political power.” That power, however, was fleeting and “after the Compromise of 1877 and the removal of federal troops from the South, concerted efforts by southern states to subvert the Reconstruction Amendments and civil rights laws of the time resulted in a backlash limiting access to voting for African American citizens.”).

<sup>47</sup> *United States v. Cruikshank*, 92 U.S. 542, 544-45 (1876).

The Enforcement Act of 1871, known as the Ku Klux Klan Act, “empowered the president to use the armed forces to combat those who conspired to deny equal protection of the laws and to suspend habeas corpus, if necessary, to enforce the act.”<sup>48</sup> President Grant chose to utilize these powers several times during the Reconstruction Era, most notably when he ordered military intervention in several counties in South Carolina to end Klan violence against black people and anti-racist white supporters.<sup>49</sup> But in 1883, the Supreme Court ruled in *United States v. Harris* that Section 2 (Rev. Stat. Section 5519) of the Enforcement Act of 1871 was unconstitutional;<sup>50</sup> this section of the act made it a crime for two or more people to conspire for the purpose of depriving anyone of the equal protection of the law.<sup>51</sup> In *Harris*, the United States attempted to enforce Section 2 against Sheriff Harris of Crocket County, Tennessee and his fellow conspirators for leading a lynch mob into a prison where they captured four black inmates, who were beaten and one was killed by the mob of private citizens.<sup>52</sup> As in the *Cruikshank* case, the Court ruled that Section 2 was unconstitutional, because it considered that the Fourteenth Amendment only applies to state actors, not to individuals or state inaction. Although a sheriff had led the criminals to the victims, the Court held that the federal government could only limit governmental actors, not penalize the attackers (who were not state actors).<sup>53</sup> The other sections of the Acts remained, but they were not heavily utilized afterwards, since by this time Reconstruction had largely ended and segregation prevailed, ushering in a relative lull in much of the explicit Klan activity.<sup>54</sup>

Hate crimes can also be prosecuted through modern federal statutes prohibiting deprivation of civil rights under 42 U.S.C. § 1983 (enacted in 1979) and 42 U.S.C. § 1985 (enacted in 1980), which are modern codifications of the Enforcement Acts that prohibit deprivation of civil rights and conspiracies to deprive persons of their civil rights.<sup>55</sup> Moreover, based on the legislative history of the Enforcement Acts, in 1971, the Supreme Court in *Griffin v. Breckenridge* held that Congress intended to protect private parties against racial violence via private conspiracies.<sup>56</sup>

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<sup>48</sup> United States Senate, “Landmark Legislation: The Enforcement Acts of 1870 and 1871,”

<https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm>.

<sup>49</sup> History, Art, & Archives, United States House of Representatives, 2008, “The Ku Klux Klan Act of 1871,”

<http://history.house.gov/HistoricalHighlight/Detail/15032451486?ret=True>.

<sup>50</sup> *United States v. Harris*, 106 U.S. 629 (1883).

<sup>51</sup> *See Id.* at 630-632.

<sup>52</sup> *Id.* at 629-30.

<sup>53</sup> *Id.* at 639 (1883)(citing) (“these provisions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals.” (quoting *Virginia v. Rives*, 100 U.S. 313 (1883)).

<sup>54</sup> United States Senate, “Landmark Legislation: The Enforcement Acts of 1870 and 1871,”

<https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm>; PBS, “Grant, Reconstruction, and the KKK,” American Experience, <https://www.pbs.org/wgbh/americanexperience/features/grant-kkk/>.

<sup>55</sup> 42 U.S.C. § 1983 and 1985; *see Monroe v. Pape*, 365 U.S. 167 (1961) (discussing the legislative history of the Enforcement Act of 1871, “[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts. . . [to enforce] the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment [that] might be denied by state agencies.” 365 U.S. at 180).

<sup>56</sup> *Griffin v. Breckenridge*, 403 U.S. 88, 100-101, (1971) (discussing the legislative history of the Enforcement Act of 1871, the precursor to 18 U.S.C. § 1985(3), and its clear inclusion of private actions).

In *Griffin*, black citizens of Mississippi alleged that white citizens conspired to assault them and deprive them of their civil rights; the Supreme Court held that 42 U.S.C. § 1985(3) could be enforced by private parties who could seek damages.<sup>57</sup> That federal statute provides that:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws (and) in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.<sup>58</sup>

In *Griffin*, the Supreme Court had held that “[b]y the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free,” and that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation;” based on this authority, the Enforcement Acts and their modern counterparts could be enforced against individuals.<sup>59</sup>

In the case of *Sines v. Kessler*, ten private plaintiffs brought similar charges after the August 2017 Unite the Right rally in Charlottesville, Virginia. The federal court summarized the plaintiffs’ allegations as follows:

One of these Plaintiffs was Tyler Magill, who was surrounded and assaulted by various marchers around a Thomas Jefferson statue. The marchers hurled torches at Magill and others, sprayed them with pepper spray, and threw other liquids on them. He later suffered a “trauma-induced stroke” and related injuries. Plaintiff John Doe, an African-American UVA student, attended the march where he was also harassed and assaulted. He suffered various emotional injuries. A third Plaintiff, a UVA student named Natalie Romero, was also surrounded and assaulted at the statue. Second, another group of Plaintiffs was injured when one of the Defendants, James Fields, drove his car into a crowd of counter-protestors... Plaintiff Romero also falls into this second group, as she was hit by Fields’s car and sustained subsequent injuries. Plaintiff Marcus Martin, an African-American counter-protestor, was hit by Fields’s car and sustained a broken leg and ankle.<sup>60</sup>

The defendants, including Ku Klux Klan organizations, allegedly planned the Charlottesville rally, discussed racial violence during the planning, and celebrated the violence that ensued.<sup>61</sup> When defendants filed a motion for the court to dismiss the charges against them, the federal court

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<sup>57</sup> See *Griffin v. Breckenridge*, 403 U.S. 88, *passim*.

<sup>58</sup> 42 U.S.C. § 1985(3).

<sup>59</sup> 403 U.S. 88, 105.

<sup>60</sup> *Sines v. Kessler*, 324 F. Supp. 3d 765, 774 (W.D. Va.2018) (denying defendant’s motion to dismiss).

<sup>61</sup> *Id.* at 776-77.

dismissed their motion, holding in part that “the Thirteenth Amendment provides Plaintiffs an underlying right to be free from racial violence analogous to that in *Griffin*.”<sup>62</sup>

In addition to defendants, in the *Sines v. Kessler* litigation, social media site owners who were not parties to the litigation were subpoenaed “to gather evidence related to Defendants’ and their co-conspirators’ coordination and planning for racially-motivated violence.”<sup>63</sup> One social media site owner petitioned the court to “quash” evidence from GoDaddy.com and Cloudflare, which allegedly provided services to defendants to organize their “Unite the Right” rally that resulted in violations of the Enforcement Act as well as of Virginia’s state hate crimes law.<sup>64</sup> Hatreon, a site allegedly used to raise money for bail for the defendants, and Twitter, which was allegedly used to “disseminate information about” and “encourage others to attend” the rally were also involved as they were subpoenaed but did not participate in the motion to quash the evidence.<sup>65</sup> The magistrate judge denied the protective order and the district court affirmed the denial, finding that the social media site owners “associational privilege [First Amendment] argument is without merit.”<sup>66</sup> As discussed in Chapter 3, DOJ has also used social media to prove hate crimes in modern times.<sup>67</sup> The question remains as to whether the federal government can and should go further to prevent hate crimes by monitoring and acting upon various types of social media posts, while balancing First Amendment rights.

Importantly, these statutes may be used by private parties to sue for civil damages against conduct that has the same elements as a hate crime—but they are not criminal laws. Congress passed the first official hate crime law in the United States in 1968 as part of the federal Civil Rights Act.<sup>68</sup> The 1968 statute made it a crime to use or threaten to use force to willfully interfere with any person on the basis of race, color, religion, or national origin who was engaging in one of six federally protected activities:

- enrolling in or attending any public school or public college school,
- applying for a job,
- acting as a juror,
- voting,
- using any facility of interstate commerce, or
- patronizing a public facility.<sup>69</sup>

Following the 1968 Civil Rights Act came the first iteration of the Hate Crimes Statistics Act in 1985 that was introduced as legislation that would require DOJ to collect and publish data regarding hate crimes.<sup>70</sup> The legislation initially failed to pass both houses of Congress in its first

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<sup>62</sup> *Id.* at 782.

<sup>63</sup> *Sines v. Kessler*, 3:17-cv-00072, 2019 WL 691788, at 25, (W.D. Va. Feb. 19, 2019).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*3.

<sup>67</sup> See *infra* notes 966-69.

<sup>68</sup> 18 U.S.C. § 245(b)(2).

<sup>69</sup> 18 U.S.C. § 245(b)(2).

<sup>70</sup> Human Rights Campaign, “Hate Crimes Timeline,” <https://www.hrc.org/resources/hate-crimes-timeline>. For a full list of hate crime legislation, see Appendix A.

two iterations, and finally, the Hate Crimes Statistics Act (HCSA)<sup>71</sup> was signed into law by President George H.W. Bush in 1990, and was subsequently modified and expanded in 2009.<sup>72</sup> The 1990 Act required the collection of data, and defined hate crimes as “crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.”<sup>73</sup> Researchers Donald Green and Amber Spry argue that under the definition of the HCSA “a hate crime can be understood as a behavioral manifestation of prejudice, where the behavior in question is conduct, such as assault, that would otherwise be unlawful.”<sup>74</sup>

In 1994, as an amendment to the Violent Crime Control and Law Enforcement Act of 1994, Congress passed the Hate Crime Sentencing Enhancement Act (HCSEA), which mandated a revision of U.S. Sentencing Guidelines to implement sentencing enhancements of at least three offense levels for hate crimes offenses.<sup>75</sup> In addition to applying to individuals who committed crimes on the basis of race, color, religion, and national origin as established in the 1968 law,<sup>76</sup> the HCSEA applied to persons who targeted individuals on the basis of their gender, ethnicity, sexual orientation, or disability.<sup>77</sup> While the 1994 Act increased the penalties for hate crimes, it did not eliminate the restrictions stated in the 1968 law, which required that the victim must be engaged in a federally protected activity when such violations occur.<sup>78</sup> Moreover, the 1994 Act stated that its sentencing enhancement for hate crimes could only be utilized when a federal crime is committed.<sup>79</sup> Congress also mandated that the U.S. Sentencing Commission “shall assure that there is reasonable consistency with other guidelines [and] avoid duplicative punishments for substantially the same offense...”<sup>80</sup> In essence, the 1994 Act merely consolidated the sentencing guidelines for all the federal criminal civil rights offenses.<sup>81</sup> Despite these limitations, the HCSEA did signal a Congressional willingness to address hate crimes, although the scope of substantive federal protections remained unchanged for another decade.

In 1996, Congress passed, and President Clinton signed, the Damage to Religious Property, Church Arson Prevention Act<sup>82</sup> in response to a wave of black church fires throughout the South in the 18

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<sup>71</sup> 28 U.S.C. § 534 et al. (1990).

<sup>72</sup> 28 U.S.C. § 534, Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990) as amended; 18 U.S.C. § 249, note, 42 U.S.C. § 3716, Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, Pub. L. 111-84, 123 Stat. 2835 (2009).

<sup>73</sup> 28 U.S.C. § 534 (as amended by the Hate Crimes Statistics Act [hereinafter HCSA]).

<sup>74</sup> Donald Green and Amber Spry, “Hate Crime Research: Design and Measurement Strategies for Improving Causal Inference,” *Journal of Contemporary Criminal Justice*, vol. 30, no. 3, (2014) at 229.

<sup>75</sup> Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994.) (codified as amended at 18 U.S.C. § 3553).

<sup>76</sup> 18 U.S.C. § 245(b)(2).

<sup>77</sup> Violent Crime Control and Enforcement Act § 280003.

<sup>78</sup> U.S. Dep’t of Justice, “Hate Crime Laws,” <https://www.justice.gov/crt/hate-crime-laws>, (last updated Oct. 15, 2018, <https://www.justice.gov/crt/hate-crime-laws>).

<sup>79</sup> Violent Crime Control and Enforcement Act § 280003.

<sup>80</sup> *Id.*

<sup>81</sup> James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics*, (New York: Oxford University Press, 1998) p. 77.

<sup>82</sup> Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247(a) (1996).



months prior to the passage of the bill.<sup>83</sup> The Act prohibited intentional defacing, damaging, or destroying religious property, and attempting to do so, because of race, color, or ethnicity of persons associated with the property.<sup>84</sup> This Act also made it a crime to intentionally deface, damage, or destroy religious real property because of the religious nature of the property, or attempt to do so, or to obstruct, by force or threat of force, a person's free exercise of religious beliefs, or attempt to do so, in situations affecting interstate commerce.<sup>85</sup>

The first iteration of the Hate Crimes Prevention Act (HCPA) was introduced in 1997 and during the next 12 years, various versions of the legislation passed the House, but Congress was unsuccessful in ratifying the bill.<sup>86</sup> Then in 2009, Congress passed, and President Obama signed, the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA), which was named for two victims of horrific hate crimes.<sup>87</sup> Matthew Shepard was abducted on October 12, 1998, by two men in Laramie, Wyoming, who repeatedly assaulted him, tied him to a fence, and left him to die. A bicyclist, who first thought Shepard was a scarecrow, took him to the hospital, where he died several days later.<sup>88</sup> On June 7, 1988, James Byrd, Jr., a black man living in Jasper, Texas, was killed by three white men who beat him unconscious, chained his ankles to the back of their pickup truck, and dragged him to death.<sup>89</sup> In both these deaths, substantial evidence suggested that the perpetrators' criminal acts were motivated by their victims' identity characteristics.<sup>90</sup>

HCPA expanded the federal definition of hate crimes to include a victim's actual or perceived race, religion, national origin, gender, sexual orientation, gender identity, or disability, enhancing the legal toolkit available to prosecutors, and increasing the ability of federal law enforcement to support state and local law enforcement.<sup>91</sup> Specifically, this law removed the prerequisite in 18 U.S.C. § 245 that the victim had to be engaging in a federally protected activity, and established federal prohibitions against crimes motivated by actual or perceived gender, sexual orientation,

<sup>83</sup> See e.g., "Washington, D.C.: President Signs Church Arson Law," *Los Angeles Times*, July 4, 1996, [http://articles.latimes.com/1996-07-04/news/mn-21139\\_1\\_church-arson-law](http://articles.latimes.com/1996-07-04/news/mn-21139_1_church-arson-law); 18 U.S.C. § 247 *et al.* (1996).

<sup>84</sup> 18 U.S.C. § 247 (c).

<sup>85</sup> 18 U.S.C. § 247 (a).

<sup>86</sup> For timeline of legislation, see Appendix A.

<sup>87</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835, 2835-2845 (2009) (codified at 18 U.S.C. § 249 (2009)) [*hereinafter* 18 U.S.C. § 249].

<sup>88</sup> Jude Sheerin, "Matthew Shepard: The murder that changed America," *BBC*, Oct. 26, 2018, <https://www.bbc.com/news/world-us-canada-45968606>; Melanie Thernstrom, "The Crucifixion of Matthew Shepard," *Vanity Fair*, Mar. 1999, <https://www.vanityfair.com/news/1999/13/matthew-shepard-199903>; *but see* Stephen Jimenez, *The Book of Matt*, (Hanover, N.H.: Steerforth Press, 2013) (citing a recent book where the author argued that Shepard's murder may actually have been motivated by a conflict about drugs, rather than by anti-gay hatred, however, during the trial the defendant tried to use "the gay panic defense," in explaining that he was motivated by Mr. Shepard's homosexuality. The prosecutors showed that the defendant and a friend had posed as gay men in order to lure Mr. Shepard out of a bar and then kidnapped him and take to the site where they murdered him.); See, Robert W. Black, *Wyo. Judge Bars "Gay Panic Defense," Associated Press*, November 1, 1999, <http://www.washingtonpost.com/wp-srv/national/daily/nov99/shepard110199.htm>.

<sup>89</sup> Thomas Fields-Meyer, "One Deadly Night," *People*, June 29, 1998, <https://people.com/archive/one-deadly-night-vol-49-no-25/>.

<sup>90</sup> *Ibid.*

<sup>91</sup> 18 U.S.C. § 249 *et al.* (2009); *see also*, U.S. Dep't of Justice, "Hate Crime Laws," (last updated Oct. 15, 2018, <https://www.justice.gov/crt/hate-crime-laws>).

gender identity, or disability; it was also the first federal statute that allowed federal prosecution of hate crimes motivated by sexual orientation or gender identity bias.<sup>92</sup>

HCPA makes it unlawful to willfully cause bodily injury, or attempt to do so, through the use of “fire, a firearm, a dangerous weapon, or an explosive or incendiary device,” under two circumstances: (1) when the crime was committed “because of the actual or perceived race, color, religion, or national origin of any person”;<sup>93</sup> or (2) when the crime was committed because of the “actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person”<sup>94</sup> and the crime affected interstate or foreign commerce or occurred within a federal special maritime or territorial jurisdiction.<sup>95</sup> Regarding bodily injury, the definitions section of the HCPA specifies that the term “does not include solely emotional or psychological harm to the victim.”<sup>96</sup>

In 2017, the Department of Justice under the Trump Administration stated that it would continue to prosecute hate crimes against transgender individuals under HCPA; this declaration was in a memo announcing that DOJ would no longer pursue employment discrimination claims on behalf of transgender workers under Title VII of the Civil Rights Act of 1964.<sup>97</sup> The contradictory nature of the messages sent by the administration about hate versus hate crimes are notable.<sup>98</sup>

To alleviate concerns about federalism, hate crimes may be prosecuted under HCPA only if:

[the] Attorney General or a designee certifies in writing that:

- (1) the State does not have jurisdiction;
- (2) the State has requested that the Federal government assume jurisdiction;
- (3) the “the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence”; or

<sup>92</sup> U.S. Dep’t of Justice, “Hate Crime Laws,” (last updated Oct. 15, 2018), <https://www.justice.gov/crt/hate-crime-laws>.

<sup>93</sup> 18 U.S.C. § 249(a)(1).

<sup>94</sup> *Id.* at § 249(a)(2).

<sup>95</sup> See 18 U.S.C. 247(a)(2) & (3); see also, Alison Smith, *Overview of Selected Federal Criminal Civil Rights Statutes*, Congressional Research Services, Dec. 16, 2014, at 6, <https://fas.org/sgp/crs/misc/R43830.pdf>. For further discussion of the statutory definition of impacting interstate commerce element and how courts have interpreted it through the facts of cases brought by DOJ, see *infra* notes 900-et. seq.

<sup>96</sup> 18 U.S.C. § 249(c).

<sup>97</sup> U.S. Dep’t of Justice, Memorandum from Attorney General Sessions to All U.S. Attorneys and Component Heads, *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Oct. 4, 2017), <https://www.documentcloud.org/documents/4067437-Sessions-memo-reversing-gender-identity-civil.html>, at 2 (“[T]he Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and the Violence Against Women Reauthorization Act prevent gender identity discrimination along with other forms of discrimination in certain contexts. 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 19235(b)(3)(A). The Department of Justice has vigorously enforced such laws, and will continue to do so, on behalf of all Americans, including transgender Americans.”)

<sup>98</sup> See, e.g., *Alexia Fernandez Campbell*, “Trump described an imaginary ‘invasion’ at the border 2 dozen times in the past year,” *Vox*, Aug. 7, 2019, <https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion> (regarding the President’s anti-Latinx statements); see e.g., *supra* notes 316-320 (regarding DOJ commitment to prosecuting hate crimes).

(4) “prosecution by the United States is in the public interest and necessary to secure substantial justice.”<sup>99</sup>

Punishment for violations may include a fine and/or imprisonment for a maximum of 10 years.<sup>100</sup> The law provides greater punishment to violators if their acts result in death (or an attempt to kill) or include kidnapping (or an attempt to kidnap) or aggravated sexual abuse (or an attempt to commit aggravated sexual abuse).<sup>101</sup> Under such circumstances, offenders may face life imprisonment.<sup>102</sup>

The HCPA also provided limited jurisdiction “for federal law enforcement officials to investigate certain bias-motivated crimes in states where current law is inadequate,”<sup>103</sup> as well as “funding and technical assistance to state, local, and tribal jurisdictions to help them more effectively investigate and prosecute hate crimes.”<sup>104</sup>

One feature of hate crimes laws is that the persons prosecuted are individual perpetrators or conspirators;<sup>105</sup> unlike some other civil rights laws, hate crimes laws do not reach systemic problems that may contribute to a pattern or practice of constitutional violations, nor do they reach discrimination in the failure to prosecute hate crimes against a protected class under the Civil Rights Act.<sup>106</sup> At the Commission’s briefing, a number of panelists testified that more is needed to prevent hate crimes from recurring, especially if there are trends of increasing hate incidents in a community. For instance, Andrea Senteno, Legislative Staff Attorney with the Mexican American Legal Defense and Educational Fund (MALDEF) discussed the importance of building relationships between schools, law enforcement, and the community. She stated that there needs to be a “discussion about the role of funding to encourage prevention of hate crimes in schools and in other areas of our community to make sure that law enforcement offices make sure that federal agencies are equipped to provide that kind of support at the local level to prevent these types of crimes from occurring or the type of behavior that can lead to those types of crimes occurring.”<sup>107</sup> Similarly, President and Executive Director of the Lawyers’ Committee for Civil Rights Under

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<sup>99</sup> 18 U.S.C. § 249(b)(1); *see also infra* notes 890 (discussing the case of *United States v. Hill*, 927 F.3d 188, 195097 (4th Cir. 2019) upholding the constitutionality of HCPA and discussing that that these provisions were enacted specifically to alleviate federalism concerns).

<sup>100</sup> *Id.* at § 249 (a)(1)(A) & (a)(2)(A)(i).

<sup>101</sup> *Id.* at § 249 (a)(1)(B) & (a)(2)(A)(ii).

<sup>102</sup> 18 U.S.C. § 249(a)(B) & (a)(2)(A)(ii); *see also* Alison Smith, *Overview of Selected Federal Criminal Civil Rights Statutes*, *supra* note 94, at 1.

<sup>103</sup> Anti-Defamation League, Matthew Shepard and James Byrd, Jr. “Hate Crimes Prevention Act (HCPA) What You Need to Know, <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf>.

<sup>104</sup> 42 U.S.C. § 3716 (2009); U.S. Dep’t of Justice, “The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009,” Testimony of Attorney General Eric Holder, Jr. before the Senate Judiciary Committee, June 25, 2009, <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0>.

<sup>105</sup> *See* 8 U.S.C. § 249.

<sup>106</sup> *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (re-codified at 34 U.S.C. § 12601)(providing ability to prosecute and remedy pattern or practice of constitutional violations by law enforcement agencies); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000D (applicable if a jurisdiction receives federal funding).

<sup>107</sup> Andrea Senteno, Legislative Staff Attorney with the Mexican American Legal Defense and Educational Fund, *Briefing Transcript*, pp. 206.

Law Kristen Clarke testified to the importance of DOJ supporting prevention efforts and collaboration with local law enforcement and community members.

The U.S. Attorney should be supporting the Civil Rights Division to address and clamp down on hate incidents, whether they are in plain sight of our nation's schools or in our college campuses and universities. The FBI should be supporting these efforts as well and there should be a special agent in charge tasked to respond to hate incidents when they occur. The FBI's Criminal Justice Information Services should also be supporting U.S. Attorneys Offices in this effort . . . the Justice Department's Bureau of Justice Statistics plays an important role here as well. But, we are at a moment where we observe the federal government retreating from this space, not bringing enough cases and not activating the vast resources of the federal government to address these incidents, whether they play out at schools, on campuses or elsewhere in our country.<sup>108</sup>

In 1981, Washington and Oregon became the first two states to pass hate crime legislation; other states followed suit over subsequent years.<sup>109</sup> Since 2009, HCPA has prohibited certain actions motivated by a person's race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.<sup>110</sup> State laws, however, vary in terms of the protected groups addressed (e.g., sexual orientation, gender identity, religion, immigration status, homelessness).<sup>111</sup> State laws also vary in the range of crimes covered and the level of additional or harsher punishment (i.e., penalty enhancements) for convicted offenders.<sup>112</sup> At the time of this writing, 46 states and the District of Columbia have some form of hate crime statute—leaving Arkansas, Georgia, South Carolina, and Wyoming as outlier states without such statutes (see Appendix B).<sup>113</sup> Georgia previously enacted a hate crime law in 2000; however, the Georgia Supreme Court struck it down four years later stating that the law was “unconstitutionally vague.”<sup>114</sup> In March 2019, a hate crime bill (HB 426) passed in the Georgia State House that would provide penalty enhancements for convicted offenders who targeted victims based on the victim's actual or perceived race, color, religion, ethnicity/national origin, sexual orientation, or disability status.<sup>115</sup> However, the bill is not

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<sup>108</sup> Kristen Clarke, President and Executive Director of the Lawyers' Committee for Civil Rights Under Law, *Briefing Transcript*, pp. 205.

<sup>109</sup> National Institute of Justice, “Hate Crime,” U.S. Department of Justice, Office of Justice Programs, <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx> (last updated, Nov. 14, 2018).

<sup>110</sup> *See e.g.*, 18 U.S.C. § 249.

<sup>111</sup> National Institute of Justice, “Hate Crime,” U.S. Department of Justice, Office of Justice Programs, <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx> (last updated Nov. 14, 2018).

<sup>112</sup> *Ibid.*

<sup>113</sup> Anti-Defamation League, State Hate Crime Statutory Provisions, <https://www.adl.org/adl-hate-crime-map> (last accessed June 2019). Note that the ADL does not count Indiana among the states with hate crimes laws because of the law's “failure to explicitly list gender identity, gender, and sex” and “because of its uniquely and problematically broad language.” Kayla Sullivan, “Indiana's new hate crime law isn't recognized by all,” *CBS4 Indianapolis*, Jul. 1, 2019, <https://cbs4indy.com/2019/07/01/indianas-new-hate-crime-law-isnt-recognized-by-all/> (quoting ADL Midwest Regional Director David Goldenberg).

<sup>114</sup> *See* Ariel Hart, “Georgia Court Strikes Down Law on Hate,” *New York Times*, Oct. 26, 2004, <https://www.nytimes.com/2004/10/26/us/georgia-court-strikes-down-law-on-hate.html>; Kate Brumback, “Hate Crime Bill Filed Prior to Georgia Legislative Session,” *U.S. News*, Jan. 6, 2018, <https://www.usnews.com/news/best-states/georgia/articles/2018-01-06/hate-crime-bill-filed-prior-to-georgia-legislative-session>.

<sup>115</sup> Donna Lowry, “Georgia House Passes Hate Crime Bill,” *NPR*, March 8, 2019, <https://www.gpbnews.org/post/georgia-house-passes-hate-crimes-bill>.

expected to pass in the Georgia Senate.<sup>116</sup> In April 2019, Indiana Governor Holcomb signed into law for that state a provision that imposes longer sentences for crimes motivated by “bias due to the victim’s or the group’s real or perceived characteristic, trait, belief, practice, association, or other attribute.”<sup>117</sup> While the law’s language includes the ability to increase sentencing for all crimes motivated by bias due to any “attribute the court chooses to consider,” some advocates and lawmakers are critical of the law since it does not explicitly include coverage for crimes committed due to bias on the basis of gender, gender identity, and age.<sup>118</sup>

### *Hate Incidents*

Hate incidents are occurrences that do not escalate to meet the legal definition of a crime, but under certain circumstances may be reported, investigated, and/or punished under federal civil rights laws, especially in education settings.<sup>119</sup> While the DOJ prosecutes hate crimes, the Department of Education’s Office for Civil Rights (ED OCR) has jurisdiction to enforce federal laws prohibiting bias-based harassment in certain circumstances in the nation’s schools.<sup>120</sup> DOJ’s work in prosecuting hate crimes, and ED OCR’s work in enforcing laws protecting students against hate incidents, is analyzed in Chapter 3 of this report.

Another emerging practice, discussed further below, is law enforcement investigation of non-criminal hate incidents in order to prevent hate crimes.<sup>121</sup> Many organizations have also started to call on law enforcement to start investigating and reporting on “hate incidents.”<sup>122</sup> Local police departments, such as Seattle, Washington and Los Angeles, California, as well as national groups such as the International Association of Chiefs of Police (IACP) are beginning to recognize that

<sup>116</sup> Maya Prabhu, “Hate crimes bill expected to stall in Georgia Senate,” *Atlanta Journal-Constitution*, March 27, 2019, <https://www.ajc.com/news/state--regional-govt--politics/hate-crimes-bill-expected-stall-georgia-senate/jmNLYNfpVSXYuyLMhambBO/>.

<sup>117</sup> Indiana Senate Enrolled Act 198, § 12, <http://iga.in.gov/legislative/2019/bills/senate/198#document-c3499c8e>, codified as IC 35-38-1-7.1.

<sup>118</sup> *Id.*; Kayla Sullivan, “Indiana’s new hate crime law isn’t recognized by all,” *CBS4 Indianapolis*, Jul. 1, 2019, <https://cbs4indy.com/2019/07/01/indianas-new-hate-crime-law-isnt-recognized-by-all/>.

<sup>119</sup> See *infra* notes 338-340 (discussing relevant law and the U.S. Department of Education’s responses to bias-related bullying or harassment implicating equal access to public education); see e.g., University of California, Santa Barbara, “Hate Crime or Hate Incident,” <http://www.sa.ucsb.edu/responding-to-distressed-students/concerns/hate-crimes-hate-incidents-or-hazing/hate-crimes-or-hate-incidents>; U.S. Dep’t of Justice, Community Relations Service, “Responding to Hate Crimes and Bias-Motivated Incidents on College/University Campuses,” Sept. 2003, <https://www.justice.gov/archive/crs/pubs/university92003.htm>; For further discussion of federal authority to work to prevent and prosecute bias-related incidents in education settings, see analysis of U.S. Department of Education located in Chapter 3.

<sup>120</sup> See *infra* notes 132-142, 338-340.

<sup>121</sup> See *infra* notes 132-142.

<sup>122</sup> See e.g., International Association of Chiefs of Police, “Responding to Hate Crimes: A Police Officer’s Guide to Investigation and Prevention,” <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention>; Ryan Hunt and Lieutenant Travis Martinez, “Lessons from a Hate Crime Detective: A Guide for Law Enforcement,” Office of Community Oriented Policing Services, 2015, pp. 4-5, <https://ric-zai-inc.com/Publications/cops-p313-pub.pdf>; Melissa Garlick, Civil Rights National Counsel for the Anti-Defamation League, *Briefing Transcript* at 131; Kristen Clarke, President and Executive Director of the Lawyers Committee for Civil Rights Under Law, *Briefing Transcript* at 185, 203-204.

documenting and investigating hate and bias incidents may aid in the prevention of hate crimes and enhance public trust and safety.<sup>123</sup>

Unlike hate crimes, there is no formal federal legal definition for a hate incident. However, some organizations and law enforcement agencies have started developing definitions to help communities identify when they believe a possible hate incident has occurred. For instance, California Attorney General for Xavier Becerra asserts that:

A **hate incident** is an action or behavior motivated by hate but legally protected by the First Amendment right to freedom of expression.

Examples of hate incidents include:

- name-calling,
- insults,
- distributing hate material in public places, and
- displaying hate material on your own property.

The U.S. Constitution allows hate speech as long as it does not interfere with the civil rights of others. If a hate incident starts to threaten a person or property, it may become a hate crime. A **hate crime** is a crime against a person, group, or property motivated by the victim's real or perceived protected social group. The law protects against many classes of hate crimes.<sup>124</sup>

Some advocacy organizations such as the Asian Americans Advancing Justice of Los Angeles define hate incidents as follows:

Hate incidents are acts directed against a person(s) based on the victim's actual or perceived race, nationality, religion, sexual orientation, disability or gender. Hate incidents also include hate crimes, which violate criminal laws and lead to a police investigation. All hate incidents should be reported to community groups and/or law enforcement, but not all incidents may lead to police or legal action.<sup>125</sup>

The group lists the following as examples of hate incidents:

- Racist graffiti spray painted on a house.
- Threats to bomb a mosque, synagogue, church, or other place of worship.

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<sup>123</sup> See *infra* notes 132-142 (discussing Seattle and Los Angeles police policies); see also, International Association of Chiefs of Police, "Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention," <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention>," *supra* note 117.

<sup>124</sup> Xavier Becerra, "Hate Crimes, What Is the Difference Between a Hate Crime and a Hate Incident?" Office of the Attorney General, California Dep't of Justice, <https://oag.ca.gov/hatecrimes> (last accessed Apr. 22, 2019) (emphasis in original).

<sup>125</sup> Asian Americans Advancing Justice Los Angeles, "An Attack Against One is an Attack Against All," Mar. 2017, <https://www.advancingjustice-la.org/sites/default/files/hate-crimes-brochure-pdf-final.pdf>.

- Circulating offensive printed or electronic material such as hate e-mails or flyers thrown on lawns.
- Making derogatory comments about another person(s) because of his or her protected characteristics (such as race, religion, or sexual orientation).
- Cyberbullying [that] target[s] a gay teenager.
- Throwing rocks or spitting at a university student while telling them to “go home.”
- Making “slanty-eye” gestures.<sup>126</sup>

Similarly, the Anti-Defamation League (ADL) defines hate incidents as follows:

A hate incident often involves a person making non-threatening bigoted, biased, or prejudiced comments to another individual based on race, religion, national origin, gender, gender identity, sexual orientation, disability, age or other personal characteristics. It also can involve a person displaying a non-threatening, bigoted, biased, or prejudiced message or image in certain contexts.<sup>127</sup>

Some examples include:

- A person walking down a public side walk passes by a person of the Sikh faith and makes an offensive comment to the individual based on religion.
- In a neighborhood, one resident yells an offensive comment about lesbians to his neighbor across the street.
- A person displays a flag with a Nazi swastika on his property.
- On Facebook an individual writes a derogatory post about women.
- An individual sends another person a non-threatening, racist e-mail.<sup>128</sup>

The Anti-Defamation League states that while actions like these may be hurtful and offensive, they do not violate criminal or civil law; therefore, they are not hate crimes or acts of unlawful discrimination.<sup>129</sup> At the Commission’s briefing, Robby Soave, Associate Editor at Reason Magazine, testified about this distinction stating that “[m]ost people would agree that the government obviously has a compelling interest in preventing crime and most people would also agree that hateful conduct is unwelcome, but many actions this society deems hateful are nevertheless protected by the Bill of Rights.”<sup>130</sup>

However, several local law enforcement agencies have started collecting data on hate incidents, because of the possibility of these incidents escalating into criminal actions.<sup>131</sup> For instance, the

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<sup>126</sup> Ibid.

<sup>127</sup> ADL, Responding to Hate: Information and Resources, What Is a Hate Incident?, <https://www.adl.org/education/resources/tools-and-strategies/responding-to-hate-information-and-resources#what-is-a-hate-incident> (last accessed June 3, 2019).

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Robby Soave, Associate Editor at Reason Magazine, testimony before the U.S. Commission on Civil Rights, briefing, “In the Name of Hate: Examining the Federal Government’s Role in Responding to Hate Crimes,” May 11, 2018, 45 [hereinafter *Briefing Transcript*].

<sup>131</sup> See e.g., Seattle interrogatory responses to the U.S. Commission on Civil Rights; Jess Nocera, “Grand Jury Indicts Teens Accused of Hate Crimes at Glenelg High School,” *Baltimore Sun*, July 13, 2018,

Seattle Police Department documents “non-criminal bias incidents,” which refers to offensive and/or derogatory comments directed at a person’s perceived or actual identity.<sup>132</sup> Christopher Fisher, Chief Strategy Officer of the Seattle Police Department, states that “while not criminal in nature because they fall into the free speech realm, the comments may cause a level of fear and concern in the targeted community. Victims can generally feel harassed, intimidated, and offended by such comments.”<sup>133</sup>

Similarly, Detective Meghan Aguilar of the Los Angeles Police Department explains that “[w]hen we talk about a hate incident, it doesn’t mean [] it’s less important. We need to know what’s going on in our communities because that may be the beginning of what will become a crime and become a much larger problem.”<sup>134</sup> The IACP also recognizes that these incidents can often escalate into criminal actions and/or prompt retaliatory action from targeted communities; therefore, like hate crimes, these bias incidents can be a threat to public safety.<sup>135</sup>

Data show that reports of hate crimes and hate incidents have increased all across the nation since the 2016 Presidential election, and affect many different communities (which will be discussed in detail in Chapter 2).<sup>136</sup> These acts of intolerance happen in a variety of locations and according to the Southern Poverty Law Center, K-12 settings and colleges have been some of the most common venues for hate incidents (see chart 1)<sup>137</sup> rendering crucial the work of the Department of Education as well as states and local entities to stem these harms.<sup>138</sup>

### Chart 1: Hate Incident Locations (2016)

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<https://www.baltimoresun.com/news/maryland/howard/ph-ho-cf-glenelg-indictment-0713-story.html>; Ken Schwencke, “Confusion, Fear, Cynicism: Why People Don’t Report Hate Incidents,” ProPublica, July 31, 2017, <https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents>.

<sup>132</sup> See Seattle interrogatory responses to the U.S. Commission on Civil Rights at 2.

<sup>133</sup> Ibid.

<sup>134</sup> Anti-Defamation League, “Audit of Anti-Semitic Incidents: Year in Review 2017” (2018) at 9.

<sup>135</sup> International Association of Chiefs of Police, “Responding to Hate Crimes: A Police Officer’s Guide to Investigation and Prevention,” <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention>.

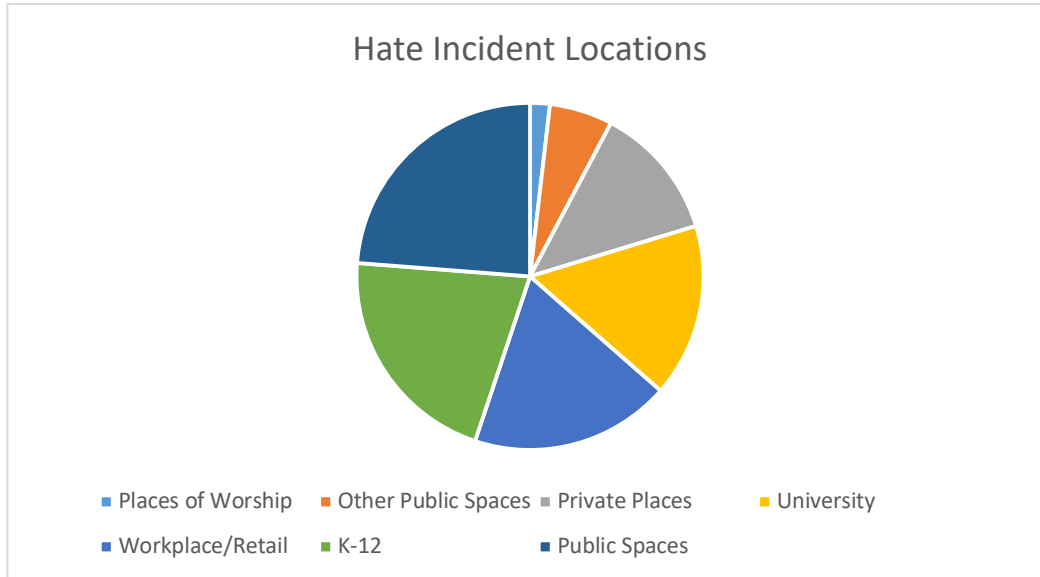
<sup>136</sup> See e.g., Southern Poverty Law Center, “Ten Days After,” November 2016,

<https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>; Anti-Defamation League, “ADL Data Shows Anti-Semitic Incidents Continue to Surge in 2017 Compared to 2016,” <https://www.adl.org/news/press-releases/adl-data-shows-anti-semitic-incidents-continue-surge-in-2017-compared-to-2016>; South Asian Americans Leading Together, “Communities on Fire,” 2018, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>137</sup> Southern Poverty Law Center, “Ten Days After,” (Nov. 2016) at 5.

<sup>138</sup> See, e.g., Francisco Vara-Orta, Hate in Schools: An In-Depth Look, Education Week, August 6, 2018, <https://www.edweek.org/ew/projects/hate-in-schools.html>.





Source: Southern Poverty Law Center

The IACP also recommends that officers should “thoroughly document evidence in all bias-motivated incidents” regardless of whether the act is criminal, because “law enforcement can help defuse potentially dangerous situations and prevent bias-motivated criminal behavior by responding to and documenting bias-motivated speech or behavior even if it does not rise to the level of a criminal offense.”<sup>139</sup>

Hate incidents may also be protected under the First Amendment of the U.S. Constitution.<sup>140</sup> In *Snyder v. Phelps*, the Supreme Court found that “[hate speech] cannot be restricted simply because it is upsetting or arouses contempt. ‘If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’”<sup>141</sup> However, if, for example, these incidents are numerous, or targeted at an individual, or become threatening, then this behavior could rise to the level of “unlawful criminal harassment or stalking under certain state laws.”<sup>142</sup> The legal distinctions among what constitutes a “hate crime” versus a “hate incident” and what is protected under the First Amendment can be complicated and blurred at times. In the 1942 case of *Chaplinsky v. New Hampshire*, the Court held that “fighting words,” which “arouse, anger, alarm, or resentment in others” are a category of speech or expression not protected by the First Amendment.<sup>143</sup> These are expressions or words “which by their very utterance inflict injury or

<sup>139</sup> International Association of Chiefs of Police, “Responding to Hate Crimes: A Police Officer’s Guide to Investigation and Prevention,” <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention>.

<sup>140</sup> See e.g., *Snyder*, 562 U.S. at 458 (internal citations omitted).

<sup>141</sup> *Id.* at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting also that “Indeed, ‘the point of all speech protection . . . is to shield just those choices of content that is someone’s eyes are misguided, or even hurtful.’” (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995))).

<sup>142</sup> Anti-Defamation League, “ADL Responding to Hate: Information and Resources,” 2017, at 6, <https://www.adl.org/education/resources/tools-and-strategies/responding-to-hate-information-and-resources>.

<sup>143</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

tend to incite an immediate breach of the peace.”<sup>144</sup> Quoting prior Supreme Court doctrine, the *Chaplinsky* Court added that: “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>145</sup> Then, in 1992 the Supreme Court ruled in *R.A.V. v. City of St. Paul* that the city’s ordinance criminalizing the “display of a symbol which one knows or has reason to know ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,’” under which R.A.V. was arrested for burning a cross on an African American family’s lawn, was unconstitutional.<sup>146</sup> In an opinion led by Supreme Court Justice Antonin Scalia, the Court held that the St. Paul ordinance was invalid on its face, because it was impermissibly content and viewpoint-based and therefore, violated the First Amendment’s freedom of speech protections.<sup>147</sup>

Yet several years later, the Court ruled in *Virginia v. Black* that the state’s specific ban on cross burning with the intent to intimidate was constitutional and did not violate the First Amendment.<sup>148</sup> The Court ruled that Virginia could outlaw cross burnings done with the intent to intimidate because “burning a cross is a particularly virulent form of intimidation.”<sup>149</sup> Supreme Court Justice Sandra Day O’Connor, writing for the majority, wrote that:

[T]he burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical . . . when a cross burning is used to intimidate, few if any messages are more powerful.<sup>150</sup>

Moreover, Justice O’Connor noted that instead of prohibiting *all* intimidating messages, Virginia chose to regulate this particular “subset of intimidating messages due to cross burning’s long and

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) (holding that Jehovah’s witnesses soliciting door-to-door, playing a record attacking the Catholic Church, did not amount to breach of peace)).

<sup>146</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992). In 1992, several teenagers were arrested for allegedly burning a cross on a black family’s lawn in St. Paul Minnesota. The city’s ordinance (St. Paul, Minnesota, Bias-Motivated Crime Ordinance) bias-motivated crime ordinance in question, stated that: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.” *Id.* (quoting St. Paul Bias–Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). However, the Supreme Court ruled that the ordinance was unconstitutional under the First Amendment. The Court held that the ordinance “imposed special prohibitions on speakers who expressed views on disfavored subjects of race, color, creed, religion or gender while at the same time it permitted displays containing abusive invective if they were not addressed to those topics and, in its practical operation, went beyond mere content discrimination to actual viewpoint discrimination.” *Id.* at 377.

<sup>147</sup> *Id.* at 391-92.

<sup>148</sup> *Virginia v. Black*, 538 U.S. 343, 363 (2003). The Court stated that a Virginia statute mandating burning a cross in public view “shall be prima facie evidence of an intent to intimidate” was facially unconstitutional under the First Amendment; and construction of the prima facie provision of the Virginia statute by jury instruction was ruling on question of state law that was as binding on Supreme Court as though precise words had been written into statute. *See id.* at 343.

<sup>149</sup> *Id.* at 344.

<sup>150</sup> *Id.* at 357.

pernicious history as a signal of impending violence.”<sup>151</sup> Therefore, a ban on cross burning carried out with the intent to intimidate was considered fully consistent with the Court’s holding in *R.A.V.*:

Contrary to the Virginia Supreme Court's ruling, *R.A.V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination.... Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists entirely of the very reason its entire class of speech is proscribable.<sup>152</sup>

Another point of distinction is where hate-based messages cross over into the realm of intimidation or a threat. For instance, in *Virginia*, the Court ruled that speech that fell under the legal definition of “true threats”<sup>153</sup> or constituted “fighting words”<sup>154</sup> was not protected by the First Amendment.<sup>155</sup> In *NAACP v. Claiborne Hardware Co.* the Court ruled that “The First Amendment has never been construed to protect acts of violence against another individual, regardless of the motivation or

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<sup>151</sup> *Id.* at 344.

<sup>152</sup> *Virginia*, 538 U.S. at 344-45.

<sup>153</sup> “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia*, 538 U.S. at 359-60 (citing *Watts v. United States* 394 U.S. 705, 708 (1969)). “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted [ ] the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.” *Virginia*, 538 U.S. at 359-60.

<sup>154</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) (holding that “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” . . . “[t]hese include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”) (internal citations omitted).

<sup>155</sup> *Virginia*, 538 U.S. at 359-360.

belief of the perpetrator.”<sup>156</sup> A “hate incident” may be considered a criminal act if the action constitutes intimidation regarding a federally protected activity,<sup>157</sup> stalking,<sup>158</sup> or harassment.<sup>159</sup>

This tension between freedom of expression, hate speech, and hate crimes has recently become particularly poignant. In August 2019, a mass shooting was committed by a white supremacist in El Paso, Texas. On Saturday August 3, 2019, Patrick Crusius opened fire on shoppers at Walmart, killing 22 and wounding more than two dozen individuals.<sup>160</sup> While investigations into the case are still underway, at the writing of this report, it is believed that before the shooting Crusius wrote a racist, anti-immigrant screed<sup>161</sup> online; the screed was filled with hateful, anti-Latinx rhetoric. For example, it used language warning about a “Hispanic invasion” and “they are instigators, not me. I am simply defending my country from cultural and ethnic replacement brought on by an invasion,” and attacking “low-security” targets was a way to “fight to reclaim my country from destruction,” among other things.<sup>162</sup> The screed was published on the online message board 8chan,

<sup>156</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”).

<sup>157</sup> See 18 U.S.C. § 245(b), Interference with Federal Rights, prohibiting willful intimidation or interference, through force or threat of force, with right to vote, participation in federal benefits or activities, employment, jury service, receiving federal financial benefits, traveling by interstate commerce or using public accommodations.

<sup>158</sup> See 18 U.S.C. § 2261A. Stalking: Whoever--

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--

(A) places that person in reasonable fear of the death of, or serious bodily injury to-- (i) that person; (ii) an immediate family member (as defined in section 115) of that person; or (iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2261A.

<sup>159</sup> Model Penal Code § 250.4: § 250.4. Harassment: A person commits a petty misdemeanor if, with purpose to harass another, he: (1) makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

<sup>160</sup> See e.g., Brian Todd, Christina Maxouris, and Amir Vera, “The El Paso shooting suspect showed no remorse or regret, police say,” *CNN*, Aug. 6, 2019, <https://www.cnn.com/2019/08/05/us/el-paso-suspect-patrick-crusius/index.html>.

<sup>161</sup> A screed is generally considered a long speech or piece of writing, typically one regarded as tedious or expresses an unreasonably strong opinion.

<sup>162</sup> Brian Todd, Christina Maxouris, and Amir Vera, “The El Paso shooting suspect showed no remorse or regret, police say,” *CNN*, Aug. 6, 2019, <https://www.cnn.com/2019/08/05/us/el-paso-suspect-patrick-crusius/index.html>; see also Michael Biesecker, Reese Dunklin, and Michael Kunzelman, “El Paso suspect appears to have posted anti-

about 20 minutes before the mass shooting.<sup>163</sup> The screed was similar to the writings of other mass shootings by white nationalists (e.g., Dylann Roof in Charleston and Robert Bowers in Pittsburgh), invoking the discourse of white supremacy and evincing a belief their actions are “saving” the country and their race.<sup>164</sup>

At the writing of this report, Crusius has been charged with capital murder and is held without bond.<sup>165</sup> DOJ stated that it is considering bringing federal hate crime charges and domestic terrorism charges against Crusius. John Bash, U.S. Attorney for the West District of Texas, tweeted that the DOJ is “treating El Paso as a domestic terrorism case. And we’re going to do what we do to terrorists in this country – deliver swift and certain justice.”<sup>166</sup> In response El Paso U.S. Representative Veronica Escobar, whose district includes El Paso, said she was “heartened” by the Justice Department recognizing the shooting

for what it is: A racially-motivated terrorist attack on our safe and tranquil community. The shooter came into our community because we are a Hispanic community and because we have immigrants in our community. He came here to harm us. The Department of Justice and local law enforcement have identified this as being motivated by hate. And it is this hate that is at the root of much suffering in our country.<sup>167</sup>

In a speech on Monday, August 5, President Trump also recognized that this attack was linked to white supremacy, bigotry, and hatred.<sup>168</sup>

That DOJ might possibly pursue both domestic terrorism charges and hate crime charges suggests that it may be examining the connections between hate crimes and domestic terrorism. Researchers argue that while these two types of crimes are different, there are some cases where, due to the actions taken by the perpetrator, they may overlap. For instance, Brian Levin, director of the Center for the Study of Hate and Extremism at California State University, San Bernardino, posits that “hate crimes and terrorism are increasingly intertwining as the U.S. becomes more politically

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immigrant screed,” *Associated Press*, Aug. 4, 2019, <https://www.apnews.com/df6dc60f37664833ba3b953927ef835d>.

<sup>163</sup> See e.g., Brian Todd, Christina Maxouris, and Amir Vera, “The El Paso shooting suspect showed no remorse or regret, police say,” *CNN*, Aug. 6, 2019.

<sup>164</sup> See e.g., Terrence McCoy, “‘Saviors of the white race’: Perpetrators of hate crimes see themselves as heroes, researchers say,” *Washington Post*, Oct. 31, 2018, [https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb\\_story.html?utm\\_term=.c215ad03671e](https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.c215ad03671e).

<sup>165</sup> Brian Todd, Christina Maxouris, and Amir Vera, “The El Paso shooting suspect showed no remorse or regret, police say,” *CNN*, Aug. 6, 2019.

<sup>166</sup> Chantal Da Silva, “El Paso Representative Praises DOJ for Recognizing Mass Shooting as ‘Racially-Motivated Terrorist Attack’: ‘He Came Here to Harm Us,’” *Newsweek*, Aug. 5, 2019, <https://www.newsweek.com/el-paso-shooting-rep-veronica-escobar-department-justice-domestic-terrorism-1452551>; see also, John Bash, Twitter, <https://twitter.com/USAttyBash>.

<sup>167</sup> Chantal Da Silva, “El Paso Representative Praises DOJ for Recognizing Mass Shooting as ‘Racially-Motivated Terrorist Attack’: ‘He Came Here to Harm Us,’” *Newsweek*, Aug. 5, 2019.

<sup>168</sup> See e.g., Tamara Keith and Brian Naylor, “‘Hate Has No Place’ In America, Trump Says After El Paso and Dayton Shootings,” *NPR*, Aug. 5, 2019, <https://www.npr.org/2019/08/05/748190808/trump-calls-for-strong-background-checks-following-el-paso-and-dayton-shootings>; Kevin Roose, “On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full,” *New York Times*, Oct. 28, 2018, <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

polarized” and according to his research, white nationalism and far right extremist groups continue to be the most ascendant groups in society at this time.<sup>169</sup>

As defined in the Patriot Act, domestic terrorism refers to activities that:

- involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- appear to be intended—
  - to intimidate or coerce a civilian population;
  - to influence the policy of a government by intimidation or coercion; or
  - to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- occur primarily within the territorial jurisdiction of the United States.<sup>170</sup>

By including acts that “appear to be intended to intimidate or coerce a civilian population,”<sup>171</sup> the definition of domestic terrorism is broader than the definition of a hate crime, which requires willfully causing or attempting to cause bodily injury.<sup>172</sup> Unlike the HCPA, the Patriot Act, however, does not include an element of bias which arguably has a benefit in sending a message that would deter biased-based crimes.<sup>173</sup> However, while the HCPA requires at least an attempt to willfully cause “bodily injury,” excluding “solely emotional or psychological harm to the victim,”<sup>174</sup> the Patriot Act criminalizes activities that “appear to be intended to intimidate.”<sup>175</sup>

Some news reports have indicated that in previous mass shootings, such as in Charleston and Pittsburgh, the FBI did not pursue terrorism charges because DOJ warned lawmakers that they “could not prosecute a white supremacist simply for the ideology or an online manifesto. There must be intent to harm or harass.”<sup>176</sup> Michael McGarrity, assistant director of the FBI’s counterterrorism division, has testified to Congress that, “[i]n order to predicate a domestic terrorism investigation of an individual, the FBI must have information that the individual is

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<sup>169</sup> Elizabeth Lawrence, “In the wake of two more hate-fueled mass shootings, when do we call it domestic terrorism?” *USA Today*, Aug. 6, 2019, <https://www.usatoday.com/story/news/nation/2019/08/04/el-paso-dayton-shootings-domestic-terrorism-hate-crime/1915402001/>; see also, Brian Levin, *Report to the Nation: 2019*, Center for the Study of Hate and Extremism, California State San Bernardino, at 3, [https://csbs.csusb.edu/sites/csusb\\_csbs/files/CSHE%202019%20Report%20to%20the%20Nation%20FINAL%207.29.19%2011%20PM\\_0.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/CSHE%202019%20Report%20to%20the%20Nation%20FINAL%207.29.19%2011%20PM_0.pdf); ADL, “Right-Wing Extremism Linked to Every 2018 Extremist Murder in the U.S., ADL Finds,” Jan. 23, 2019, <https://www.adl.org/news/press-releases/right-wing-extremism-linked-to-every-2018-extremist-murder-in-the-us-adl-finds>.

<sup>170</sup> 18 U.S.C. § 2331, <https://www.hsdl.org/?abstract&did=449089>.

<sup>171</sup> *Id.*

<sup>172</sup> 18 U.S.C. § 249(a).

<sup>173</sup> 18 U.S.C. § 2331; and see *infra* notes Tables 5-8 (discussion about necessity of the bias element over prosecution of crimes without it).

<sup>174</sup> 18 U.S.C. § 249(c)(1).

<sup>175</sup> 18 U.S.C. § 2331.

<sup>176</sup> Jared Keller, “The DOJ is Finally Bridging the Gap between Online Radicalization and Domestic Terrorism,” *Pacific Standard*, Aug. 5, 2019, <https://psmag.com/social-justice/the-doj-is-finally-bridging-the-gap-between-online-radicalization-and-domestic-terrorism>; Colleen Long, “FBI: 850 open investigations into domestic terrorism,” *Associated Press*, May 8, 2019, at 3, [https://www.apnews.com/70168e7cf4d5481c8a38589bbfb40483?\\_ga=2.215385748.2084331166.1565186372-144003251.1563914953](https://www.apnews.com/70168e7cf4d5481c8a38589bbfb40483?_ga=2.215385748.2084331166.1565186372-144003251.1563914953).

perpetrating violent, criminal actions in furtherance of an ideology.”<sup>177</sup> However, now that in three different mass shootings – the mosque shooting in Christchurch, New Zealand, the synagogue shooting in Poway, California, and now the Walmart shooting in El Paso, Texas— each of the shooters posted racist content on 8chan leading up to the massacres,<sup>178</sup> DOJ is reportedly beginning to examine the tension between hate speech, hate crimes, and domestic terrorism.<sup>179</sup> This would possibly work around any limitation of HCPA to monitor hateful activity on websites, such as 8chan, that are breeding grounds for white supremacist activity. Designating some hate crimes as a type of domestic terrorism might allow law enforcement to monitor these posts online in hope of preventing another massacre based on hateful ideology. Further, as discussed herein, under HCPA, various federal courts have relied on DOJ’s submission of social media posts as proof of biased intent, and one federal court has subpoenaed evidence from the website owners in the context of the later hate crime committed in Charlottesville, Virginia.<sup>180</sup>

### Opponents to Existing Hate Crime Laws

While 45 states including the District of Columbia have hate crime legislation, there are several critiques of hate crime legislation.<sup>181</sup> One common argument is that these laws create a special class of protected individuals. This argument was (and still is in some cases) often utilized in debates about extending federal hate crime laws to cover crimes committed against individuals based on their sexual orientation and gender identity. For instance, in *Glenn v. Holder*, the plaintiffs argued that

the expression and practice of their anti-homosexual religious beliefs will lead to federal investigation and prosecution under the Act, in violation of their First Amendment rights. But Plaintiffs’ underlying complaint is with the government’s heightened protection of homosexuals from criminal violence – this lawsuit is really a political statement against the Hate Crimes Act.<sup>182</sup>

The District Judge for the case stated that the “[p]laintiffs have a (sincere, apparently) belief that the Hate Crimes Act is all about elevating certain persons (homosexuals) to a protected class under federal law. . . .”<sup>183</sup> However, he dismissed their case for lack of standing.<sup>184</sup>

<sup>177</sup> Michael McGarrity, Assistant Director, Counterterrorism Division, FBI, Statement before the Committee on Homeland Security, U.S. House of Representatives, Hearing: “Confronting the Rise of Domestic Terrorism in the Homeland,” May 8, 2019, [https://homeland.house.gov/imo/media/doc/Testimony-McGarrity.pdf?\\_ga=2.1527602.2084331166.1565186372-144003251.1563914953](https://homeland.house.gov/imo/media/doc/Testimony-McGarrity.pdf?_ga=2.1527602.2084331166.1565186372-144003251.1563914953).

<sup>178</sup> April Glaser, “8chan Is a Normal Part of Mass Shootings Now,” *Slate*, Aug. 4, 2019, [https://slate.com/technology/2019/08/el-paso-8chan-4chan-mass-shootings-manifesto.html?\\_ga=2.203850259.2084331166.1565186372-144003251.1563914953](https://slate.com/technology/2019/08/el-paso-8chan-4chan-mass-shootings-manifesto.html?_ga=2.203850259.2084331166.1565186372-144003251.1563914953).

<sup>179</sup> Jared Keller, “The DOJ is Finally Bridging the Gap between Online Radicalization and Domestic Terrorism,” *Pacific Standard*, Aug. 5, 2019, <https://psmag.com/social-justice/the-doj-is-finally-bridging-the-gap-between-online-radicalization-and-domestic-terrorism>.

<sup>180</sup> See *infra* notes 63-68 (discussing *Sines v. Kessler* and also referencing DOJ cases along these lines).

<sup>181</sup> Movement Advancement Project, “Hate Crimes Laws,” (last updated March 29, 2019),

[http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws).

<sup>182</sup> *Glenn v. Holder*, 690 F.3d 417, 419 (2012), <http://www.opn.ca6.uscourts.gov/opinions.pdf/12a0238p-06.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Further, in a debate on whether to pass a state hate crime bill, former South Carolina senator Jim DeMint said: “this amendment creates a special class of victims whose protections by the law will be, in Orwell’s phrase, ‘more equal than others.’ If some are more equal, others will be less equal. This amendment will create the very problem it purports to solve.”<sup>185</sup> Critics also argue hate crime legislation may violate a person’s Fourteenth Amendment right to equal protection.<sup>186</sup> They argue that these laws may work to privilege some individuals’ lives over others.<sup>187</sup>

Supporters of HCPA and expanding state hate crime laws to cover residents in all 50 states refute the notion that these laws create a “special class” of victims. For instance, Terry Curry who is a prosecutor in Marion County, Indiana asserts that:

Those who talk about the fact that we’re creating this special class of victims is really not the point because ultimately the bias crime and hate crime provision protects everyone because essentially, we all have a race; we all have a sexual orientation; we all have a gender; we all have a religion even if it’s a non-religion. So those who would focus on the fact that it’s supposedly limiting those who it protects is not accurate. It would protect everyone.<sup>188</sup>

Another main opposition of hate crime legislation is that these laws penalize free speech and/or religious expression.<sup>189</sup> However, federal and state hate crimes laws do not criminalize any individual or religious leader for preaching or speaking out against other groups, unless their speech threatens others.<sup>190</sup> Moreover, HCPA specifically includes language clarifying that this

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<sup>185</sup> Kaitlin Stansell, “South Carolina one of 5 states without hate crime law; could 2017 be the year?” *WMBF News*, April 11, 2017, <http://www.wmbfnews.com/story/35126421/south-carolina-one-of-5-states-without-hate-crime-law-could-2017-be-the-year/>.

<sup>186</sup> See Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 *Pace L. Rev.* 326, 337-39 (2016), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1941&context=plr> (summarizing theoretical arguments of a law student).

<sup>187</sup> Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 *Pace L. Rev.* 326, 337-9, (2016), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1941&context=plr>; Kaitlin Stansell, “South Carolina one of 5 states without hate crime law; could 2017 be the year?” *WMBF News*, April 11, 2017, <http://www.wmbfnews.com/story/35126421/south-carolina-one-of-5-states-without-hate-crime-law-could-2017-be-the-year/>.

<sup>188</sup> Staff Writer, “Indiana remains 1 of only 5 states without hate crime legislation, local groups urge lawmakers to reconsider bill,” *Fox 59*, March 15, 2017, <https://fox59.com/2017/03/15/hate-crime-bill-dies-in-statehouse-for-the-second-year-in-a-row/>.

<sup>189</sup> Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 *Pace L. Rev.* 326, 336-37 (2016),

<sup>190</sup> See e.g., *Brandenburg v. Ohio*, 395 U.S. 444(1969) (protecting a Ku Klux Klan member’s hate speech towards African Americans, holding that such speech could only be limited if it posed an “imminent danger” of inciting violence); *Collin v. Smith*, 578 F.2d 1197 (1978) (upholding decision to allow Neo-Nazis to march on the streets of an Illinois suburb where a substantial Jewish community resided); *Snyder v. Phelps*, 580 F. 3d 2016 (2011) (Supreme Court held that the Westboro Baptist Church had the right to picket a military funeral with signs that disparaged the dead officer, LGBTQ individuals, and the federal government); *Boos v. Barry*, 798 F.2d 1450 (D.C. Cir. 1988) (according to the Supreme Court, we “must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”).



legislation does not interfere with any activity protected under the First Amendment.<sup>191</sup> Indiana University professor of law Jeannine Bell clarifies this common misperception: “It’s not just that you dislike people of my background. You’re entirely free to dislike people of my background. It’s not that you tell me that you don’t like me. Again, entirely free to do that. It’s that you selected me for some sort of criminal action because of my background.”<sup>192</sup>

An early claim that hate crime legislation would unconstitutionally violate the First Amendment came in 1989 in the case of *Wisconsin v. Mitchell*.<sup>193</sup> In 1989, Todd Mitchell, a young black man, instigated an attack against Gregory Reddick, a young white boy in Kenosha, Wisconsin and was found guilty of committing a hate crime on the basis of race. Mitchell was charged and convicted in circuit court with aggravated battery and given an enhanced sentence under Wisconsin’s hate crime law. Mitchell challenged the verdict claiming that the enhancement was prohibited by the First and Fourteenth Amendments.<sup>194</sup> The Court of Appeals affirmed and Mitchell petitioned the Wisconsin Supreme Court which reversed and remanded.<sup>195</sup> The Supreme Court then held (1) that the Wisconsin statute that allowed for the enhancement of Mitchell’s sentence because he intentionally selected his victim on account of the victim’s race, did not violate his free speech rights as it did not punish his beliefs and (2) the statute was not overboard.<sup>196</sup>

Mitchell argued that the only reason for the enhancement was his discriminatory motive for selecting his victim and as such, the statute violates his First Amendment freedom of speech rights as it punishes his bigoted beliefs.<sup>197</sup> In a unanimous opinion authored by Chief Justice Rehnquist, the Court explained that although it had previously held that defendants’ abstract beliefs were not admissible

we emphasized that “the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.” Thus, in *Barclay v. Florida*, 463 U. S. 939 (1983) (plurality opinion), we allowed the sentencing judge to take into account the defendant’s racial animus towards his victim. The evidence in that case showed that the defendant’s membership in the Black Liberation Army and desire to provoke a “race war” were related to the murder of a white man for which he was convicted. Because “the elements of racial hatred in [the] murder” were relevant to several

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<sup>191</sup> “Nothing in this Act shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the First Amendment and peaceful picketing or demonstration. The Constitution does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.” See Hate Crimes Prevention Act, (Public Law No. 111-84), S.909, 111<sup>th</sup> Congress (2009-2010), <https://www.congress.gov/bill/111th-congress/senate-bill/909/text>; see also Carter Coker, *Hope-Fulfilling Or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*. Vanderbilt Law Review, vol. 64, no. 1, at 279, <https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2011/01/Coker-Hope-Fulfilling-or-Effectively-Chilling-64-Vand.-L.-Rev.-271-2011.pdf>.

<sup>192</sup> German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, <https://www.vox.com/identities/2017/4/10/15183902/hate-crime-trump-law>.

<sup>193</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>194</sup> *Id.* at 479-483 (1993).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 479.

<sup>197</sup> *Id.* at 485.

aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant[.]<sup>198</sup>

In deciding the *Mitchell* case, the Court also took into account the precedent it set in 1992 in *R.A.V. v. City of St. Paul*, in which it held that discriminatory motives were not enough to overcome the First Amendment’s protections against content-based regulation, but in the case of a hate crime (resulting in assault), “the statute in this case is aimed at conduct *unprotected* by the First Amendment.”<sup>199</sup> Taking this precedent into account as well as the fact that bias-related crime results in greater societal harm than ordinary crime, the then-Chief Justice wrote that: “The State’s desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”<sup>200</sup>

Other defendants charged under HCPA by the federal government have argued that HCPA violates the Tenth Amendment because it interferes with states’ rights to prosecute hate crimes and interferes with state sovereignty and state police powers.<sup>201</sup> However, in such cases, courts have confirmed existing principles of federalism.<sup>202</sup> For example, in *New York v. United States*, the Supreme Court emphasized that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”<sup>203</sup> The Tenth

<sup>198</sup> *Id.* at 485 (citing *Dawson v. Delaware*, 503 U.S. 159, 165, and 167 (1992)).

<sup>199</sup> *Id.* at 487 (discussing *R.A.V. v. St. Paul*, 505 U.S. at 389-91 (1992)) (emphasis added).

<sup>200</sup> *Id.* at 487-88 (noting that “[F]or example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”).

<sup>201</sup> See e.g., *United States v. Metcalf*, 881 F.3d at 645 (8<sup>th</sup> Cir. 2018); Brief for the United States as Appellee 3 at 30, *United States v. Hatch*, No. 12-2040 (10<sup>th</sup> Cir. July 25, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/hatchbrief.pdf>.

<sup>202</sup> In *U.S. v. Hatch*, the Tenth Circuit Court of Appeals ruled that:

Federal laws often criminalize conduct within traditional areas of state law, and regardless whether States have also criminalized the same conduct. Given the principle of dual sovereignty, such laws “involve no infringement per se of State sovereignty in the administration of their criminal laws.” *United States v. Johnson*, 114 F.3d 476, 481 (4<sup>th</sup> Cir. 1997); cf. *Cleveland v. United States*, 329 U.S. 14, 19 (1946).

Moreover, as the district court recognized, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” *New York v. United States*, 505 U.S. 144, 155 (1992)). The Tenth Amendment states: “The powers *not delegated to the United States by the Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (emphasis added in original). For this reason, the conclusion that Congress acted within its Section 2 power in enacting Section 249(a)(1) is a conclusion that the legislation does not impermissibly address a realm of power reserved to the States in violation of the Tenth Amendment. See R. 85 at 19-20; *New York*, 505 U.S. at 159 (“[i]n the end, \* \* \* it makes no difference whether one views the question \* \* \* as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment”); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 292 (1981) (Tenth Amendment does not “prohibit[] Congress from displacing state police power laws regulating private activity”).

722 F. 3d 1193, 1201-02 (10<sup>th</sup> Cir. 2013).

<sup>203</sup> *Hatch*, 722 F.3d at 1202 (quoting *New York v. United States*, 505 U.S. 144, 156 (1992)).

Circuit held that this concept clearly also applies to HCPA,<sup>204</sup> because Congress is acting within its enumerated powers, that is, within Section 2 of the Thirteenth Amendment, it was not impinging on any State powers.<sup>205</sup> Other federal circuit courts have followed suit.<sup>206</sup>

Other critics contend that hate crime legislation does not deter crime, and many hate crime experts agree.<sup>207</sup> For instance, Bell posits that “I don’t think that perpetrators think about whether they’re going to commit a hate crime, look to see whether there’s a law that can be punished, and then don’t commit the hate crime when they learn it could be punished. That doesn’t make sense to me.”<sup>208</sup> Moreover, due to insufficient reporting practices of hate crime data by law enforcement, it is challenging to conclusively determine if these laws produce the desired effect of deterring hate crimes.<sup>209</sup> Nevertheless, at the Commission’s briefing, Roy Austin, former Deputy Assistant Attorney General of the Civil Rights Division at the Justice Department, testified that these laws do work as a deterrent to future crimes. He testified that “in a country where we believe that greater sentences have a deterrent effect, the fact that there is usually an increased sentence, an enhancement based on the fact that something is a hate crime, certainly has a deterrent effect to the extent any of our laws provide a deterrent effect.”<sup>210</sup>

Other proponents of HCPA and related bills assert that even if simply having hate crime laws does not deter crime, these laws are nonetheless worthwhile because they can serve several important purposes.<sup>211</sup> For example, hate crimes laws send a message to perpetrators that hate and prejudice are not acceptable, and send a message to victims and their communities that these crimes will not be permitted. Bell argues that these laws help communities feel safer because passing legislation can then devote funds for police departments to investigate potential hate crimes and law enforcement will also take these types of crimes more seriously. “By making it [a crime] a hate

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<sup>204</sup> *Id.*

<sup>205</sup> See *U.S. v. Allen*, 341 F.3d 870, 884 (9th Cir.2003); *U.S. v. Cannon*, 750 F.3d 492, 501 (5th Cir. 2014); *U.S. v. Hatch*, 722 F. 3d 1193, 1201 (10<sup>th</sup> Cir. 2013); *U.S. v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012); *U.S. v. Nelson*, 277 F.3d 164, 186 (2d Cir. 2002); *United States v. Henery*, 60 F. Supp. 3d 1126 (D. Idaho, 2014). See also *infra* notes 253-259 (discussing legal challenges to Thirteenth Amendment theory).

<sup>206</sup> See e.g., *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014).

<sup>207</sup> See, e.g., German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, <https://www.vox.com/identities/2017/4/10/15183902/hate-crime-trump-law>; Movement Advancement Project, Movement Advancement Project, “Equality Maps: Hate Crime Laws, (last updated March 28, 2019) [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws); Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 Pace L.Rev. 326 (2016), at 340-42; Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, <https://www.thenation.com/article/hate-crime-laws-dont-prevent-violence-against-lgbt-people/>.

<sup>208</sup> German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, <https://www.vox.com/identities/2017/4/10/15183902/hate-crime-trump-law>.

<sup>209</sup> See, e.g., Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 Pace L.Rev. 326 (2016), at 340-42.

<sup>210</sup> Roy Austin partner at Harris, Wiltshire, & Grannis, LLP and former Deputy Assistant Attorney General of the Civil Rights Division at the U.S. Department of Justice, *Briefing Transcript*, p. 280.

<sup>211</sup> See e.g., Anti-Defamation League, “Hate Crime Laws: Punishment to Fit the Crime,” July 8, 2010, <https://www.adl.org/news/op-ed/hate-crime-laws-punishment-to-fit-the-crime>; German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, <https://www.vox.com/identities/2017/4/10/15183902/hate-crime-trump-law>.

crime, you call attention to it in the minds of the police [and] in the minds of the prosecutors.”<sup>212</sup> Further, Toni Bisconti, professor at the University of Akron, argues that many individuals and communities do not feel safe about reporting hate or bias-motivated incidents to law enforcement, thus passing hate crime legislation helps these groups feel safer to come forward and also shows police that a particular community is truly being targeted.<sup>213</sup> Jack Levin, sociology professor at Northeastern University, maintains that hate crime laws are important because they have an “important symbolic meaning” and that:

[H]ate crimes are message crimes—that is, they send a message not only to the primary victim but to every member of this group. That’s the kind of message that has to be counteracted...They send a message to two groups: They send it to the perpetrator, informing him that our community will not tolerate his intolerance. And then at the same time, they send a message to potential victims that they are welcome in our community.<sup>214</sup>

Cynthia Deitle, Programs and Operations Director for the Matthew Shepard Foundation and former Chief of the Civil Rights Unit at the FBI, testified at the Commission’s briefing about how these crimes have widespread effects: she stated that “hate destroys everyone it touches: the victim, the perpetrator, their families, and the community.”<sup>215</sup>

Proponents of hate crime legislation argue that these laws are needed because these crimes are qualitatively different from other crimes.<sup>216</sup> When hate crimes occur, research shows they are “inherently more harmful to the social fabric than comparable crimes without bias motive.”<sup>217</sup> Melissa Garlick, Civil Rights National Counsel for the Anti-Defamation League, in her written testimony to the Commission explained:

Bias crimes are intended to intimidate the victim and members of the victim’s community, leaving them feeling fearful, isolated, and vulnerable. Failure to address this unique type of crime often causes an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of targeted communities fearful, angry, and suspicious of other groups – and of the power structure that is supposed to protect them – these incidents can damage the fabric of our society and fragment communities.<sup>218</sup>

Hate crimes legislation is also important because hate crimes are also more likely to involve violence and be more violent than other crimes. For instance, hate crime researchers Jack Levin

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<sup>212</sup> German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, <https://www.vox.com/identities/2017/4/10/15183902/hate-crime-trump-law>.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> Cynthia Deitle, Programs and Operations Director for the Matthew Shepard Foundation and former Chief of the Civil Rights Unit at the FBI, *Briefing Transcript*, p. 254.

<sup>216</sup> Anti-Defamation League, “Hate Crime Laws: Punishment to Fit the Crime,” July 8, 2010, <https://www.adl.org/news/op-ed/hate-crime-laws-punishment-to-fit-the-crime>.

<sup>217</sup> Jack McDevitt, Jennifer Balboni, Luis Garcia, and Joanne Gu, “Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults,” *American Behavioral Scientist*, 2001, 45(4), 697-713.

<sup>218</sup> Melissa Garlick, Civil Rights National Counsel for the Anti-Defamation League, written statement to the U.S. Commission on Civil Rights, p. 2.

and Jack McDevitt found that hate crime assaults are twice as likely to cause injury and survivors are four times as likely to require hospitalization, compared to survivors of assaults not motivated by bias.<sup>219</sup> According to the Bureau of Justice Statistics, about 90 percent of reported hate crimes involved violence, and 29 percent were serious violent crimes (e.g., rape, sexual assault, aggravated assault); and between 2011 and 2015, violent crimes accounted for a higher percentage of “hate” (90 percent) than “nonhate” (25 percent) crime victimizations.<sup>220</sup> Lastly, research has also shown that the lingering effects—physically, psychologically, and emotionally—for survivors of hate crimes may be longer than being a victim of other crimes.<sup>221</sup>

Michael Lieberman, Washington Counsel for the Anti-Defamation League (ADL) argues that:

We cannot outlaw hate, but laws shape attitudes. And attitudes influence behavior. We Americans have communally determined to try to prevent and remedy bigoted behavior in the housing market or workplace through thousands of federal, state, and local laws that prohibit invidious discrimination because of race or other identifying personal characteristics. In fact, hate crimes laws are a criminal justice system parallel to these laws. In language, structure, and application, the majority of the nation’s hate crime laws are directly analogous to anti-discrimination civil rights laws. Under our nation’s workplace civil rights laws, for example, an employer can refuse to hire, fire, or fail to promote non-unionized employees for virtually any reason. It is only when that decision is made “by reason of” race, religion, national origin, gender, or disability (and in too-few state and local jurisdictions, sexual orientation) that the conduct becomes unlawful.<sup>222</sup>

On the contrary, Michael Bronski, Ann Pellegrini, and Michael Amico contend that while laws do shape societal attitudes, “our legal system does not write law to shape attitudes; it writes them to justly and fairly punish explicit behaviors.”<sup>223</sup> They argue that penalty enhancements for convicted hate crime perpetrators do not change societal perceptions or challenge bigoted ideas. And research suggests that these stiffer punishments which sentence convicted offenders for longer jail time may actually have a counter effect, because research has found that “prisons can exacerbate, not reduce, recidivism.”<sup>224</sup> Therefore, some scholars argue that changing prejudicial feelings and stopping

<sup>219</sup> Jack Levin and Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, New York, Plenum Press, 1993.

<sup>220</sup> U.S. Dep’t of Justice, Office of Justice Programs, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, June 2017, 3, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>221</sup> Gregory M. Herek, J. Roy Gillis, and Jeanine C. Cogan, “Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults,” *Journal of Consulting and Clinical Psychology*, 1999, 67(6), 945-951; Jack McDevitt, Jennifer Balboni, Luis Garcia, and Joann Gu, “Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults,” *American Behavioral Scientist*, 2001, 45(4), 697-713; Robert Boeckmann and Carolyn Turpin-Petrosino, “Understanding the harm of hate crime,” *Journal of Social Issues*, 2002, 58(2), 207-225; Phyllis Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 2011, Thousand Oaks: Sage.

<sup>222</sup> Anti-Defamation League, “Hate Crime Laws: Punishment to Fit the Crime,” July 8, 2010, <https://www.adl.org/news/op-ed/hate-crime-laws-punishment-to-fit-the-crime>.

<sup>223</sup> Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, at 416.

<sup>224</sup> German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017, (citing National Institute of Justice, “Five Things bout Deterrence,” <https://nij.gov/five-things/pages/deterrence.aspx>).

discriminatory actions will not be solved through the criminal justice system.<sup>225</sup> Bronski et al., argue that changing attitudes does not happen in prisons, but “in schools, in activist organizations, around the dinner table, at houses of worship and other places where people can talk, disagree and learn that disagreement may be a useful and even productive means of growth.”<sup>226</sup>

Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, in their written testimony to the Commission similarly stated that hate crimes laws do not address the root causes of hate crimes:

While state and federal hate crimes laws were hard won battles aiming to protect many vulnerable populations, they have done very little to increase public awareness for why LGBT people, especially transgender people are deserving and in need of respect and legal protections. Hate crime prosecutions are not the answer for protecting transgender communities from violence. Charging one person with a hate crime does nothing to prevent the next murder, or increase public awareness of why transgender people are deserving of respect. To take this violence seriously our country must look at solutions that address the conditions transgender people face, especially state and federal elected officials who daily create laws and executive orders which strip transgender people of their rights and dignity.<sup>227</sup>

Similarly, Micah Fletcher, a survivor of the Portland MAX train stabbing on May 26, 2017, testified to the Commission that education may be the key in reducing hate violence. He posited:

I believe that police and federal organizations are already far stretched too thin and that the best course of action would be to institute methodologies of youth intervention, so that youth are able to have a wider range of experiences to different kinds of people. I believe that at a fundamental level, the only way we’re going to be able to deal with hatred in America is by making sure that we understand each other, making sure the communities talk.<sup>228</sup>

Despite these concerns, scholars recognize that hate crime legislation can be useful because it may provide communities a sense of safety and a sense that the legal system and law enforcement care that their communities are being targeted.<sup>229</sup> Further, most hate crimes occur against individuals who are members of communities that have long been targets of bias and injustice (both structurally and societally), therefore having legislation (even if symbolic) can feel like it is

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<sup>225</sup> See e.g., Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, at 416; Kay Whitlock, “Reconsidering Hate: Policy and Politics at the Intersection,” Political Research Associates, 2012, <http://www.politicalresearch.org/wp-content/uploads/downloads/2012/11/HateFrames.pdf>.

<sup>226</sup> Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, at 416.

<sup>227</sup> Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, written statement to the U.S. Commission on Civil Rights, p. 2.

<sup>228</sup> Micah Fletcher, survivor of the Portland MAX train stabbing, testimony, Briefing Transcript, pp. 127-28.

<sup>229</sup> See German Lopez, “Why it’s so hard to prosecute a hate crime,” *Vox*, May 23, 2017; Michael Bronski, Ann Pellegrini, and Michael Amico, “Hate Crime Laws Don’t Prevent Violence Against LGBT People,” *The Nation*, Oct. 2, 2013, at 418.

righting some of the historical injustices (e.g., Congress' refusal to pass anti-lynching laws) that has occurred throughout the history of the United States.<sup>230</sup>

Another criticism of hate crime legislation is that meeting the standard of proof to establish criminal liability for hate crimes is challenging: in addition to proving that the defendant committed the crime, prosecutors must also prove that the act was committed because of the victim's actual or perceived identity or status.<sup>231</sup> In other words, prosecutors must prove discriminatory intent. Many of the cases DOJ prosecutes that result in a hate crime conviction involve the perpetrator using hate speech when committing the criminal act, thereby proving intent and making conviction possible.<sup>232</sup> But some advocates argue that without some measure to demonstrate other indicia of bias or bigotry, proving the act was hate motivated by bias beyond a reasonable doubt is difficult.<sup>233</sup> For instance, in 2015 Craig Hicks was accused of fatally shooting Deah Shaddy Barakat, Yusor Mohammad Abu-Salha, and Razan Mohammad Abu-Salha in Chapel Hill, North Carolina.<sup>234</sup> As of April 2019, Hicks is still awaiting trial (which is set for July 2019), and prosecutors have not yet determined if Hicks will be charged with a hate crime.<sup>235</sup> Chapel Hill police stated that the "preliminary investigation indicates that the crime was motivated by an ongoing neighbor dispute over parking."<sup>236</sup> However, others argue that Hicks was biased against the three due to their religion and had consistently made them (and other residents) feel "uncomfortable and unsafe."<sup>237</sup> In a CNN interview, Yusor's father, Mohammad Abu-Salha said: "I am sure my daughter felt hated, and she said, literally, 'Daddy, I think it is because of the way we look and the way we dress.'"<sup>238</sup> Mr. Abu-Salha also testified before the House Judiciary Committee in April 2019 regarding the attack against his daughter and her two friends.

Although the local police chief has apologized for initially characterizing the crime as being over a parking dispute, the response from the government to the murders has been muted. We were told that North Carolina's ethnic intimidation law does not apply to the crime that their killer is currently charged with: first degree murder. In addition, we were eventually told that the FBI and the United States Department of Justice would not pursue this as a hate crime because of the "high bar" for proving such a crime. Why is that the

<sup>230</sup> Michael Bronski, Ann Pellegrini, and Michael Amico, "Hate Crime Laws Don't Prevent Violence Against LGBT People," *The Nation*, Oct. 2, 2013, at 418.

<sup>231</sup> See, e.g., 18 U.S.C. § 249(a)(1) and (2); Cal. Pen. Code § 422.55(a).

<sup>232</sup> See *infra* Tables 5-8 (discussion of DOJ hate crimes cases showing the great majority involve hate speech).

<sup>233</sup> Swathi Shanmugasundaram, "Hate Crimes, Explained," Southern Poverty Law Center, April 15, 2018, <https://www.splcenter.org/20180415/hate-crimes-explained>.

<sup>234</sup> Margaret Talbot, "The Story of A Hate Crime," *The New Yorker*, June 15, 2015, <https://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

<sup>235</sup> Jorge Valencia, "Will There Be Hate Crimes Charges In the Chapel Hill Shootings Case?" *WUNC*, Feb. 12, 2016, <https://www.wunc.org/post/will-there-be-hate-crimes-charges-chapel-hill-shootings-case>; Associated Press, "Durham DA: No Death Penalty For 3 Muslim Student Deaths," *WUNC*, April 12, 2019, <https://www.wunc.org/post/durham-da-no-death-penalty-3-muslim-student-deaths>.

<sup>236</sup> Eyder Peralta and Bill Campbell, "Hate Crime or Parking Dispute? Killing of 3 Muslims in N.C. Sparks A Debate," *NPR*, Feb. 11, 2015, <https://www.npr.org/sections/thetwo-way/2015/02/11/385417978/an-arrest-but-no-motive-announced-in-killing-of-3-muslims-in-n-c>.

<sup>237</sup> Margaret Talbot, "The Story of a Hate Crime," *The New Yorker*, June 22, 2015, <https://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

<sup>238</sup> Mohammad Abu-Salha, interview on Anderson Cooper 360, Feb. 11, 2015, <http://transcripts.cnn.com/TRANSCRIPTS/1502/11/acd.01.html>.

case? Even worse, we saw that individuals used the internet to praise the killer for his actions. The day after the murders, someone tweeted that the person who slaughtered our children in cold blood deserved a medal of honor and a purple heart, and that he should be released immediately. Another tweeted, “Three down and 1.6 billion to go.” Some media outlets ridiculed the idea that a hate crime could be committed. One commentator showed my picture and said of my statement about the murders being a hate crime, “This is just vile,” exposing my family to further pain and the potential for more violence.<sup>239</sup>

Jack McDevitt, a criminologist at Northeastern University, argues that Hicks should be charged with a hate crime and stated that:

With hate crimes, it’s not always an either/or. You can decide you want to rob someone, for instance, but only someone you perceive to be gay, because maybe you think they’ll be less likely to go to the police, or only an immigrant, because you think the police won’t take it as seriously. In this case, he’s angry about the way people around him live, but he’s chosen these specific people because they also represent a religion he’s intolerant of.<sup>240</sup>

According to McDevitt, FBI investigators often consider the level of violence a perpetrator uses to commit the crime to determine if an incident is a possible hate crime, if “the level of violence is more than what is required to do the crime.”<sup>241</sup>

Perhaps because the legal standards are very high, hate crime prosecutions are extremely rare. According to a 2015 report by the Transactional Records Access Clearinghouse, a research organization at Syracuse University, federal prosecutors turned down about 87 percent of hate crime referrals since the passage of HCPA.<sup>242</sup> The report stated that the most common reasons for lack of prosecution was insufficient evidence, particularly evidence of criminal intent.<sup>243</sup> Dr. Prabhjot Singh, a hate crime survivor who was attacked for being Sikh, stated that this ambiguity about what is labelled a hate crime not only makes investigation and prosecution difficult, but also can cause victims and their communities additional hardship. Singh stated that:

There’s very clear rules about how you punish a hate crime. But there’s not a lot of clarity around how one brings both closure and understanding to why it was labeled a hate crime in the first place, for myself, and my family and my community – but also for the people that perpetrated it.<sup>244</sup>

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<sup>239</sup> Mohammad Abu-Salha, testimony before U.S. House Judiciary Committee, April 9, 2019, at 3, <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-Abu-SalhaM-20190409.pdf>.

<sup>240</sup> Margaret Talbot, “The Story of a Hate Crime,” *The New Yorker*, June 22, 2015, <https://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

<sup>241</sup> *Ibid.*

<sup>242</sup> Transactional Records Access Clearinghouse, “Convictions in Federal Hate Crime Cases Since FY 2010,” June 25, 2015, <http://trac.syr.edu/tracreports/crim/393/>.

<sup>243</sup> *Ibid.*

<sup>244</sup> Chris Fuchs, “Many crimes may look motivated by hate. Proving it can be a different story,” *NBC News*, April 11, 2018, <https://www.nbcnews.com/news/asian-america/many-crimes-may-look-motivated-hate-proving-it-can-be-n864451>.



Under the federal HCPA, proving intent can be legally complex, and as will be discussed below, there is no one standard to which courts have agreed.<sup>245</sup>

Prosecution is difficult even in states with more comprehensive hate crime legislation. For instance, the California Penal Code defines a hate crime as “a criminal act committed, *in whole or in part, because of* one or more of the following actual or perceived characteristics of the victim: (1) disability, (2) gender, (3) nationality, (4) race or ethnicity, (5) religion, (6) sexual orientation, (7) association with a person or group with one or more of these actual or perceived characteristics.”<sup>246</sup> This is an easier legal standard for proving intent than the federal HCPA, which requires that the crime was committed almost entirely because of the victim’s protected status, yet there was an apparently lower conviction rate among the cases the DOJ chose to prosecute.<sup>247</sup> In 2017, California prosecutors filed 195 hate crimes complaints under the state’s hate crimes statute, of which 113 (57.9%) resulted in convictions.<sup>248</sup>

### Court Challenges to Federal Hate Crimes Laws

To date, all federal circuits have held that the HCPA is constitutional, and the Supreme Court has not taken up any appeals or ruled otherwise.<sup>249</sup>

In November 2010, in the case of *United States v. Beebe*,<sup>250</sup> Paul Beebe, Jesse Sanford, and William Hatch became the first three defendants charged under HCPA for a racially motivated assault against a Native American man with a disability.<sup>251</sup> The defendants were each indicted on two counts under HCPA (18 U.S.C. § 249) and conspiracy to commit a hate crime under 18 U.S.C. § 371; one defendant plead guilty to the HCPA charge and the other two defendants pleaded guilty to conspiracy charges. Then-Assistant Attorney General for the Civil Rights Division Thomas Perez stated, “Deplorable, hate-filled incidents like this one have no place in civilized society. The Justice Department is committed to using all the tools in our law enforcement arsenal, including the [HCPA], to prosecute acts of hate.”<sup>252</sup> Three years later in *United States v. Hatch*, William Hatch filed an appeal to the Tenth Circuit of Appeals on the basis that Congress lacked the authority to promulgate it under the Thirteenth Amendment.<sup>253</sup> The court unanimously held that the “Thirteenth Amendment can be seen as treating most forms of racial discrimination as badges and incidents of slavery, and that Congress not only has the power to enforce the amendment, but

<sup>245</sup> See *infra* notes 292-294 (discussing *United States v. Miller* and other cases).

<sup>246</sup> Cal. Pen. Code § 422.55(a).

<sup>247</sup> See *infra* Tables 5-8 (documenting 98.7% conviction rate among 41 federal cases prosecuted from 2009-2018).

<sup>248</sup> Xavier Becerra, “Hate Crime in California,” Office of the Attorney General, California Dep’t of Justice, 2017, Table 10, <https://openjustice.doj.ca.gov/downloads/pdfs/hc17.pdf>.

<sup>249</sup> See *e.g.*, *United States v. Hill*, 927 F.3d 188, 195-97 (4th Cir. 2019).

<sup>250</sup> *United States v. Beebe* 807 F. Supp. 2d 1045 (D.N.M. 2011).

<sup>251</sup> *Id.* See also, United States Dep’t of Justice, “United States v. Paul Beebe, Jesse Sanford, and William Hatch,” Press Release, Aug. 18, 2011, [https://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2011-08-18\\_beebe\\_sanford\\_pr.pdf](https://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2011-08-18_beebe_sanford_pr.pdf); U.S. Dep’t of Justice, “Two Men Sentenced for Racially-Motivated Assault in New Mexico,” Jan. 25, 2012, <https://www.justice.gov/opa/pr/two-men-sentenced-racially-motivated-assault-new-mexico>.

<sup>252</sup> U.S. Dep’t of Justice, “Farmington Men Plead Guilty to Racially-Motivated Assault,” Aug. 18, 2011, at 1, [https://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2011-08-18\\_beebe\\_sanford\\_pr.pdf](https://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2011-08-18_beebe_sanford_pr.pdf).

<sup>253</sup> *United States v. Hatch*, 722 F.3d 1193, 1195 (10th Cir. 2013) (addressing Hatch’s arguments that the Hate Crimes Act was unconstitutional, “claiming Congress lacks the authority to criminalize purely intrastate conduct of this character.”).

also to a certain extent to define its meaning.”<sup>254</sup> Hatch petitioned the Supreme Court to review the lower court’s decision, but the justices declined to hear his case.<sup>255</sup>

Opponents of HCPA argue that the federal government’s ability to take over a state prosecution or to re-prosecute (in some cases) violates the constitutional protections against double jeopardy<sup>256</sup> and “intrudes on the core police powers of the states.”<sup>257</sup> In 2015, in *United States v. Metcalf*, Randy Metcalf was prosecuted under federal law because he violated HCPA in a bar fight with Lamarr Sandridge, which the trial judge described as a “brutal and outrageous attack” due to Metcalf stomping and kicking Sandridge in the head multiple times. Federal prosecutors indicted him on one count of violating HCPA for causing bodily harm “because of the actual or perceived race, color, religion, or national origin of any person”; witnesses reported that he made several racial slurs during the attack.<sup>258</sup> Metcalf appealed the decision claiming that HCPA is unconstitutional as Congress did not have the authority to enact it under the Thirteenth Amendment.<sup>259</sup> The Thirteenth Amendment mandates that:

### Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

### Section 2.

Congress shall have power to enforce this article by appropriate legislation.<sup>260</sup>

In an *amicus* brief, the Cato Institute, Reason Foundation, and Individual Rights Foundation argued that:

HCPA is not a legitimate exercise of authority...and [t]he provision does not prohibit slavery or involuntary servitude [under the Thirteenth Amendment]. Nor is it a prophylactic measure intended to assist in preventing the return of slavery or involuntary servitude. The federal government thus does not have jurisdiction over the prohibited acts in Section

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<sup>254</sup> *Id.* at 1198.

<sup>255</sup> *United States v. Hatch*, 722 F.3d 1193, 1195 (10th Cir. 2013) *cert. denied*, 134 S.Ct. 1538 (2014).

<sup>256</sup> Protections from double jeopardy can be found in the text of the Fifth Amendment: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” Double Jeopardy Clause, U.S. Const. amend. V.

<sup>257</sup> *Brief of Amici Curiae Cato Inst., Reason Foundation, and Individual Rights Foundation, in Support of Appellant*, at 3, Ilya Shapiro as Amici Curiae Supporting Appellant *United States v. Metcalf*, 881 F.3d 641 (8th Cir. 2018)(No. 16-4006), [https://object.cato.org/sites/cato.org/files/wp-content/uploads/metcalf\\_8th\\_cir.pdf](https://object.cato.org/sites/cato.org/files/wp-content/uploads/metcalf_8th_cir.pdf).

<sup>258</sup> See *United States v. Metcalf*, 2016 WL 827763 (N.D. Iowa 2015).

<sup>259</sup> *United States v. Metcalf*, 881 F.3d 641, 644 (8th Cir. 2018); Ilya Shapiro, “Let States Prosecute Assaults, Regardless of Their Motivations,” *Cato at Liberty*, Dec. 21, 2016. HCPA was enacted under Section 2 of the Thirteenth Amendment, which authorizes Congress to enforce the Constitution’s ban on slavery and the Supreme Court has extended this jurisdiction to include eliminating any “badges and incidents” of slavery. See 18 U.S.C. § 249 (2011); U.S. Const. amend. XIII; see also *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>260</sup> U.S. Const. amend. XIII.

249(a)(1), and the dual sovereignty rule does not apply to a government that lacks jurisdiction.<sup>261</sup>

George F. Will also argued that HCPA is unconstitutional due to double jeopardy, opining that:

Hate crimes (usually vandalism, e.g., graffiti, or intimidation, e.g., verbal abuse) are a tiny fraction of 1 percent of all reported crimes. Almost all states have such laws, and a federal law duplicating them merely serves two disreputable purposes. It allows Congress to express theatrical indignation about hate. And it exposes to double jeopardy, under a federal law, defendants who are acquitted in politically charged state trials, especially ones involving race or religion.<sup>262</sup>

The Fifth Amendment prohibits double jeopardy through charging or punishing a person more than once for the same offense.<sup>263</sup> However, the Supreme Court has held that different sovereigns can charge for different offenses requiring different elements of proof (the “different sovereign rule”).<sup>264</sup> In hate crimes cases, the Tenth Circuit as well as at least two federal district courts have agreed that federal prosecution does not violate double jeopardy,<sup>265</sup> and the Supreme Court declined to take up a case in which Cato had argued that HCPA violated double jeopardy.<sup>266</sup>

In *United States v. Metcalf*, on February 2, 2018 the U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the lower court that HCPA was constitutional, and on October 29, the Supreme Court denied the defendant’s petition to take up the case, letting stand the Eighth Circuit’s ruling.<sup>267</sup> The Eighth Circuit held that the indictment of Metcalf under HCPA was constitutionally sound, citing the holding in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that Section 2 of the Thirteenth Amendment gave “Congress not only the authority to abolish slavery, but also the ‘power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’”<sup>268</sup> The Court further held that “rather than itself defining the ‘badges and incidents of slavery’... [s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to

<sup>261</sup> *Brief of Amici Curiae Cato Institute, Reason Foundation, and Individual Rights Foundation, in Support of Appellant*, at 3-4.

<sup>262</sup> George F. Will, “The Federal Hate Crime Law is Both Unconstitutional and Unwise,” *Washington Post* (Oct. 24, 2018), [https://www.washingtonpost.com/opinions/the-federal-hate-crime-law-is-both-unconstitutional-and-unwise/2018/10/24/0db36e72-d6f2-11e8-aeb7-ddcad4a0a54e\\_story.html?utm\\_term=.a9fe1546fdeb](https://www.washingtonpost.com/opinions/the-federal-hate-crime-law-is-both-unconstitutional-and-unwise/2018/10/24/0db36e72-d6f2-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.a9fe1546fdeb) (discussing *U.S. v. Metcalf* and the constitutionality of the HCPA in general).

<sup>263</sup> U.S. Const. amend. V (text quoted at *infra* note 276); see also *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“The fundamental nature of the guarantee against double jeopardy can hardly be doubted.”).

<sup>264</sup> See, e.g., *United States v. Louisville Edible Oil Products*, 926 F. 2d 584 (N.D. Ohio 2000), *cert denied* 502 U.S. 859 (1991); Slip Op., *Gamble v. United States*, No. 17-646 (S.Ct., June 17, 2019), [https://www.supremecourt.gov/opinions/18pdf/17-646\\_new\\_o759.pdf](https://www.supremecourt.gov/opinions/18pdf/17-646_new_o759.pdf).

<sup>265</sup> See *supra* notes 263-64 (discussing cases).

<sup>266</sup> See *supra* note 262 (George H. Will discussing the Cato Institute’s double jeopardy argument in its amicus brief in support of the appellant in *U.S. v. Metcalf*, but the theory is not part of the litigation regarding the constitutionality of the HCPA decided by federal courts); See *United States v. Metcalf*, 881 F. 3d 641 (8th Cir. 2018), *cert denied* 139 S. Ct. 412, U.S. (2018) (focusing on Congress’ power under the Thirteenth Amendment, not the Fifth Amendment’s double jeopardy provisions. 881 F. 3d 641 (*passim.*)).

<sup>267</sup> *United States v. Metcalf*, 881 F. 3d 641 (8<sup>th</sup> Cir. 2018), *cert denied* 139 S. Ct. 412, U.S. (2018).

<sup>268</sup> *Metcalf*, 881 F. 3d at 439 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968)).

translate that determination into effective legislation.”<sup>269</sup> Moreover, in *United States v. Maybee*, the Eighth Circuit stated that:

The parties agree that the constitutionality of § 249(a)(1) depends on whether it is a proper exercise of Congress’ power under Section Two of the Thirteenth Amendment ‘rationally to determine what are the badges and incidents of slavery’ and to abolish them.<sup>270</sup> This inquiry is exemplified by our previous examination of the constitutionality of 18 U.S.C. § 245(b)(2)(B) in *United States v. Bledsoe*,<sup>271</sup> and our sister circuits’ analogous cases *United States v. Allen*,<sup>272</sup> and *United States v. Nelson*.<sup>273</sup> *Bledsoe*, *Allen*, and *Nelson* each held that Congress rationally could designate as a badge and incident of slavery the willful infliction of injury on a person because of that person’s race and because that person has enjoyed a public benefit.<sup>274</sup> (‘[I]nterfering with a person’s use of a public park because he is black is a badge of slavery.’)<sup>275</sup>

Furthermore, regarding the concern that HCPA violated the constitutional protection against double jeopardy,<sup>276</sup> in *United States v. Hatch*, the Tenth Circuit Court held that the Act did not violate this clause since both state and federal jurisdiction laws had been offended on separate grounds.<sup>277</sup> In the original case, the state of New Mexico charged Beebe, Sanford, and Hatch under state law with kidnapping, aggravated battery, and conspiracy to commit both of these crimes.<sup>278</sup> Six months later, while state prosecution was still pending, the federal government charged the three defendants with violating (and conspiracy to violate) 18 U.S.C. § 249(a)(1), a portion of HCPA, making it unlawful to “subject a person to physical violence on account of the person’s race.”<sup>279</sup>

The court in *United States v. Hatch* ruled that the federal government is permitted to exhaust its remedies for the same crime as tried by a state court using federal law.<sup>280</sup> This ruling was significant, because HCPA gave the federal government the authority to step in and prosecute cases that violate both federal and state laws, which can be a critical tool in hate crime cases, especially for those crimes that occur in states without hate crime statutes (or limited statutes). Such a gap in state laws could mean that some hate crimes would not be prosecuted as hate crimes

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<sup>269</sup> *Metcalf*, 881 F. 3d at 440. Defendant Metcalf argues in opposition stating that “U.S.C. § 249(a)(1) is unconstitutional even if *Jones* applies, both because Congress could not rationally determine that racially motivated violence is a badge or incident of slavery and because the statute is contrary to federalism principles.” *Metcalf*, 2016 WL 827763, at 2.

<sup>270</sup> See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).

<sup>271</sup> *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir.1984)

<sup>272</sup> *United States v. Allen*, 341 F.3d 870 (9th Cir.2003)

<sup>273</sup> *United States v. Nelson*, 277 F.3d 164 (2d Cir.2002)

<sup>274</sup> *United States v. Maybee*, 687 F.3d 1026, 1030-31 (8th Cir. 2012) (citing *Bledsoe*, 728 F.2d at 1097).

<sup>275</sup> *Id.* at 1030-31 (8th Cir. 2012) (citing *Jones*, 392 U.S. at 445); see also *Allen*, 347 F.3d at 884; *Nelson*, 277 F.3d at 190-91.

<sup>276</sup> U.S. Const. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

<sup>277</sup> *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013).

<sup>278</sup> *United States v. Beebe* 807 F.Supp.2d 1045 (D.N.M. 2011).

<sup>279</sup> *United States v. Beebe*, 807 F.Supp.2d 1045, 1047 (D.N.M. 2011).

<sup>280</sup> See *United States v. Hatch*. 722 F.3d 1193, 1207-1208 (10th Cir. 2013).

unless the federal government also determines to charge the accused.<sup>281</sup> For instance, in *United States v. Morange*, the federal government stepped in to prosecute Dorian Morange, who was charged with assaulting and causing bodily injury to a man (known as B.W. in the court documents) due to his perceived or actual sexual orientation. There was no state prosecution of the hate crime due to Georgia lacking a hate crime statute.<sup>282</sup>

In *United States v. Cannon*, a Fifth Circuit case upholding the constitutionality of HCPA, in contrast to the majority, Circuit Judge Elrod wrote a special concurrence stating that:

Under binding precedent, § 249(a)(1) [of the HCPA] is constitutionally valid. I write separately to express my concern that there is a growing tension between the Supreme Court’s precedent regarding the scope of Congress’s powers under § 2 of the Thirteenth Amendment and the Supreme Court’s subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause. Our sister circuit [the Tenth Circuit] noted similar concerns in *United States v. Hatch*.<sup>283</sup>

Judge Elrod also stated that the Supreme Court’s decision in *Shelby County v. Holder*, holding that the preclearance formula of the Voting Rights Act was unconstitutional because it was not based on current conditions “suggests that this congressional finding regarding circumstances now more than 100 years old cannot serve as the justification for a current expansion of Congress’s powers under the Thirteenth Amendment.”<sup>284</sup> Judge Elrod goes on to say that “the question, following *Shelby County*, is whether § 249(a)(1) satisfies constitutional requirements in our current society. Because the Shepard-Byrd Act ‘imposes current burdens,’ perhaps, like the Voting Rights Act, it too ‘must be justified’ with congressional findings regarding ‘current needs.’”<sup>285</sup> However, this is only one judge’s opinion, and despite a petition to do so as in the case of *Metcalf*,<sup>286</sup> the Supreme Court declined to take up the case,<sup>287</sup> and the majority opinion confirming the constitutionality of the HCPA under the Thirteenth Amendment still holds.<sup>288</sup>

Proof of intent because of an individual’s actual or perceived identity is another major legal issue arising under federal hate crimes law—intent can be difficult to prove. In *United States v. Miller*, the Sixth Circuit Court of Appeals considered the HCPA’s statutory language that the crime must have occurred *because of* the victim’s actual or perceived race, gender, sexual orientation, or religion.<sup>289</sup> The Sixth Circuit reversed its prior rulings that the statute’s “because of” standard required that prosecutors prove that the crime was substantially motivated by hate, and held

<sup>281</sup> See e.g., *United States v. Morange* 1:13-CR-86 (N.D. Ga. 2013); *United States v. Roof*, 252 F. Supp. 3d 469 (D.S.C. 2017).

<sup>282</sup> See *United States v. Morange* 1:13-CR-86 (N.D. Ga. 2013).

<sup>283</sup> *United States v. Cannon*, 750 F. 3d 492,508 (5th Cir. 2014) (J. Elrod, special concurrence).

<sup>284</sup> *Id.* at 511.

<sup>285</sup> *Id.*

<sup>286</sup> See *supra* note 258.

<sup>287</sup> See *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014), *cert denied*.

<sup>288</sup> *Id.* at 500-505.

<sup>289</sup> *United States v. Miller*, 767 F.3d 585, 591 (6th Cir. 2014) (addressing a jury verdict that convicted sixteen members of the Bergholz, Ohio, Amish community of hate crime and obstruction-of-justice charges stemming from a spate of hair-cutting and beard-shearing attacks and reversing the crime convictions because the relevant jury instruction was inconsistent with an intervening Supreme Court decision)

instead, that prosecutors must prove an even higher standard—that the crime would not have occurred “but for” the prohibited discriminatory motive, and explained that the “prohibited act or motive must be an actual case of the specified outcome.”<sup>290</sup> In other words, a prosecutor must prove that the crime would not have been committed, had it not been due to the victim’s identity (perceived or actual).

In terms of prosecutions, the Sixth Circuit’s “but-for” standard is considerably high and often challenging to prove.<sup>291</sup> In *Miller*, the court ruled that:

Any standard that requires less than but-for causality, moreover, treads uncomfortably close to the line separating constitutional regulation of conduct and unconstitutional regulation of beliefs. The government may punish ‘bias-inspired *conduct*’ without offending the First Amendment because bigoted conduct ‘inflict[s] greater individual and societal harm.’ But punishment of a defendant’s ‘abstract beliefs,’ no matter how ‘morally reprehensible’ they may be, violates the First Amendment.<sup>292</sup>

Further, the *Miller* court relied on a Supreme Court decision holding that in criminal matters requiring a showing that an aspect of defendant’s conduct caused the injury, the jury must be instructed that a “but for” causation standard must be proven.<sup>293</sup> However, the Sixth Circuit in *Miller* may have overstated the *Burrage* case, because that case was about a drug control statute requiring that the injury “results from” the defendant’s conduct and not the HCPA’s “because of” language.<sup>294</sup> The Ninth Circuit allows for an easier standard of proof of discriminatory intent in hate crimes cases. For example, the prosecutor’s trial brief in *Mason* (in the Ninth Circuit) discussed that “[t]he United States will prove that Beltier’s sexual orientation *significantly* motivated Mason’s actions by introducing language used by Mason and Gardner, the circumstances surrounding the offense, and other evidence that sheds light on Mason’s motives.<sup>295</sup> Moreover, according to case law in the Ninth Circuit, evidence of prior anti-gay slurs was “highly probative of Mason’s motive when he attacked Beltier who was openly gay.”<sup>296</sup> The Ninth Circuit HCPA cases do not require “but for” causation.<sup>297</sup>

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<sup>290</sup> *Id.* at 592-593.

<sup>291</sup> *Id.* at 593, 600.

<sup>292</sup> *Id.* at 592 (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (emphasis added by Miller court) and *Dawson v. Delaware*, 503 U.S. 159, 167 (1992)).

<sup>293</sup> *Miller*, 767 F.3d at 589 (citing *Burrage v. United States*, 571 U.S. 204 (2014)).

<sup>294</sup> *Burrage*, 571 U.S. at 209.

<sup>295</sup> See Government’s Trial Memorandum, *United States v. Mason*, No. 3:13-cr-00298, 13 (D. Ore. Jan. 7, 2014). The indictment was dismissed with prejudice on other grounds. Order Dismissing Indictment as to Defendant Mason, No. 3-13-cr-00298 (D. Ore. May 14, 2014).

<sup>296</sup> *Id.* at 13-13; see also *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003) (upholding admission of color photographs of swastika tattoos, photographs of defendants in Heil Hitler poses, registration forms for Aryan Nations World Congress, and other skinhead paraphernalia as direct evidence of motive element in prosecution of bias-motivated assault); *United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992) (admitting a “sign reading ‘All Niggers Will be Executed,’ [] dolls with nooses around their necks, and [a] machete in [a] sheath reading ‘Nigger tucker’” that served as direct evidence of racial motive); *United States v. Dunaway*, 88 F.3d 617, 619 (8th Cir. 1996) (evidence of racist views, speech, and conduct admissible in prosecution of 18 U.S.C. § 245, a racially motivated crime, because motive is an element of the crime); *United States v. Magleby*, 241 F.3d 1306, 1315-20 (10th Cir. 2001) (evidence of racist lyrics of song admissible to prove the racially motivated crime charged).

<sup>297</sup> *Id.*

Another challenge has arisen in the need to prove that a hate crime involving bias based on gender, sexual orientation or disability was committed “across a state line or national border,” or “using a channel, facility, or instrumentality of interstate or foreign commerce.”<sup>298</sup> Defendants have challenged the constitutionality of the HCPA on the grounds that it exceeds Congress’ authority under the interstate commerce clause. The holdings in these cases are fact-intensive, and since they are mainly related to hate crimes prosecuted by the federal government—which has generally prevailed in courts holding that interstate commerce was sufficiently impacted in the cases it has litigated—they are described in Chapter 3 of this report.<sup>299</sup>

### Federal Responses to Hate Crimes

There is a general consensus among the American public that a person’s civil rights should be protected, but in practice, the enforcement of federal and state hate crime laws has been unequal and sometimes troubling. Marguerite Angelari, Senior Attorney at Open Society Foundations, argues that “[t]he same prejudices that motivate people to commit hate crime may also influence the decisions of prosecutors and the actions of the police.”<sup>300</sup>

The federal government also implemented several initiatives to address the problem of hate crimes. For instance, the Bureau of Justice Assistance (BJA) provides funding for organizations such as the Center for the Prevention of Hate Violence at the University of Southern Maine that has produced a series of reports that offer the BJA recommendations and “best practice” suggestions on how to effectively address, respond to, and possibly prevent hate crimes.<sup>301</sup> However, the National Institute of Justice recognizes that these reports are limited, because while they are well-drafted and based on practical experience and expert opinion, none of the criminal justice responses have been subjected to rigorous empirical evaluation.<sup>302</sup>

#### *Department of Justice*

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<sup>298</sup> 8 U.S.C. § 249 (2)(A) and (B).

<sup>299</sup> See *infra* notes 900-et. seq.

<sup>300</sup> Marguerite Angelari, “Hate Crime Statutes: A Promising Tool For Fighting Violence Against Women” (citing Peter Finn, Bias Crime: A Special Target for Prosecutors, *Prosecutor*, 21(4), 1988, at 10 (arguing that a “[1]ack of police and prosecutor attention to bias crime sometimes reflects the attitudes of local residents who do not want minorities in their community”); See also, Tanya Kateri Hernandez, Note, Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence,” 99 *Yale L.J.* 845, (1990), 851-55 (stating that “unconscious racism, ingrained in North American culture, makes it difficult for prosecutors to concede that racially motivated violence is indeed a crime”).

<sup>301</sup> See e.g., U.S. Department of Justice, Bureau of Justice Assistance, *Addressing Hate Crimes: Six Initiatives That Are Enhancing the Efforts of Criminal Justice Practitioners*, (February 2000), <https://www.ncjrs.gov/pdffiles1/bja/179559.pdf>.

<sup>302</sup> National Institute of Justice, “Response to Hate Crimes,” Dec. 22, 2010.

Since the passage of HCPA in 2009, the DOJ has charged over 300 defendants with hate crime offenses.<sup>303</sup> In fiscal year 2018, the Justice Department pursued hate crime charges against 27 defendants and obtained 30 convictions.<sup>304</sup>

Robert Moossy, Deputy Assistant Attorney General, Civil Rights Division at the Department of Justice, wrote in his statement to the Commission that the Justice Department sees its role in addressing hate crimes as broader than just focusing on prosecution.<sup>305</sup> For instance, then-Attorney General Jeff Sessions announced in April 2017 that he would establish a Hate Crimes Subcommittee that was part of the Department's Task Force on Crime Reduction and Public Safety. Sessions, mirroring the sentiment expressed by Perez seven years previously, stated that:

We will not tolerate threats or acts of violence targeting any person or community in this country on the basis of their religious beliefs or background. Accordingly, the Hate Crimes Subcommittee will develop a plan to appropriately address hate crimes to better protect the rights of all Americans.<sup>306</sup>

The Department has also created a Hate Crimes Enforcement and Prevention Working Group that consists of representatives from the Civil Rights Division, FBI, U.S. Attorneys Offices, the Office on Community Oriented Policing Services (COPS), the Office of Justice Programs, and the Community Relations Service (CRS).<sup>307</sup> “Our goal [at the Justice Department] is to assist state and local law enforcement to address bias motivated violence, support communities which have been impacted by this violence, and, where appropriate, prosecute these crimes at a federal level.”<sup>308</sup>

Further, in a speech at the 2017 Hate Crimes Summit declaring the Justice Department's dedication to fighting hate crime, Sessions stated that “[h]ate crimes are not only violent attacks on our fellow citizens; they are an attack on our country's most fundamental principles. We have a duty to make sure that all Americans can live their lives without fear.”<sup>309</sup>

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<sup>303</sup> U.S. Dep't of Justice, Office of Public Affairs, “Justice Department Releases Update on Hate Crimes Prosecutions and Announces Launch of New Hate Crimes Website,” Oct. 29, 2018, <https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>.

<sup>304</sup> U.S. Dep't of Justice, Office of Public Affairs, “Justice Department Releases Update on Hate Crimes Prosecutions and Announces Launch of New Hate Crimes Website,” (last updated Oct. 29, 2018), <https://www.justice.gov/opa/pr/justice-department-releases-update-hate-crimes-prosecutions-and-announces-launch-new-hate>.

<sup>305</sup> Robert Moossy, Written Statement to U.S. Commission on Civil Rights at 3.

<sup>306</sup> Memorandum: Attorney General Jeff Sessions, “Update on the Task Force on Crime Reduction and Public Safety,” Office of the Attorney General, April 5, 2017, <https://www.justice.gov/opa/press-release/file/955476/download>.

<sup>307</sup> Moossy Written Statement at 3; *see also*, U.S. Dep't of Justice, Office of Public Affairs, “Deputy Attorney General Rosenstein Announces Funds and Technical Assistance Resources to Help Law Enforcement Investigate and Prosecute Hate Crimes at Law Enforcement Roundtable,” Oct. 29, 2018, <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.

<sup>308</sup> Moossy Written Statement at 3.

<sup>309</sup> U.S. Department of Justice, Office of Public Affairs, “Attorney General Jeff Sessions Delivers Remarks at the 2017 Hate Crime Summit,” June 29, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-2017-hate-crimes-summit>.



Some civil rights advocates, nevertheless, have expressed concerns that the DOJ has not dedicated and will not dedicate the necessary resources to investigate and prevent hate crimes. For instance, Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law, stated during the Hate Crimes Summit's briefing that Sessions' statement does not go far enough and disregards the negative effects that the Administration's policies have had on the lives of vulnerable communities. Clarke asserts that "While it is critical that the Department of Justice redouble its commitment to effectively investigate and prosecute hate crimes, any actions it takes must be understood in the context of the policies and positions that the [DOJ] has taken that promote the marginalization of minority communities and contribute to a climate of fear and hate."<sup>310</sup> The ADL also asserts that to combat hate crimes the Justice Department needs to take an integrated approach to sufficiently respond, deter, and prevent hate crimes. Specifically, the organization calls for the DOJ to create "a separate working group or task force to address hate violence and bias-motivated incidents in the United States, rather than embedding these issues into a subcommittee under the Task Force on Crime Reduction and Public Safety which seems designed to target immigrants and people of color."<sup>311</sup>

Similarly, the International Center for Advocates Against Discrimination posits that the federal government has not sufficiently protected individuals and communities from hate crimes "through a combination of inadequate data collection, limited training of law enforcement to investigate and document hate crimes, and the failure to devote resources to monitor domestic extremists with supremacist ideologies."<sup>312</sup> The Justice Research and Statistics Association also contends that the federal government could be doing more in terms of reporting hate crimes. The organization posits that "the nation needs more than simple annual summary counts of offenses in order to think more strategically about crime, to enhance trust between communities and their law enforcement agencies, and promote a sense of community wellness and safety."<sup>313</sup> In light of these issues, other groups and lawmakers have also called for Congress to pass the NO HATE Act that would incentivize local and state law enforcement to more accurately report hate crimes to the FBI, and promote greater transparency and accountability, which would aid in building community trust.<sup>314</sup>

<sup>310</sup> Aaron Morrison, "Hate crimes reporting is on the uptick, new DOJ report shows, but more than 50% still go unreported," *Mic*, June 29, 2017, <https://mic.com/articles/181033/hate-crimes-reporting-is-on-the-uptick-new-doj-report-shows-but-more-than-50-still-go-unreported#.jGOrA3WRS>.

<sup>311</sup> Hate Crimes Coalition, Policy Recommendations to the U.S. Department of Justice following the Charlottesville's "Unite the Right" Rally, Sept. 15, 2017, 2, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>. Note: The DOJ's Task Force on Crime Reduction and Public Safety is a task force that was created on February 27, 2017 with the purpose of identifying ways that the "federal government can more effectively combat illegal immigration and violent crime... The Task Force will accomplish its work through a variety of subcommittees." See U.S. Dep't of Justice, Office of Attorney General, "Memorandum for Head of Department Components," April 5, 2017, <https://www.justice.gov/opa/press-release/file/955476/download>.

<sup>312</sup> Hansdeep Singh, Jaspreet Singh, & Murtaza Khwaja, "Perpetuating Discrimination: How the U.S. Government's Compliance with the Underreporting of Hate Crimes Leads to a Failure to Protect Minority Groups and Effectively Combat Hate Crimes," International Center for Advocates Against Discrimination, Aug. 2014, 1, [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17772\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17772_E.pdf).

<sup>313</sup> Jeffrey Sedgwick, "Crime and Public Safety: Working Toward a More Accurate Assessment of Criminal Incidents," *Justice Research and Statistics Association Forum*, vol. 33, no. 1, 2015, 1, [http://www.jrsa.org/pubs/forum/forum\\_issues/for33\\_1.pdf](http://www.jrsa.org/pubs/forum/forum_issues/for33_1.pdf).

<sup>314</sup> See S. 662 NO HATE Act, 115th Congress, 2017-2018, <https://www.congress.gov/bill/115th-congress/senate-bill/662/text>; see also, NAACP, "No Hate: NAACP Tackles Hate Crimes," 2017,

At the Commission’s briefing, Robert Moosy, Deputy Assistant Attorney General, Civil Rights Division at the Department of Justice, stated that the current Administration is placing a priority on investigating and prosecuting hate crimes.<sup>315</sup> Moosy wrote in his testimony to the Commission, that “since January 2017, the Department has brought hate crimes charges against more than two dozen defendants and obtained 22 convictions.”<sup>316</sup>

The Leadership Conference on Civil and Human Rights testified that:

It is vitally important that the Justice Department continues to vigorously investigate and prosecute hate crimes. However, investigation and prosecution of federal hate crimes alone is insufficient. It’s past time for the Trump administration and the Sessions Justice Department to demonstrate – through action and its megaphone – its full and unflagging commitment to preventing hate-based violence and harassment that hurts our communities and destroys the fabric of our nation.<sup>317</sup>

Moreover, more than prosecution of hate crimes may be needed. Kristen Clarke president and executive director of the Lawyers’ Committee for Civil Rights Under Law, testified before the House Committee on the Judiciary that:

[T]he Trump Administration—whether intentionally or not—has sent a clear message to the communities most vulnerable to hate crimes that their civil rights are in jeopardy and not worthy of protection. Efforts to combat the increase in hate crimes must be understood in the context of the policy decisions and other actions taken by the Trump Administration which promote the dehumanization of people in our communities, and contribute to a climate of fear and hate.... By abandoning full enforcement of our federal civil rights laws, this Justice Department has also sent a dangerous message that the rights of vulnerable communities simply do not matter.<sup>318</sup>

Testimony from other advocates mirrored Clarke’s sentiments stating that many communities are fearful to report when crimes do happen citing lack of trust in the federal government and being fearful of reporting civil rights violations.<sup>319</sup>

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<https://www.naacp.org/campaigns/no-hate/>; Michael Burke, “Dem lawmaker vows to renew push for anti-hate legislation in new Congress,” *The Hill*, Jan. 2, 2019, <https://thehill.com/homenews/house/423619-dem-lawmaker-vows-to-renew-push-for-anti-hate-legislation-in-new-congress>.

<sup>315</sup> Robert Moosy, Deputy Assistant Attorney General, Civil Rights Division at the Department of Justice, written statement to U.S. Commission on Civil Rights, p. 2

<sup>316</sup> *Ibid.*

<sup>317</sup> India-West Staff Reporter, “Civil Rights Groups Denounce Justice Department Hate Crimes Hearing as ‘Photo Op’,” *India-West*, July 10, 2017, [https://www.indiawest.com/news/global\\_indian/civil-rights-groups-denounce-justice-department-hate-crimes-hearing-as/article\\_41fa5f96-6598-11e7-905d-f3bb6faba7f7.html](https://www.indiawest.com/news/global_indian/civil-rights-groups-denounce-justice-department-hate-crimes-hearing-as/article_41fa5f96-6598-11e7-905d-f3bb6faba7f7.html).

<sup>318</sup> Hearing on Hate Crimes and the Rise of White Nationalism Before the H. Comm. on the Judiciary, 111th Cong. (2019) (statement of Kristen Clarke, President and Executive Director, Lawyers’ Committee for Civil Rights Under Law), at 2-3, <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>

<sup>319</sup> See e.g., Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, testimony, *Briefing Transcript*, pp. 219; Lena Masri, National Litigation Director and Acting Civil Rights Director, Council on American-Islamic Relations (CAIR), testimony, *Briefing Transcript*, pp. 219-20; Melissa Garlick, Civil Rights

### *Department of Education*

Reported numbers of hate crimes have been increasing at K-12 schools and on college campuses.<sup>320</sup> In 2015, The Office of Postsecondary Education reported that there were 1,043 hate crimes reported, compared to 1,309 reported hate crimes in 2016.<sup>321</sup> However, 2017 figures show that there was a decrease (though still higher than in 2015) in the number of reported hate crimes on college campuses (1,143 crimes reported, based on 6,339 institutions with 11,210 campuses).<sup>322</sup>

While the Department of Education (ED) does not have jurisdiction over prosecuting hate crimes, it is charged with enforcing civil rights guarantees.<sup>323</sup> In regards to bias-related incidents, ED's Office for Civil Rights (OCR) enforces Title VI of the Civil Rights Act of 1964<sup>324</sup> (Title VI) that prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance; Title IX of the Education Amendments of 1972<sup>325</sup> (Title IX) that prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973<sup>326</sup> (Section 504); and Title II of the Americans with Disabilities Act of 1990<sup>327</sup> (Title II). Both Section 504 and Title II prohibit discrimination on the basis of disability. Title VI, Title IX, and Section 504 apply to all programs and institutions that receive federal funds from the Education Department, which includes all state educational agencies, primary and secondary schools, and postsecondary schools.<sup>328</sup> Title II similarly applies, but confers jurisdiction regardless of whether

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National Counsel, ADL, testimony, *Briefing Transcript*, pp. 102-3; Suman Raghunathan, Executive Director, South Asian Americans Leading Together (SAALT), testimony, *Briefing Transcript*, pp. 129-30.

<sup>320</sup> See e.g., Southern Poverty Law Center, "Ten Days After," November 2016, at 5.

<sup>321</sup> See U.S. Department of Education, Campus Safety and Security (citing data from U.S. Department of Education, Office of Postsecondary Education, Campus Safety and Security survey), <https://ope.ed.gov/campussafety/Trend/public/#/answer/2/201/main?row=-1&column=-1>. Note: crime data reported by institutions and not independently verified by U.S. Department of Education.

<sup>322</sup> *Ibid.*

<sup>323</sup> See *infra* notes 332-25 (discussing the Civil Rights Act, the Rehabilitation Act, the Americans with Disabilities Act, and the Clery Act).

<sup>324</sup> 42 U.S.C. § 2000d *et seq.*

<sup>325</sup> 20 U.S.C. § 1681 *et seq.* Title IX "promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee." See White House Task Force to Protect Students from Sexual Assault, "Intersection of Title IX and the Clery Act," April 2014, <https://www.justice.gov/ovw/page/file/910306/download>; see also U.S. Department of Education, Office for Civil Rights, "Dear Colleague," Oct. 26, 2010 (Explaining that "[a]lthough Title IX does not prohibit discrimination based solely on sexual orientation, Title IX protects all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination." See U.S. Department of Education, Office for Civil Rights, "Dear Colleague," Oct. 26, 2010. "The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment."), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>326</sup> 29 U.S.C. § 794.

<sup>327</sup> 42 U.S.C. § 12131 *et seq.*

<sup>328</sup> See 42 U.S.C. § 2000d *et seq.* (Title VI); 20 U.S.C. § 1681 *et seq.* (Title IX); 29 U.S.C. § 794 (Section 504).

institutions or educational programs receive federal funds.<sup>329</sup> Under these statutes, ED OCR has jurisdiction over alleged acts of harassment and/or bullying based on race, color, national origin, sex, or disability.<sup>330</sup>

The Department of Education's Office for Civil Rights is charged with protecting students from unlawful harassment and bullying while engaging in education-related programs (e.g., at school, field trips, after school activities) under Title VI, Title IX, Section 504, and the ADA.<sup>331</sup> Schools are legally obligated to take appropriate steps to prevent and protect students from bullying and discrimination.<sup>332</sup> Schools may violate federal civil rights laws when "peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."<sup>333</sup> Yet, Aviva Vogelstein, Director of Legal Initiatives at the Brandeis Center, testified that these current federal civil rights laws are not inclusive enough to protect students from religious harassment.<sup>334</sup> She asserts that while Title VI extended protections against discrimination and harassment for students based on race, ethnicity, and national origin the statute

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<sup>329</sup> See 42 U.S.C. § 12131 *et seq.* (Title II); see also *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 276 n.4 (5th Cir. 2005) (noting that "... Title II applies to public entities regardless of whether they receive federal funds.").

<sup>330</sup> The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106, see U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague," Oct. 26, 2010, at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>331</sup> *Ibid.* (citing federal civil rights statutes and regulations). OCR defines harassment or bullying as "intimidating or abusive behavior toward a student from another student, school employee, or non-school employee third party. It can take many forms, including verbal name-calling, insults, or intimidation, as well as non-verbal acts or behavior such as graphic or written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents." See U.S. Dep't of Education, Office for Civil Rights, "School Climate and Safety: 2015-16 Civil Rights Data Collection," May 2019, at 5, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>; see also, U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague," Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. The National Center on Safe Supportive Learning Environments Technical Assistance Center (NCSSE) also developed a website with the Department of Health and Human Services (HHS), [stopbullying.gov](http://stopbullying.gov) and defines bullying as "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time..." and three types of bullying are identified: verbal, social, and physical bullying. ED defines cyberbullying as a form of "bullying that takes place over digital devices like cell phones, computers, and tablets. Cyberbullying can occur through SMS, Text, and apps, or online in social media, forums, or gaming where people can view, participate in, or share content. Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing embarrassment or humiliation. Some cyberbullying crosses the line into unlawful or criminal behavior." See "Bullying Definition," [Stopbullying.gov](http://Stopbullying.gov), <https://www.stopbullying.gov/what-is-bullying/index.html>.

<sup>332</sup> Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex in education programs; Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination on the basis of disability; and the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age. These laws apply to programs and activities that receive federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibits discrimination on the basis of disability by public entities, including public schools. Title II applies to public entities, regardless of whether they receive federal financial assistance.

<sup>333</sup> U.S. Department of Education, Office for Civil Rights, "Dear Colleague," Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>334</sup> Aviva Vogelstein, Director of Legal Initiatives, Brandeis Center, testimony, *Briefing Transcript*, pp. 220-221.

does not extend to religious protections for students. “So, through clearer guidance from the Department of Education and through legislation that protects religious students from harassment, there could be better reporting as well as better enforcement of incidents.”<sup>335</sup>

The Department of Education also recognizes that “bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>336</sup> As discussed above, these incidents might not rise to the level of a crime, but they may be actionable under the relevant civil rights statutes that OCR enforces.

The Education Department defines a hate crime as a “criminal offense that manifests evidence that the victim was intentionally selected because of the perpetrator’s bias against the victim.”<sup>337</sup> And ED defines bias as a “preformed negative opinion or attitude toward a person or group of persons” based on their race, gender, religion, disability, sexual orientation, ethnicity, or national origin.”<sup>338</sup> While individuals may hold many forms of biases, under relevant legislation, schools are only required to report bias-motivated crimes against eight categories: race, gender, gender identity, religion, sexual orientation, ethnicity, national origin, and disability.<sup>339</sup>

Many schools have adopted their own anti-bullying policies that go beyond federal civil rights statutes and offer protections for students on the basis of sexual orientation, gender identity, and religion. OCR further reminds schools that “some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [ ] OCR.”<sup>340</sup>

Harassment and bullying are serious issues and can create hostile learning environments that can make students feel unsafe while at school, in addition to impeding their ability to learn. Nationally, about 12 percent of public schools reported incidents of student bullying at least once a week in the 2015-16 school year.<sup>341</sup> The percentage of schools that reported student bullying occurred at least once a week was higher for middle schools (22 percent) than for high schools (15 percent), combined schools (11 percent), and elementary schools (8 percent).

According to data from the Civil Rights Data Collection (CRDC) collected and maintained by ED OCR, approximately 135,200 individual allegations of harassment or bullying were filed in the 2015-16 school year.<sup>342</sup> Of these allegations, forty-one percent were on the basis of sex—this

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<sup>335</sup> Ibid.

<sup>336</sup> U.S. Department of Education, Office for Civil Rights, “Dear Colleague,” Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>337</sup> U.S. Dep’t of Education, “*The Handbook for Campus Safety and Security Reporting*: “Chapter 3 Crime Statistics: Classifying and Counting Clery Act Crimes,” at 25, (2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

<sup>338</sup> Ibid., 25-26.

<sup>339</sup> 34 C.F.R. § 668.46 (2015).

<sup>340</sup> U.S. Department of Education, Office for Civil Rights, “Dear Colleague,” Oct. 26, 2010, at 2.

<sup>341</sup> National Center for Education Statistics, “Indicators of School Crime and Safety: 2017,” March 2018, <https://nces.ed.gov/pubs2018/2018036.pdf>.

<sup>342</sup> U.S. Dep’t of Education, Office for Civil Rights, “2015-16 Civil Rights Data Collection: School Climate and Safety,” April 2018 (updated May 2019) at 5, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

includes sexual and other sex-based harassment or bullying. Race based bullying or harassment accounted for 23 percent, 16 percent were on the basis of sexual orientation, 11 percent on the basis of disability, and 8 percent were on the basis of religion.

Researchers have found that some incidents may be obvious and out in the open (e.g., in hallways, classrooms, on the bus) while others may be more hidden; however, regardless of the method of harassment or bullying, schools are required to address these incidents. ED OCR reminds school officials and administrators that it is their responsibility to address the behavior even if it is “covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.”<sup>343</sup> ED OCR recommends possible solutions such as separating the students, providing counseling, or disciplinary actions. Specifically, the Department also states that whichever method(s) school administrators decide upon, the school’s actions should not punish or penalize the harassed or bullied student.<sup>344</sup>

Based on the above general description of the federal hate crimes law and federal authorities, the following chapter discusses and analyzes federal hate crimes data collection, as well as targeted communities. After that, Chapter 3 provides a more in-depth discussion of federal enforcement and strategies used by the DOJ and ED. Finally, Chapter 4 takes a look at state and local policies.

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<sup>343</sup> U.S. Department of Education, Office for Civil Rights, “Dear Colleague,” Oct. 26, 2010, at 3.

<sup>344</sup> *Ibid.*

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## CHAPTER 2: HATE CRIME DATA AND TARGETED COMMUNITIES

The previous chapter offered a discussion of the background of hate crimes in the United States and provided an overview of the applicable federal civil rights law and the federal agencies involved in enforcing it. This chapter now moves to analyze national hate crime data collection and reporting programs, national data trends, and focuses on which communities are frequently targeted by hate crimes and bias-motivated incidents. This chapter also discusses the lack of sufficient data and some of the related challenges law enforcement face.

### Hate Crime Reporting and National Data Collection

Since the 1980s, advocacy organizations such as the Anti-Defamation League (ADL), the Southern Poverty Law Center (SPLC), and the National LGBTQ Task Force have been compiling data on hate crime and bias-motivated incidents. Official federal data collection on hate crimes did not begin until the 1990s with the passage of the Hate Crimes Statistics Act (HCSA).<sup>345</sup> President Bush emphasized that he saw this law as a significant step towards the federal government fulfilling its obligation to ensure civil rights protections, as he stated that:

Bigotry and hate regrettably still exist in this country, and hate breeds violence, threatening the security of our entire society. We must rid our communities of the poison we call prejudice, bias, and discrimination. That's why I'm signing into law today a measure to require the Attorney General to collect as much information as we can on crimes motivated by religion, race, ethnicity, or sexual orientation -- the Hate Crime Statistic Act.<sup>346</sup>

The HCSA requires the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”<sup>347</sup> The Attorney General has delegated the responsibilities to develop the needed procedures to implement, collect, and manage hate crime data to the Director of the FBI, who in turn, assigned the tasks to the Uniform Crime Reporting (UCR) Program. Under the ongoing direction of the Attorney General, the UCR Program cooperated with state and local law enforcement to create a hate crimes data collection system to comply with the congressional mandate.<sup>348</sup> UCR data are reported by law enforcement

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<sup>345</sup> Hate Crimes Statistics Act, 28 U.S.C. § 534 (1993) (HCSA). The HCSA defines hate crimes as “crimes that manifest evidence of prejudice based on race, gender or gender identity, religion, disability, sexual orientation, or ethnicity.” See 28 U.S.C. § 534 (b)(1).

<sup>346</sup> President George Bush, “Remarks on Signing the Hate Crime Statistics Act,” Public Papers, George H.W. Bush Presidential Library & Museum, April 23, 1990, <https://bush41library.tamu.edu/archives/public-papers/1791>.

<sup>347</sup> The required data collection was later extended to include disability with the passage of the Violent Crime Control and Law Enforcement Act of 1994 and the FBI began gathering data on this population on Jan. 1, 1997. See Federal Bureau of Investigation, Uniform Crime Report, “Hate Crimes Statistics,” <https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime>. The definition of a hate crime was again extended with the passage of the HCPA, discussed previously, to include gender and gender identity. The FBI began data collection on this data in 2013. And in 2013, the FBI further expanded the religious bias category to include Sikhs, Hindus, Arabs, Mormons, Jehovah’s Witnesses, and Eastern Orthodox persons; this data has been officially collected since 2015. See Swathi Shanmugasundaram, “Hate Crimes, Explained,” Southern Poverty Law Center, April 15, 2018, <https://www.splcenter.org/20180415/hate-crimes-explained>.

<sup>348</sup> See Federal Bureau of Investigation, Uniform Crime Report, “Hate Crimes Statistics,” <https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime>.



directly to the FBI. These data provide the number of incidents, victims, and offenders in hate and bias-related crimes whether the crime is fully or partially motivated by the bias.<sup>349</sup>

The other main source for government-collected national hate crime data is the National Crime Victimization Survey (NCVS) which has been collected by the U.S. Department of Justice's Bureau of Justice Statistics (BJS) since 2003.<sup>350</sup> NCVS data are collected from a nationally representative sample of households who are interviewed twice a year about criminal victimization. The survey collects data on frequency, characteristics and consequences of rape, sexual assault, assault, theft, motor vehicle theft, and household burglary. The NCVS measures crimes perceived by victims to be motivated by an offender's bias against them for belonging to or being associated with a group largely identified by these characteristics. For a crime to be classified as a hate crime by the NCVS, the victim must report at least one of the three types of evidence that that act was motivated by hate:

- the offender used hate language;
- the offender left behind hate symbols; or,
- police investigators confirmed that the incident was a hate crime.<sup>351</sup>

Data collected by the NCVS is based on nonfatal crimes and does not depend on whether a victim reported the crime to the police. However, data from NCVS does show violent hate crimes were less likely to result in arrest than violent nonhate crimes.<sup>352</sup> Researchers have found that despite the lack of significant difference in the percentage of violent hate (42 percent) and violent nonhate crimes (46 percent) reported to the police, violent nonhate crimes reported to police were nearly three times (28 percent) more likely to result in an arrest than violent hate (10 percent) crimes.<sup>353</sup> Only about four percent of all violent hate crimes, whether reported to the police or not, resulted in an arrest.<sup>354</sup>

One of the primary differences between the Uniform Crime Report and National Crime Victimization Survey programs relate to victim reporting to the police and how police process and classify incidents as hate or bias-motivated,<sup>355</sup> but both sources define hate crimes according to the Hate Crimes Statistics Act. Unlike the UCR, NCVS data are based on victim perceptions and

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<sup>349</sup> Ibid.

<sup>350</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, U.S. Department of Justice, June 2017.

<sup>351</sup> Note: "Hate crime victimization refers to a single victim or household that experienced a criminal incident believed to be motivated by hate. For violent crimes (rape or sexual assault, robbery, aggravated assault, and simple assault) and for personal larceny, the count of hate crime victimizations is the number of individuals who experienced a violent hate crime. For crimes against households (burglary, motor vehicle theft, or other theft), each household affected by a hate crime is counted as a single victimization." See Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, U.S. Department of Justice, June 2017, at 2.

<sup>352</sup> U.S. Department of Justice, Office of Justice Programs, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, June 2017, [https://www.bjs.gov/content/pub/pdf/hcv0415.pdf?utm\\_source=juststats&utm\\_medium=email&utm\\_content=hcv0415\\_report\\_pdf&utm\\_campaign=hcv0415&ed2f26df2d9c416fbddddd2330a778c6=fvaddfvxvr-fvgjdvmgv](https://www.bjs.gov/content/pub/pdf/hcv0415.pdf?utm_source=juststats&utm_medium=email&utm_content=hcv0415_report_pdf&utm_campaign=hcv0415&ed2f26df2d9c416fbddddd2330a778c6=fvaddfvxvr-fvgjdvmgv).

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

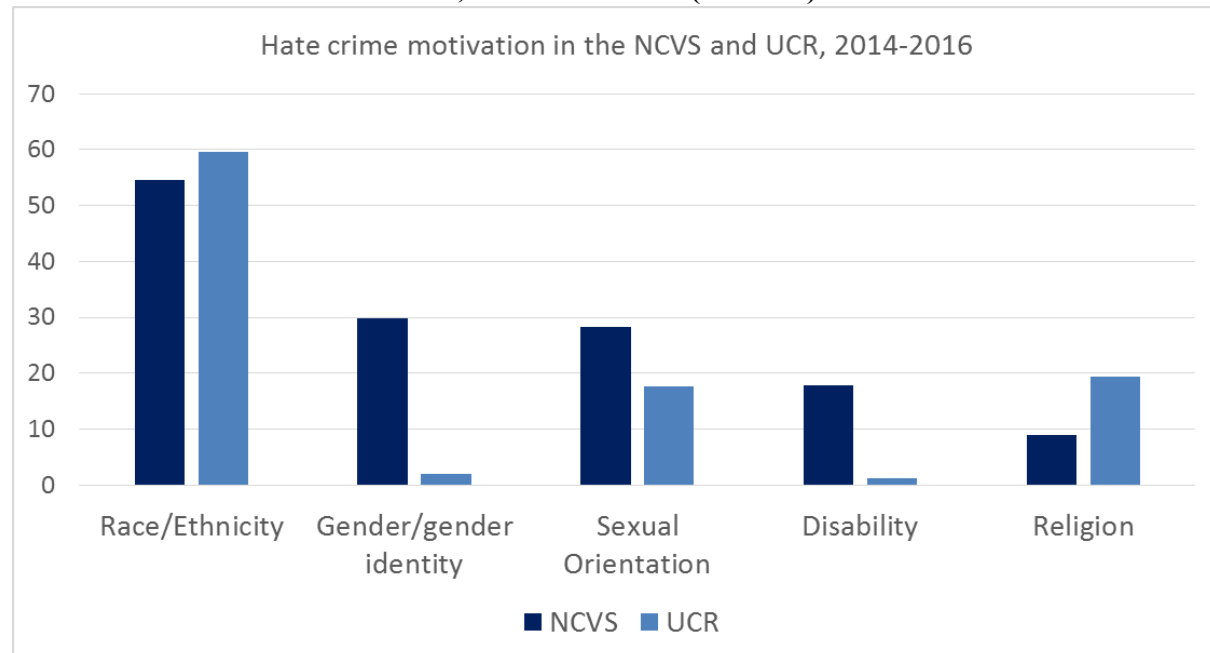
<sup>355</sup> Lynn Langton and Michael Planty, "Hate Crime, 2003-2009," Bureau of Justice Statistics, U.S. Dep't of Justice, June 2011, <https://www.bjs.gov/content/pub/pdf/hc0309.pdf>.

crime scene evidence, so they are not limited to police or investigator reports. For instance, in 2014-2016, NCVS reported an average of 210,890 victimizations, of those, 110,820 were reported to the police, and 16,020 were confirmed by police investigators, compared to 7,170 UCR victimizations reported by UCR during the same time period.<sup>356</sup>

NCVS researchers also found that almost all (99 percent) of hate crime survivors cited offenders' use of hate language during the incident as evidence of a hate crime.<sup>357</sup> Even if some of these incidents could not be proven to be legally motivated by hate, these data show the connection between bias and crime in the United States.

Both UCR and NCVS show that the largest proportion of hate crimes are motivated by racial or ethnic bias, but NCVS data show a larger number of hate crimes motivated by gender or gender identity, sexual orientation, or disability bias than are reported to the UCR (see chart 2).

**Chart 2: Hate Crime Motivation, NCVS vs. UCR (2014-16)**



Source: Lynn Langton, Briefing materials submitted to the U.S. Commission on Civil Rights, "Federal Role in Measuring Hate Crime," Bureau of Justice Statistics, May 11, 2018.

Some of these differences may be due to some victims not feeling comfortable reporting the crime to police. For instance, crimes against individuals in LGBT communities often go unreported due to some members distrusting the police, feeling afraid that they will not be taken seriously, or not having disclosed their gender identity or sexual orientation to their friends and family.<sup>358</sup> At the Commission's briefing, the National Organizing and Policy Strategist at the Transgender Law

<sup>356</sup> Lynn Langton, Briefing materials submitted to the U.S. Commission on Civil Rights, "Federal Role in Measuring Hate Crime," Bureau of Justice Statistics, May 11, 2018.

<sup>357</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, U.S. Department of Justice, June 2017.

<sup>358</sup> Katie Gagliano and Emma Keith, "Hate in America," News21, Aug. 15, 2018, <https://hateinamerica.news21.com/lack-of-trust-in-law-enforcement-hinders-reporting-LGBTQ-crimes/>

Center Shelby Chestnut testified that for many victims of hate crimes there may be “a fear of reporting to law enforcement or official government agencies of not being believed or being mistreated as you’re reporting.”<sup>359</sup>

Despite these concerns, overall, there has been a general increase of the number of crimes being reported to the police each year, which may reflect steps that some law enforcement agencies have taken to improve community trust in police. For one example, some law enforcement agencies are reforming their cultural competency trainings and community outreach either as part of consent decrees with the Justice Department or taking the initiative on their own.<sup>360</sup> According to Lynn Langton, Chief of Victimization Statistics at BJS, who testified at the Commission’s briefing, NCVS found that overall for the 2011-2015 reporting period, a lower percentage (54 percent) of hate crimes went unreported to police compared to the 2007-2011 period (64 percent).<sup>361</sup> At the Commission’s briefing, Langton explained that the data are collected in the following manner:

[T]he way this is operationalized in the NCVS is that when a respondent answers affirmatively that they experienced a violent or property crime, that respondent is then asked a series of questions about the nature of the incident. Including whether they believe the incident was motivated by bias against them. The survey also asks victims whether they had any evidence that the crime was motivated by hate. And in order to be classified as a victim of hate crime in the NCVS, the victim has to state the offender either used hate language, left hate symbols at the scene of the crime, or that police investigators confirmed that it was a hate crime.<sup>362</sup>

Langton and a colleague also found that respondents stated that the most common reason for not reporting a hate crime to law enforcement was that the victimization was handled another way (41 percent), such as through a non-law enforcement official (e.g., school official or landlord); followed by respondents who believed that police would not want to be bothered or to get involved, would be ineffective, or would cause additional trouble for the victim (23 percent); followed by about 19 percent of victims who stated that the offense was not important enough to report to the

<sup>359</sup> Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, testimony, *Briefing Transcript* p. 219.

<sup>360</sup> Katie Gagliano and Emma Keith, “Hate in America,” News21, Aug. 15, 2018, <https://hateinamerica.news21.com/lack-of-trust-in-law-enforcement-hinders-reporting-LGBTQ-crimes/>; *Ibid*; see also, U.S. Department of Justice, “Investigation of the New Orleans Police Department,” March 16, 2011, (investigators found the department had a systemic issue of biased policing and showed “a lack of respect for the civil rights and dignity of the people of New Orleans), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf); Consent decree, *U.S. v. City of Newark*, (D.N.J. Mar. 30, 2016) (2:16-cv-01731-MCA-MAH), <https://www.justice.gov/opa/file/836901/download>; Consent Decree, *U.S. v. Police Department of Baltimore City, et al.*, (D.M.D. Jan. 12, 2017) (1:17-cv-00099-JKB), <https://www.justice.gov/opa/file/925056/download>.

<sup>361</sup> Aaron Morrison, “Hate crimes reporting is on the uptick, new DOJ report shows, but more than 50% still go unreported,” *Mic*, June 29, 2017, <https://mic.com/articles/181033/hate-crimes-reporting-is-on-the-uptick-new-doj-report-shows-but-more-than-50-still-go-unreported#.ACmBLRptv>.

<sup>362</sup> Lynn Langton, testimony, *Briefing transcript* pp. 238-39.

police.<sup>363</sup> In particular communities, there are also particular fears of law enforcement that may lead to under-reporting.<sup>364</sup>

UCR data showed a similar trend with reported hate crimes increasing. It is important to recall that the data collection methods differ, as UCR gets its data from participating law enforcement agencies (LEAs) rather than victim reporting. According to UCR, in 2017, there were 16,149 (out of the over 18,000) LEAs that submitted data to the FBI.<sup>365</sup> UCR collects data on both single-bias and multiple-bias incidents, as well as offense types, and details about the offenders' bias motivation. UCR defines an incident as an "incident in which one or more offense types are motivated by the same bias."<sup>366</sup> As of 2013, law enforcement agencies can report up to five bias motivations per offense type to UCR. UCR's definition of a multiple-bias incident is "an incident in which one or more offense types are motivated by two or more biases."<sup>367</sup>

UCR collects data on 13 offense types: "murder and nonnegligent manslaughter, rape (revised and legacy definitions), aggravated assault, simple assault, intimidation, human trafficking—commercial sex acts, and human trafficking—involuntary servitude (*crimes against persons*); and robbery, burglary, larceny-theft, motor vehicle theft, arson, and destruction/damage/vandalism (*crimes against property*)."<sup>368</sup> In terms of hate crimes, UCR also collects details about the offenders' bias motivations that are associated with the above offense types. LEAs may also report hate crime data for the category "*crimes against society*," which includes drug or narcotic offenses, gambling offenses, prostitution offenses, weapon law violations, and animal cruelty offenses. Beginning in 2015, law enforcement agencies could additionally report human trafficking offenses, and there was one incident of human trafficking reported to the FBI in 2017.<sup>369</sup>

In 2017, of the 16,149 participating LEAs, only a fraction, 2,040 (12.6 percent) reported 7,175 hate crime incidents involving 8,437 offenses that were motivated by race, ethnicity, ancestry, religion, sexual orientation, disability, gender or gender identity.<sup>370</sup> This translates to 7,106 single-biased incidents that involved 8,126 offenses, 8,493 victims, and 6,307 known offenders.<sup>371</sup> There were also 69 multiple-bias incidents reported to police in 2017, which involved 311 offenses, 335 victims, and 63 known offenders.<sup>372</sup> Overall, these data show a 17 percent increase in hate crime incidents reported compared to 2016 (6,063 single-bias incidents reported),<sup>373</sup> making it the third

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<sup>363</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, Dep't of Justice, June 2017, at 5, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>364</sup> See, e.g., *infra* notes 491-501 (discussing such fear in immigrant communities) and See U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, Nov. 2018, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>.

<sup>365</sup> See Federal Bureau of Investigation, Uniform Crime Reporting, 2017 Hate Crime Statistics, <https://ucr.fbi.gov/hate-crime/2017>.

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.*

<sup>370</sup> See Federal Bureau of Investigation, Uniform Crime Reporting, 2017 Hate Crime Statistics, <https://ucr.fbi.gov/hate-crime/2017>.

<sup>371</sup> See Federal Bureau of Investigation, Uniform Crime Reporting, 2017 Hate Crime Statistics, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses>.

<sup>372</sup> *Ibid.*

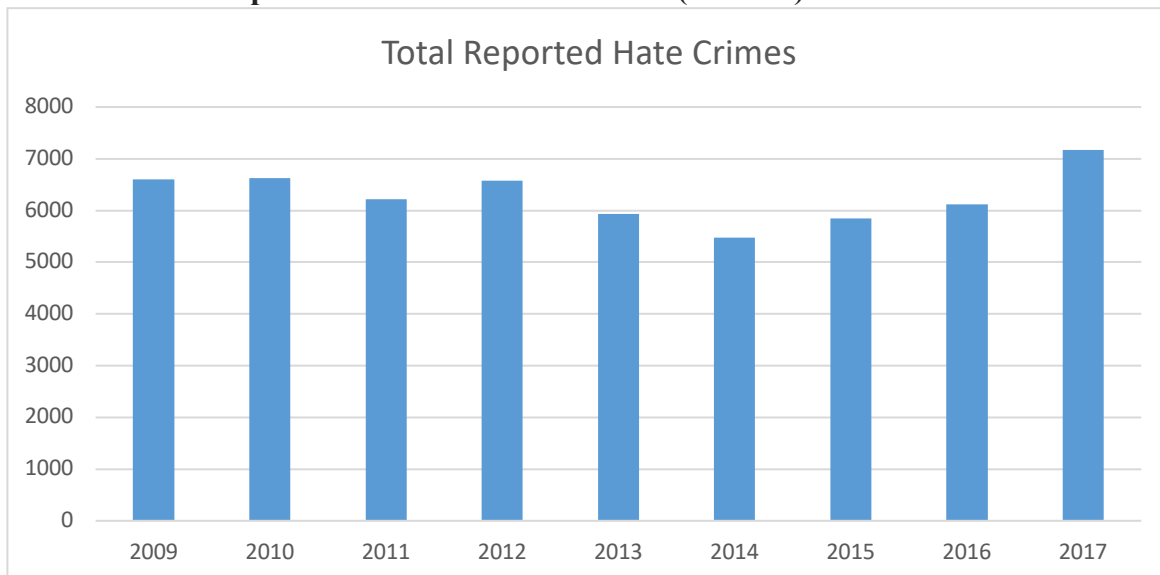
<sup>373</sup> FBI, UCR, Hate Crimes Statistics 2016, <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses>.

year in a row that UCR hate crimes data have shown notable increases (see chart 3). It is important to note that of the over 16,000 law enforcement agencies that participated, almost nine out of 10 reported zero hate crimes (87.4 percent), which means these statistics are based upon the reporting of 12.6 percent of participating law enforcement agencies.<sup>374</sup> There are likely to be many more hate crime incidents in the United States. At the Commission's briefing, former federal hate crimes prosecutor Roy Austin went so far as to say that while he had great respect for the individuals who are responsible for collecting hate crimes data, the system is flawed:

A major problem with respect to hate crimes statistics is quite obvious. We do not have the slightest idea how many hate crimes there are in America. And we have never known. The numbers currently kept by the FBI, and I'm speaking primarily of the FBI and not to insult my former colleague, Lynn Langton, the numbers currently kept by the FBI are largely useless.<sup>375</sup>

Despite these pitfalls, the data that are currently available, while being only the tip of the iceberg, show trends over time.

**Chart 3: Total Reported Hate Crimes to the FBI (2009-17)**



Source: FBI, UCR. Data compiled and chart created by Commission staff

Of the 7,106 single-bias incidents that were reported in 2017, 4,131 were motivated by racial or ethnic bias (58.1 percent); 1,564 by religious bias (22.0 percent); 1,130 by sexual orientation bias (15.9 percent); 119 by gender identity bias (1.67 percent); 116 by disability bias (1.63 percent); 46 by gender bias (0.66 percent)<sup>376</sup> (see chart 4). The majority of reported hate crimes are committed

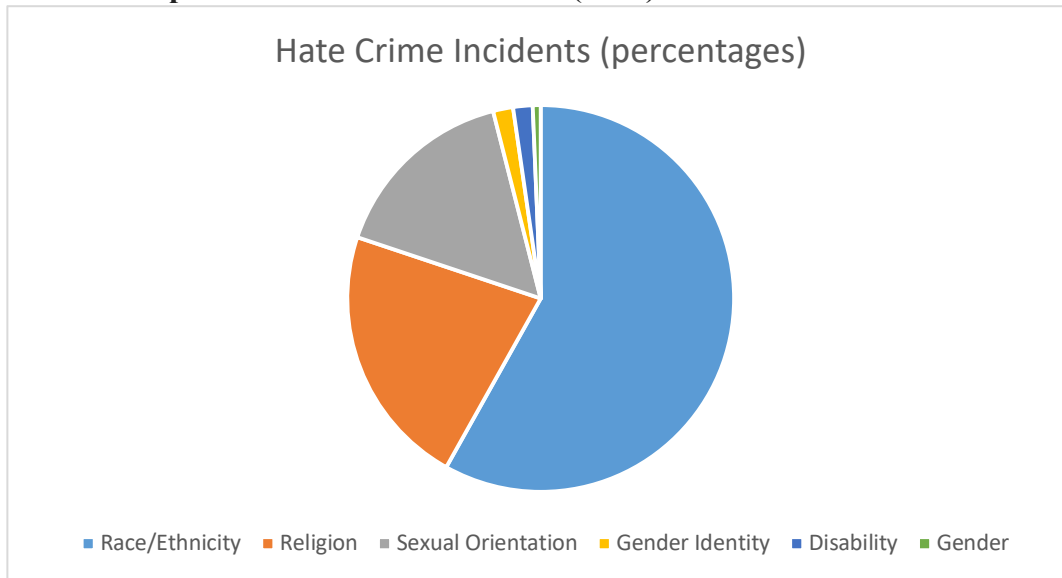
<sup>374</sup> FBI, UCR, Hate Crimes Statistics 2017.

<sup>375</sup> Roy Austin, testimony, *Briefing Transcript* pp. 243-44.

<sup>376</sup> Federal Bureau of Investigation, Uniform Crime Reporting, Incidents, Offenses, Victims, and Known Offenders, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>. Note these data are disaggregated below, see Targeted Communities section, pages 84-121.

by those who are male and white; and in 2017, approximately 51 percent of hate crime reported were committed by white people and 83 percent were committed by those 18 years or older.<sup>377</sup>

**Chart 4: Reported Hate Crime Incidents (2017)**



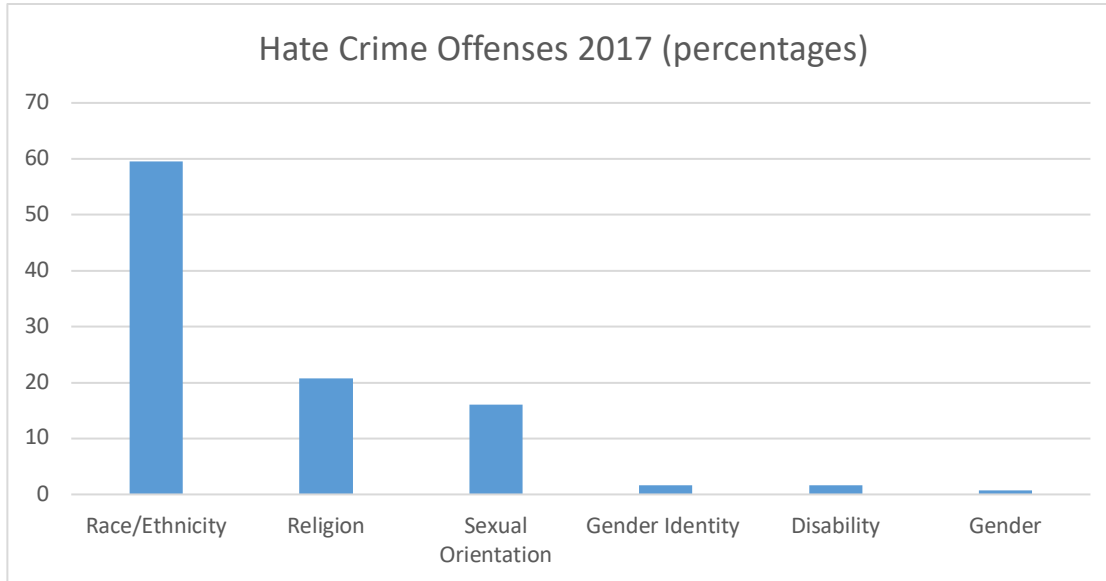
Source: FBI, UCR Hate Crime Statistics, 2017, chart created by Commission staff

Of the 8,126 single-bias hate crimes offenses reported in 2017, 59.5 percent were motivated by racial or ethnic bias; 20.7 percent were motivated by religious bias; 16.0 percent were motivated by sexual orientation bias; 1.6 percent motivated by gender-identity bias; 1.6 percent were motivated by disability bias; and 0.7 percent (53 offenses) were motivated by gender bias (see chart 5 below).<sup>378</sup>

**Chart 5: Reported Hate Crime Offenses (2017)**

<sup>377</sup> Federal Bureau of Investigation, Uniform Crime Reporting, 2017 Hate Crime Statistics, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/offenders> (showing 50.7% of reported offenders were white); Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, Dep't of Justice, June 2017, at 5, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf> (showing 60.9% of reported offenders were male).

<sup>378</sup> Federal Bureau of Investigation, Uniform Crime Reporting, Incidents and Offenses, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses>.



Source: FBI, UCR Hate Crime Statistics, 2017, chart created by Commission staff

These data are further disaggregated below in the subsections of this chapter on Racial/Ethnic Bias Hate Crimes, Religious Bias Hate Crimes, Sexual Orientation and Gender Identity Bias Hate Crimes, and Disability Bias Hate Crimes.<sup>379</sup>

Breaking these offenses down by the type of crime committed, 5,084 crimes were against individuals and 3,115 were crimes against property. Regarding crimes against persons, law enforcement reported 44.9 percent were perpetrators using intimidation; 34.3 percent were simple assault, approximately 20 percent were aggravated assaults, and a little under 1 percent (0.74) were murders and rapes.<sup>380</sup> For the offenses against property, the majority (74.6 percent) were acts of destruction, damage, or vandalism and the remaining 25 percent were robbery, burglary, larceny-theft, motor vehicle theft, and arson.<sup>381</sup>

Relying on FBI data, researchers at the Center for the Study of Hate and Extremism at California State University in San Bernardino found that in the ten largest cities, reported hate crimes rose 12.5 percent in 2017.<sup>382</sup> This increase makes 2017 the fourth consecutive annual rise in reported hate crimes and the highest total in over a decade. Comparing the increase of reported hate crimes in the ten largest cities in 2016, overall crime rates slightly dropped across the nation in the first half of 2017.<sup>383</sup> The total number of reported hate crimes in the ten cities in 2017 (1,038) also marked the first time in more than a decade that the combined number of official reports have

<sup>379</sup> See Targeted Communities section pages 65-98.

<sup>380</sup> Federal Bureau of Investigation, Uniform Crime Reporting, Incidents, Offenses, Victims, and Known Offenders, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-2.xls>.

<sup>381</sup> Ibid.

<sup>382</sup> Center for the Study of Hate & Extremism, *Report to the Nation: Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference*, California State University, San Bernardino, May 2018, at 3, [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf). The ten largest cities by population: New York City, NY; Los Angeles, CA; Chicago, IL; Houston, TX; Phoenix, AZ; Philadelphia, PA; San Antonio, TX; San Diego, CA; Dallas, TX; San Jose, CA.

<sup>383</sup> Ibid.

exceeded a thousand; and seven out of ten of the largest U.S. cities saw an increase in hate crime reports.<sup>384</sup> Furthermore, the researchers found that this increase holds true even when expanding the sample size to over three dozen large local law enforcement agencies, finding an increase of 12 percent in 2017.<sup>385</sup>

Reported hate crimes and bias-motivated incidents on college campuses have also been on the rise. According to the National Center for Education Statistics in 2015 (which are the most recent numbers as of the timing of this report), there were 860 hate crimes reported to police and security agencies on public and private two-year and four-year higher education institutions.<sup>386</sup> The most common incidents reported were destruction, damage, and vandalism (363 incidents),<sup>387</sup> followed by intimidation (357),<sup>388</sup> simple assault (79),<sup>389</sup> larceny (25), aggravated assault (19), forcible sex offenses (6), and burglary, robbery, arson, and motor vehicle theft (9 incidents, together).<sup>390</sup> Of these, four out of five of the total reported on-campus hate crimes were motivated by race, religion, or sexual orientation. Racial bias accounted for 39 percent (339 incidents), religious bias accounted for 22 percent (187 incidents), and sexual orientation bias accounted for 19 percent (163 incidents) of on-campus hate incidents in 2015.<sup>391</sup>

In part due to the weaknesses of the national data collection by the federal government, some non-governmental organizations have instituted their own mechanisms for collecting data on hate crimes and bias-motivated incidents. For example, the Southern Poverty Law Center regularly collects data and reports on hate incidents through the use of the organization's "Hate Map" and "Extremist Files."<sup>392</sup> These databases provide information to the public regarding hate and extremist groups.<sup>393</sup> The Lawyers' Committee on Civil Rights Under Law established the Stop Hate hotline in order to provide resources to affected individuals; the hotline is also meant to "built

<sup>384</sup> Center for the Study of Hate & Extremism, *Report to the Nation: Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference*, California State University, San Bernardino, May 2018, at 3-4.

<sup>385</sup> Ibid.

<sup>386</sup> Lauren Musu-Gillette, Anlan Zhang, Ke Wang, Jizhi Zhang, Jana Kemp, Melissa Diliberti, Barbara A. Oudekerk, *Indicators of School Crime and Safety: 2017*, National Center for Education Statistics, March 2018, (citing U.S. Department of Education, Office of Postsecondary Education, Campus Safety and Security Reporting System, 2015), <https://nces.ed.gov/pubs2018/2018036.pdf>.

<sup>387</sup> Defined as: "Willfully or maliciously destroying, damaging, defacing, or otherwise injuring real or personal property without the consent of the owner or the person having custody or control of it." Ibid.

<sup>388</sup> Defined as: "Placing another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack." Ibid.

<sup>389</sup> Defined as: "A physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness." Ibid.

<sup>390</sup> Lauren Musu-Gillette, Anlan Zhang, Ke Wang, Jizhi Zhang, Jana Kemp, Melissa Diliberti, Barbara A. Oudekerk, *Indicators of School Crime and Safety: 2017*, National Center for Education Statistics, March 2018, (citing U.S. Department of Education, Office of Postsecondary Education, Campus Safety and Security Reporting System, 2015), <https://nces.ed.gov/pubs2018/2018036.pdf>.

<sup>391</sup> National Center for Education Statistics, "Indicator 23: Hate Crime Incidents at Postsecondary Institutions," (last updated March 2018), at 128-30, <https://nces.ed.gov/pubs2018/2018036.pdf>.

<sup>392</sup> See Southern Poverty Law Center, "Hate & Extremism," <https://www.splcenter.org/issues/hate-and-extremism>.

<sup>393</sup> Ibid. However, it is important to note that the SPLC's designation of certain groups as "hate groups" has come under criticism. See e.g., David Montgomery, "The State of Hate," *Washington Post*, Nov. 8, 2018, [https://www.washingtonpost.com/news/magazine/wp/2018/11/08/feature/is-the-southern-poverty-law-center-judging-hate-fairly/?noredirect=on&utm\\_term=.986efdea3fb6](https://www.washingtonpost.com/news/magazine/wp/2018/11/08/feature/is-the-southern-poverty-law-center-judging-hate-fairly/?noredirect=on&utm_term=.986efdea3fb6).



an accurate public record of these incidents.”<sup>394</sup> Other data sources include the Anti-Defamation League’s Center on Extremism which for the past forty years has conducted an annual audit of incidents of anti-Semitic harassment, vandalism, and assault. The ADL relies on a combination of reports from victims, law enforcement, and media.<sup>395</sup> The ADL also publishes an online map (H.E.A.T. Map) that includes extremist and anti-Semitic incidents; the data on the map is collected from news and media reports, government documents, victim reports, extremist-related sources, ADL investigations and more.<sup>396</sup> For hate incidents and crimes against South Asian, Muslim, and Arab communities, South Asian Americans Leading Together (SAALT) created an online database to track “incidents of hate violence, xenophobic political rhetoric, and racial profiling” sources for the database included internet news articles, advocate organization announcements, members of the public, and other media.<sup>397</sup> From 1996 to 2009, the Council for American-Islamic Relations (CAIR) published an annual report on the status of Muslim civil rights, including documentation of anti-Muslim incidents.<sup>398</sup> Muslim Advocates’ Program to Counter Anti-Muslim Hate also tracks harassment, threats, and violence against Muslims and those perceived to be Muslim.<sup>399</sup> The Arab American Institute in their 2018 *Under Reported, Under Threat* established a ranking system of states based on the state’s response to reported hate crimes.<sup>400</sup> To receive a perfect score (100 points), a state needed to have an:

- inclusive hate crime statute;
- mandatory hate crime reporting and data collection statute;
- mandatory law enforcement training statute on hate crime;
- annual hate crime report that includes Anti-Arab and Anti-Islamic (Muslim) hate crime statistics; and
- consistent participation in the FBI hate crime statistics program.<sup>401</sup>

The organization reports that only six states received a “perfect rating” in 2018, which means they have a “strong” response to data collection and reporting of hate crimes. Those six states are: California, Connecticut, Illinois, New Jersey, Oregon, and Washington.<sup>402</sup>

For the data collection and reporting of hate crimes targeting LGBT communities, since 1996, the National Coalition of Anti-Violence Programs (NCAVP) has tracked hate violence against the

<sup>394</sup> The Lawyers’ Committee on Civil Rights Under Law, “Reporting Hate,” <https://8449nohate.org/>.

<sup>395</sup> Anti-Defamation League, Audit of Anti-Semitic Incidents: Year in Review 2018, <https://www.adl.org/media/12857/download>.

<sup>396</sup> Anti-Defamation League, “H.E.A.T. Map,” <https://www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-map>.

<sup>397</sup> South Asian Americans Leading Together, *Communities on Fire*, 2018, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>398</sup> Council on American-Islamic Relations, “CAIR Civil Rights Report,” <https://www.cair.com/civil-rights-reports>.

<sup>399</sup> Muslim Advocates, “Map: Recent Incidents of Anti-Muslim Hate Crimes,” (accessed Aug. 5, 2019), <https://www.muslimadvocates.org/map-anti-muslim-hate-crimes/>.

<sup>400</sup> Arab American Institute Foundation, *Under Reported, Under Threat*, July 2018, at 6, [https://d3n8a8pro7vhm.cloudfront.net/aai/pages/14141/attachments/original/1534353696/Underreported\\_Under\\_Threat.pdf?1534353696](https://d3n8a8pro7vhm.cloudfront.net/aai/pages/14141/attachments/original/1534353696/Underreported_Under_Threat.pdf?1534353696).

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

LGBTQ and HIV-affected communities, and reported annually.<sup>403</sup> The Human Rights Campaign Foundation also publishes annual reports tracking the violence against the transgender community.<sup>404</sup> Investigative journalists have also started collecting hate crime data to supplement official hate crime reports. Since 2016, ProPublica established the Documenting Hate project, which is a national coalition of new organizations that collect data using news articles about hate crimes as well as data contributed from civil rights organizations. The database was specifically established in response to the lack of an accurate national resource of hate incidents.<sup>405</sup>

Hate crime experts have long attempted to categorize hate crimes in the hope to understand the potential event(s) or catalyst(s) that may cause them. Researchers have found that cultural shifts like social, demographic, or political change may be associated with greater levels of hate crimes.<sup>406</sup> Some experts posit that hate crimes are fueled by racial anxieties or social changes that are perceived as threatening (e.g., 9/11 attacks, the legalization of same-sex marriage, the election of President Barack Obama) and that these factors have always been a key motivator for bias-incidents or hate crimes.<sup>407</sup> According to hate crime experts, most hate crimes can generally be classified into one of four hate crime typologies:

- **Thrill-seeking:** perpetrators are motivated by the desire for excitement.
- **Defensive:** perpetrators are motivated to commit hate crimes to protect their neighborhood, workplace, school, or physical well-being from a perceived threat or an “outsider” who is seen as posing a challenge.
- **Retaliatory:** perpetrators are acting in response to a hate crime or act of terrorism, can be either real or perceived.
- **Mission:** perpetrators are committed to bigotry and see committing hate crimes as an act of “war” against any and all members of a particular group of people.<sup>408</sup>

And according to the SPLC, thrill-seeking motivates about 66 percent of reported hate crimes and in 90 percent of these crimes, victims do not know the attacker. Defensive hate crimes account for

<sup>403</sup> See National Coalition of Anti-Violence Programs, “Hate Crime Reports,” <https://avp.org/resources/reports/>.

<sup>404</sup> Human Rights Campaign, “A National Epidemic: Fatal Anti-Transgender Violence in America in 2018,”

[https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf?\\_ga=2.175312930.1053541371.1559231155-1763670669.1559231155](https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf?_ga=2.175312930.1053541371.1559231155-1763670669.1559231155).

<sup>405</sup> ProPublica, “Documenting Hate,” <https://projects.propublica.org/graphics/hatecrimes>.

<sup>406</sup> See e.g., Joshua D. Freilich and Steven M. Chermak, “Hate Crimes: Problem-Oriented Guides for Police Problem-Specific Guides Series,” U.S. Department of Justice, Community Oriented Policing Services, June 2013, No. 72, at 13, <https://ric-zai-inc.com/Publications/cops-p268-pub.pdf>; American Psychological Association, “The Psychology of Hate,” <https://www.apa.org/advocacy/civil-rights/hate-crimes.pdf>; Jack McDevitt, Jack Levin, and Susan Bennett “Hate Crime Offenders: An Expanded Typology,” *Journal of Social Issues*, 2002, 58(2).

<sup>407</sup> See e.g., Jack McDevitt, Jack Levin, and Susan Bennett “Hate Crime Offenders: An Expanded Typology,” *Journal of Social Issues*, 2002, 58(2); Terrence McCoy, “‘Saviors of the white race’: Perpetrators of hate crimes see themselves as heroes, researchers say,” *Washington Post*, Oct. 31, 2018, [https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb\\_story.html?utm\\_term=.c215ad03671e](https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.c215ad03671e).

<sup>408</sup> See e.g., Jack McDevitt, Jack Levin, and Susan Bennett “Hate Crime Offenders: An Expanded Typology,” *Journal of Social Issues*, 2002, 58(2).

approximately 25 percent of hate crimes, followed by retaliatory attacks at about 8 percent, and mission driven hate crimes at about 1 percent of the time.<sup>409</sup>

In terms of who commits hate crimes, data show that while victims may come from various demographic backgrounds, most offenders do not. According to the NCVS for reported hate crimes from 2011-2015, alleged perpetrators are often male (60.9%), and are 30 or older (43.3%) (see table 1 below).<sup>410</sup>

**Table 1: Characteristics of violent offenders as reported by victims of hate crime victimizations, 2011-2015**

Offender Characteristic	Percentage of Reported Characteristic
<b>Sex</b>	
Male	60.9
Female	17.1
Unknown	13.3
<b>Race<sup>1</sup></b>	
White	37.7
Black	34.3
Other <sup>2</sup>	12.8
Various Races <sup>3</sup>	2.4
Unknown	12.8
<b>Age</b>	
17 or younger	15.4
18-29	16.7
30 or older	43.3
More than one age group	8.5
Unknown	16.1

Note: These percentages of hate crime perpetrator characteristics are for incidents confirmed by police as bias-motivate and incidents perceived by victims to be bias-motivated because the offender used hate language or left behind hate symbols.

<sup>1</sup>White, black, and other race categories exclude persons of Hispanic or Latino origin

<sup>2</sup>Includes American Indian and Alaska Natives; Asian, Native Hawaiian, and Other Pacific Islanders; and persons of two or more races.

<sup>3</sup>Includes multiple offenders of two or more racial groups.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2011-2015.

<sup>409</sup> Southern Poverty Law Center, Written Statement to U.S. Commission on Civil Rights, June 12, 2018.

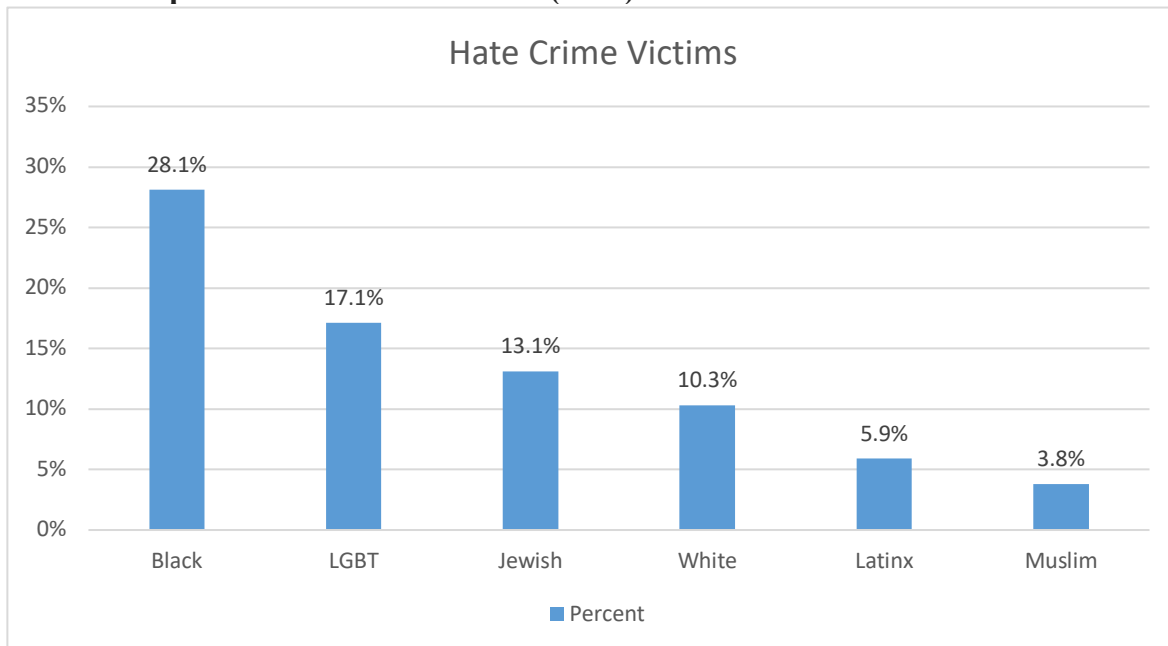
<sup>410</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," U.S. Dep't of Justice, Bureau of Justice Statistics, June 2017, at 7, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

Comparatively, the FBI’s UCR statistics show similar demographic characteristics but with a majority of offenders being white; in 2017, 51 percent of the 6,370 known offenders were white and 83 percent were 18 years and over.<sup>411</sup>

Brian Levin, Director of the Center for the Study of Hate and Extremism at California State University, San Bernardino, asserts that “there’s no one single accelerant for a hate crime although, at particular times, one accelerant will override like a terrorist attack... that being said, the basic truth that a catalytic event can correlate to an increase in hate crimes is quite stark.”<sup>412</sup> Furthermore, discerning a perpetrator’s motivation to commit an offense is further complicated by the underreported nature of these types of crimes, thus the data offer limited answers.

Despite these limitations, data show that black people were the most targeted group in 2017, comprising about 29 percent of the hate crime victims. Black victims of hate crimes were followed in numerosity by lesbian, gay, bisexual, and transgender (LGBT) individuals, Jewish individuals, white individuals, Latinx people, and Muslim individuals (see chart 6).

**Chart 6: Reported Hate Crime Victims (2017)**



Note: The FBI states that the term victim may refer to an individual, business/financial institution, government entity, religious organization, or society/public as a whole.

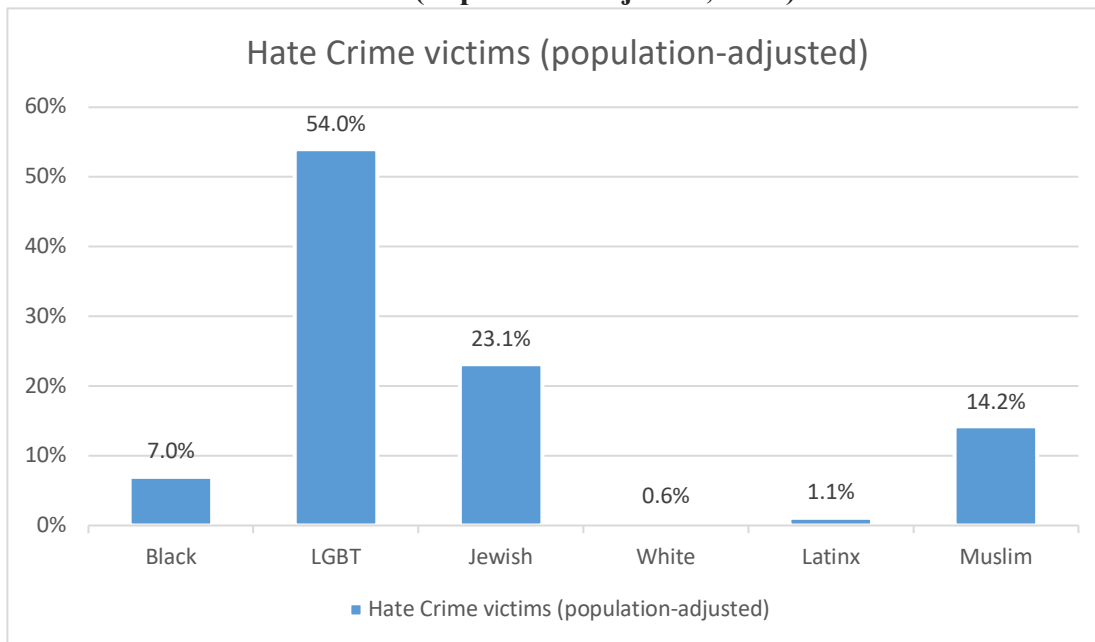
Source: FBI, UCR; chart created by Commission staff.

<sup>411</sup> Federal Bureau of Investigation, “2017 The Crime Statistics,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/offenders>. As an important reminder, the differences in these numbers are due to the methodological differences between these two databases. The NCVS statistics are based on victim’s perceptions and contains data that were both reported and not report to police, whereas the FBI statistics are solely based on reports from law enforcement.

<sup>412</sup> Aaron Williams, “Hate crimes rose the day after Trump was elected, FBI data show,” *Washington Post*, March 23, 2018, [https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?noredirect=on&utm\\_term=.4e950f6090f5](https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?noredirect=on&utm_term=.4e950f6090f5).

Adjusting these statistics for population size, FBI numbers show that racially biased hate crimes still constitute the highest absolute numbers, but the percentages for the targeted groups offers a different understanding of the issue. Data based on the relative population sizes of each demographic show that crimes against LGBT communities (i.e., gender identity bias and sexual orientation bias) were some of the highest in 2017,<sup>413</sup> followed by crimes against Jewish individuals, Muslim individuals, black people, and Latinx people (see chart 7).

**Chart 7: Hate Crime Victims (Population Adjusted, 2017)**



Source: FBI, UCR (hate crime victims), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>; U.S. Census (population statistics), <https://www.census.gov/quickfacts/fact/table/US/PST045217>; Pew Research Center (religion statistics), <http://www.pewforum.org/religious-landscape-study/>; Gallup (LGBT statistics), <https://news.gallup.com/poll/201731/lgbt-identification-rises.aspx>.

According to the SPLC, in the first 10 days after the November 2016 election, researchers documented 867 hate incidents around the country and that they were reported in almost every state.<sup>414</sup> They found that the largest portion (323) of these incidents occurred on university campuses or in K-12 schools. Most of these incidents focused on anti-immigrant or anti-Muslim sentiments (329, together), but also included anti-black statements (187), anti-Semitic (100), anti-LGBT (95), anti-woman (40), support of white nationalism (32), and anti-Trump (23).<sup>415</sup> The

<sup>413</sup> The percentages were calculated by number of hate crimes per 10,000 citizens. Important to note, LGBT statistics above represent victimization against gay men, lesbians, bisexuals, and transgender individuals as a combined community. Breaking these numbers out by their individual communities, shows that hate crimes against transgender and gender non-conforming people are at 24.2 percent, followed by gay men at 21.5 percent, lesbians at 7.6 percent, and bisexuals at 0.7 percent, *see* FBI, UCR 2017 data.

<sup>414</sup> Note these numbers were collected through media reports, social media, and through a #ReportHate link on the SPLC's website and staff disregarded incidents that were found to be hoaxes. *See* Mark Potok, "The Trump Effect," Southern Poverty Law Center, Feb. 15, 2017, <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

<sup>415</sup> Southern Poverty Law Center, "The Trump Effect," Feb. 15, 2017, <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

Center later updated its counts to analyze the first 34 days after the election and found a total of 1,094 reported bias-related incidents,<sup>416</sup> which according to the SPLC, FBI reports confirmed showing that there was an increase in reported hate crimes in the fourth quarter of 2016.<sup>417</sup> The SPLC noted that the anti-Muslim bias included a series of letters sent to 15 mosques and Islamic centers around the country describing Muslims as “children of Satan” and “vile and filthy people.”<sup>418</sup> Also included in the SPLC count were 57 incidents of white supremacist and extremist posters and flyers appearing, mostly (about three-quarters), on university campuses.<sup>419</sup> Moreover, data suggest that the rise in reported hate crimes and bias-motivated incidents in 2016 was in part correlated to the election that year. Researchers Stephen Rushin, Assistant Professor of Law at Loyola University Chicago School of Law and Griffin Sims Edwards, Assistant Professor at University of Alabama, Birmingham, found evidence that the election and the rhetoric utilized in President Trump’s campaign did have a statistically significant effect in reported hate crimes in the United States, even after controlling for alternative factors.<sup>420</sup> Rushin and Edwards also found the highest spikes of reported hate crimes in the counties that voted for President Trump by the widest margins. These steep increases were second only to the largest surge in reported hate crimes that occurred after the 9/11 terror attacks, since the FBI began collecting hate crime data in 1992.<sup>421</sup>

Further, scholars from the University of North Texas found a correlation at the county level between counties that held Trump rallies and the post-election increases of hate crime violence.<sup>422</sup> The researchers used aggregate hate crime incident data, utilizing the ADL’s Hate, Extremism, Anti-Semitism, Terrorism map data (H.E.A.T. map),<sup>423</sup> in combination with data regarding the counties where President Trump held rallies. After controlling for other factors (e.g., county’s crime rates, number of active hate groups, minority populations, percentage of county’s college educated population, geographical location, and month the rallies occurred), “counties that had hosted a 2016 Trump campaign rally saw a 226 percent increase in reported hate crimes over comparable counties that did not host such a rally.”<sup>424</sup>

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<sup>416</sup> Southern Poverty Law Center, “Hate Crimes, Explained,” April 15, 2018, <https://www.splcenter.org/20180415/hate-crimes-explained>.

<sup>417</sup> Ibid.

<sup>418</sup> Southern Poverty Law Center, “The Trump Effect,” Feb. 15, 2017, <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

<sup>419</sup> Southern Poverty Law Center, “The Trump Effect,” Feb. 15, 2017, <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

<sup>420</sup> Stephen Rushin and Griffin Sims Edwards, “The Effect of President’s Trump’s Election on Hate Crimes,” Jan. 18, 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3102652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652).

<sup>421</sup> Ibid.

<sup>422</sup> Ayal Feinberg, Regina Branton, & Valerie Martinez-Ebers, “Counties that hosted a 2016 Trump rally saw a 226 percent increase in hate crimes,” *Washington Post*, March 22, 2019, [https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on&utm\\_term=.e795e31eba45](https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on&utm_term=.e795e31eba45).

<sup>423</sup> Anti-Defamation League, H.E.A.T. Map, <https://www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-map>.

<sup>424</sup> Ayal Feinberg, Regina Branton, & Valerie Martinez-Ebers, “Counties that hosted a 2016 Trump rally saw a 226 percent increase in hate crimes,” *Washington Post*, March 22, 2019, [https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on&utm\\_term=.e795e31eba45](https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on&utm_term=.e795e31eba45).

While the spike in 2017 is the highest increase reported to the FBI in the past decade, reported hate crimes have generally spiked during election years since the early 1990s.<sup>425</sup> For instance, after President Obama was elected in 2008, there was a 21 percent increase in reported hate crimes the next day.<sup>426</sup> However, many researchers argue that these increases after the 2016 election are different, largely due to the types of hate crimes that have occurred (e.g., anti-Muslim, anti-Black and anti-Latinx), and also the sheer number of them following the election. For instance, following the 2016 election, reports of hate crimes more than doubled the day after the election and there was a 92 percent increase in the daily average in the two weeks following the election, compared to the daily average from the beginning of 2016.<sup>427</sup> And reports of crimes specifically against Latinx communities increased by the greatest percentage, followed by reports of crimes against Muslims, Arabs, and black Americans.<sup>428</sup> In other election cycles, including 2008, after the initial increase following an election, data show that there was a subsequent drop in the number of reported hate crimes.<sup>429</sup> But more currently, researchers are finding that while the increase in reports declined slightly from the initial spike followed the days after the 2016 election, data show that overall reported hate crimes have remained higher than previous years for 2017.<sup>430</sup>

### Challenges to Hate Crime Data Collection

Obtaining accurate national estimates of the prevalence of hate crimes remains complicated for many reasons. One challenge stems from the UCR program being limited to the reporting practices of voluntarily participating local and state law enforcement agencies, which can greatly vary depending on the jurisdiction.<sup>431</sup> While federal law requires the Justice Department to collect crime data and publish a yearly report, law enforcement reporting is not mandatory for either state or federal agencies. In 2017, about 12 percent of the more than 18,000 law enforcement agencies did not submit hate crime data to the FBI.<sup>432</sup>

Roy Austin testified to this underreporting issue at the Commission's briefing:

The numbers currently kept by the FBI...are largely useless. While a small handful of states and law enforcement agencies seem to take the collection of hate crime numbers seriously, the majority of states and the vast majority of law enforcement agencies do not seriously

<sup>425</sup> Center of the Study of Hate & Extremism, "Final U.S. Status Report: Hate Crime Analysis & Forecast for 2016/2017,"

[https://csbs.csusb.edu/sites/csusb\\_csbs/files/Final%20Hate%20Crime%2017%20Status%20Report%20pdf.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/Final%20Hate%20Crime%2017%20Status%20Report%20pdf.pdf).

<sup>426</sup> Aaron Williams, "Hate crimes rose the day after Trump was elected, FBI data show," *Washington Post*, March 23, 2018 (citing data from Center of the Study of Hate & Extremism, "Final U.S. Status Report: Hate Crime Analysis & Forecast for 2016/2017").

<sup>427</sup> Brian Levin, James Nolan, & John David Reitzel, "New data show US hate crimes continue to rise in 2017," *The Conversation*, June 26, 2018, <http://theconversation.com/new-data-shows-us-hate-crimes-continued-to-rise-in-2017-97989>.

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.*

<sup>430</sup> FBI, UCR Hate Crime Statistics 2017, <https://ucr.fbi.gov/hate-crime>.

<sup>431</sup> National Institute of Justice, "Hate Crime Prevalence and Victimization," Dec. 22, 2010, <http://www.nij.gov/topics/crime/hate-crime/prevalence-victimization.htm>.

<sup>432</sup> FBI, UCR, Hate Crimes Statistics, 2017.

report hate crime's numbers. And the handful of numbers that are reported are released late and unaudited... There are approximately 18 thousand law enforcement agencies in the United States. And almost three thousand agencies did not even bother to respond to the FBI request for hate crime information. And they suffer no consequences for not doing so.<sup>433</sup>

The resulting data disparities can be quite striking. For instance, the NCVS found that between 2003 and 2011, there was an annual average of over 250,000 victims of reported hate crimes in the United States. This number was 25 times higher than the reported FBI numbers for those years.<sup>434</sup>

Speaking before the House Judiciary Committee, then Director of the FBI James Comey stated that:

We need to do a better job of tracking and reporting hate crime and “color of law” violations to fully understand what is happening in our communities and how to stop it. There are jurisdictions that fail to report hate crime statistics. Others claim there were no hate crimes in their community—a fact that would be welcome if true. We must continue to impress upon our state and local counterparts in every jurisdiction the need to track and report hate crime and to do so accurately. It is not something we can ignore or sweep under the rug.<sup>435</sup>

Advocacy organizations argue that one way to potentially enhance reporting practices would be to enact policies that would incentivize and/or mandate local and state law enforcement to report hate crime incidents to the FBI.<sup>436</sup> For example, during the Commission’s briefing and public comment period many organizations argued that Congress needs to pass the NO HATE Act,<sup>437</sup> which would create a system to aid in reporting practices.<sup>438</sup> In SAALT’s 2018 annual report, the organization stated that the federal NO HATE Act is significant because it is the

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<sup>433</sup> Roy Austin, partner at Harris, Wiltshire & Grannis, LLP & former Deputy Assistant Attorney General of the Civil Rights Division at the U.S. Dep’t of Justice, *Briefing Transcript*, at 244-45, 247.

<sup>434</sup> Nathan Sandholtz, Lynn Langton, and Michael Planty, “Hate Crime Victimization, 2003-2011,” Bureau of Justice Statistics, March 2013, <https://www.bjs.gov/content/pub/pdf/hcv0311.pdf>; see also, Southern Poverty Law Center, “DOJ Study: More Than 250,000 Hate Crimes A Year, Most Unreported,” March 26, 2013, <https://www.splcenter.org/hatewatch/2013/03/26/doj-study-more-250000-hate-crimes-year-most-unreported>.

<sup>435</sup> James Comey, Director, FBI, Statement Before the House Judiciary Committee (Oct. 22, 2015), <https://www.fbi.gov/news/testimony/oversight-of-the-federal-bureau-of-investigation-7>.

<sup>436</sup> Stacy Statement, Southern Poverty Law Center written statement to U.S. Commission on Civil Rights; Sikh Coalition, Written Statement to U.S. Commission on Civil Rights.

<sup>437</sup> If passed, the Act would “provide incentives for hate crime reporting, grants for State-run hate crime hotlines, a Federal private right of action for victims of hate crimes, and additional penalties for individuals convicted under the Matthew Shepard and James Byrd Jr. Hate Crime Prevention Act.” See No Hate Act, H.R. 1566, 115<sup>th</sup> Cong. (1st Sess. 2017, <https://www.congress.gov/bill/115th-congress/house-bill/1566>).

<sup>438</sup> South Asian Americans Leading Together (SAALT), *Communities On Fire*, 2018, at 25; Vanita Gupta, Leadership Conference, public comment statement submitted to U.S. Commission on Civil Rights; Hillay Shelton, Washington Bureau of the NAACP, public comment statement submitted to U.S. Commission on Civil Rights; National Council of Jewish Women, public comment statement submitted to U.S. Commission on Civil Rights.



only comprehensive legislation proposed to establish incentives for state and local law enforcement to submit credible and complete hate crime reports, create grants for state-run hate crime hotlines, create a federal private right of action for victims of hate crimes, even those who live in states without hate crime laws, and allow for judges to require community service or educational programming for individuals convicted under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>439</sup>

Moreover, some of these non-reporting jurisdictions to the FBI are some of the country's largest most populous cities of over 250,000 residents. Even when police departments state that they "participate" in the UCR program, there is evidence to suggest that proper reporting may not be occurring.<sup>440</sup> For example, according to investigative reporters for ProPublica, in 2015 the Orlando Police Department had reported five hate crimes to the Florida Department of Law Enforcement; however, FBI data show no reported hate crimes in Orlando for that year.<sup>441</sup> The Orlando police department told ProPublica that the state agency acknowledged that the city's data was not sent to the FBI "due to a system error" but a state agency spokesperson said that the Orlando police did not submit the data on time.<sup>442</sup> As discussed above, for the past several years the majority of agencies indicated that they had zero hate crimes that year, including at least 70 cities with populations over 100,000.<sup>443</sup> Further, approximately 1,500 law enforcement agencies did not report any data to the FBI in 2016<sup>444</sup> and the state of Hawaii has not participated in the FBI data collection since its inception.<sup>445</sup>

Jonathan Greenblatt, CEO of the Anti-Defamation League (ADL), argues that accurate reporting of hate crimes by local law enforcement is important because it provides a "measure of accountability and how well prepared they are to address hate crimes when they occur."<sup>446</sup> The International Association of Chiefs of Police (IACP) states that the reporting of hate crimes by law enforcement also helps to assure survivors that their victimization is being handled "swiftly and compassionately" and will help build trust between police and community stakeholders.<sup>447</sup>

A second challenge is due to law enforcement officers not being well trained in how to investigate or report possible hate crimes. Since the passage of HCSA in the 1990s, the FBI has been working with local and state law enforcement agencies on how to collect hate crime statistics and report

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<sup>439</sup> South Asian Americans Leading Together (SAALT), *Communities On Fire*, 2018, at 25, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>440</sup> Melissa Garlick, Civil Rights National Counsel for ADL, Written Statement at 5. (For list of cities that did not report or reported 0 hate crimes to the UCR, see <https://www.adl.org/media/12148/download>).

<sup>441</sup> Ken Schwencke, "Why America Fails at Gathering Hate Crime Statistics," *ProPublica*, Dec. 4, 2017, <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>.

<sup>442</sup> *Ibid.*

<sup>443</sup> Melissa Garlick, Civil Rights National Counsel for ADL, Written Statement at 5.

<sup>444</sup> *Ibid.*

<sup>445</sup> See generally FBI, UCR, 2017, <https://ucr.fbi.gov/hate-crime/2017/tables/table-12.xls>. Note: however, the state does submit data on violent crimes to the FBI.

<sup>446</sup> Press Release, Anti-Defamation League, "ADL Urges More Vigorous Police Data Collection Efforts in Wake of Annual FBI Hate Crimes Report" (Nov. 16, 2016), <https://www.adl.org/news/press-releases/adl-urges-more-vigorous-police-data-collection-efforts-in-wake-of-annual-fbi>.

<sup>447</sup> International Association of Chiefs of Police, Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention, [https://www.theiacp.org/sites/default/files/2019-01/IACP-Hate\\_Crimes\\_Brochure.pdf](https://www.theiacp.org/sites/default/files/2019-01/IACP-Hate_Crimes_Brochure.pdf).

those data to the FBI.<sup>448</sup> At the Commission’s briefing, Boston Sergeant Detective Carmen Curry testified to the importance of training regarding hate crime investigations. She stated that

for law enforcement, training is the key, because if a police officer does not know how to identify a hate crime, then it’s not going to be reported... when we look at the numbers of how many [] law enforcement agencies do not participate in reporting hate crimes, I believe that they don’t report them because they don’t know how to identify what a hate crime is. And so, training is key... and training with victims and letting them know, [and] understand what a hate crime is, what it isn’t, and what the resources are available to them.<sup>449</sup>

Police training on hate crimes (or lack thereof) continues to be a significant hurdle for national hate crime data collection efforts. Many police departments do not train their officers in the ways to identify possible hate crimes, despite when there is evidence of a possible hate crime. For instance, Detective Argemis Colome, spokesperson for the Miami-Dade, Florida police department stated, “I was on the road for 9 years, but when I wrote a report, I don’t ever remember titling it a hate crime. If they would have done graffiti on a wall, it would have been titled a vandalism.”<sup>450</sup> According to investigative reporters for ProPublica, officials for the Miami-Dade police department stated that they could not find any reports since 2010 where officers noted that a crime had a possible bias motivation.<sup>451</sup> On the contrary, some agencies stress the importance to their officers of identifying if a crime has a possible bias motivation. For instance, the Los Angeles Police Department uses a detailed form where officers can enter in details of the incident, including what community the bias was targeting and any other specific indicators that bias may have been involved.<sup>452</sup> The form also reminds officers to collect information on the victim’s perception of the incident, the demeanor of the victim, as well as the suspect.<sup>453</sup>

There are only 12 states that have statutes that require police academies to provide training to new recruits, and at least seven other states do not have any requirements to teach recruits about hate crimes.<sup>454</sup> For states that do teach about hate crime in the academy, the length and detail of instruction can vary significantly. For instance, in Wisconsin, North Carolina, and Washington, while all have state hate crime laws, police recruits spend about 30 minutes learning about the

<sup>448</sup> A.C. Thompson, Rohan Naik, and Ken Schwencke, “Hate Crime Training for Police is Often Inadequate, Sometimes Nonexistent,” ProPublica, Nov. 29, 2017, <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>.

<sup>449</sup> Sgt. Detective Carmen Curry for the Boston Police Department, *Briefing Transcript*, p. 24-25.

<sup>450</sup> Ken Schwencke, “Why America Fails at Gathering Hate Crime Statistics,” ProPublica, Dec. 4, 2017, <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>.

<sup>451</sup> *Ibid.*

<sup>452</sup> See Los Angeles Police Department, “Hate Crime Supplemental Report,” <https://assets.documentcloud.org/documents/5526134/LAPD-Hate-Crime-Supplemental.pdf>; see also, Peter Aldhous, “The Cities Where the Cops See No Hate,” *BuzzFeed News*, Dec. 13, 2018, <https://www.buzzfeednews.com/article/peteraldhous/hate-crimes-miami-police-irving-syracuse>.

<sup>453</sup> See Los Angeles Police Department, “Hate Crime Supplemental Report,” <https://assets.documentcloud.org/documents/5526134/LAPD-Hate-Crime-Supplemental.pdf>; see also, Peter Aldhous, “The Cities Where the Cops See No Hate,” *BuzzFeed News*, Dec. 13, 2018, <https://www.buzzfeednews.com/article/peteraldhous/hate-crimes-miami-police-irving-syracuse>.

<sup>454</sup> A.C. Thompson, Rohan Naik, and Ken Schwencke, “Hate Crime Training for Police is Often Inadequate, Sometimes Nonexistent,” ProPublica, Nov. 29, 2017, <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>. (These states include: Alaska, Georgia, Idaho, Nevada, Missouri, South Dakota, and Texas.).

subject; whereas, in Iowa academies teach out of an extensive handbook that thoroughly covers hate crimes.<sup>455</sup>

According to investigative reporters for ProPublica, some agencies actively dissuade their officers from labeling a crime a hate crime when filing paperwork. Captain Dewayne McCarver of the Huntsville, Alabama Police Department said that he advises his officers to be “very careful” in classifying a crime as a potential hate crime because it could

cause trouble for officers when they testify in court: [for instance] an aggressive defense attorney might challenge the officer’s decision to label the offense as a hate crime, particularly if prosecutors don’t wind up charging it as such.<sup>456</sup>

McCarver stated that officers in his city “rarely, if ever” categorize offenses as hate crimes; and UCR reports show that Huntsville has never reported a hate crime to the FBI.<sup>457</sup> Similarly, Boe Turner, Chief of Training for Nevada’s Commission on Peace Officer Standards and Training, asserts that it is not the job of officers to label an offense as a hate crime, it is the job of the prosecutor to determine the motivation.<sup>458</sup> However, many hate crime experts disagree and state that it is essential for an officer to be properly trained on identifying potential hate crimes in order to collect as much evidence from the victim and crime scene as possible.<sup>459</sup> Further, Detective Dave Gouran of the Madison, Wisconsin police department and Officer Karla Lehmann of the Milwaukee Police Department both testified to the Wisconsin State Advisory Committee to the Commission that hate crimes should be investigated in a similar manner to other “sensitive crimes,” such as sexual assault and child abuse.<sup>460</sup>

Similarly, in the FBI training manual, the agency recommends that there are several factors that the responding officer(s) should consider when they arrive at the scene of a crime. First, the officer needs to be sensitive to the victim and understand that these crimes and their effects on the victim can be different from other crimes.<sup>461</sup> The manual states that a victim of any crime may feel isolated or fearful, however,

there is a deeper level of isolation, fear, and anger that the victim of hate crime feels. This individual has been chosen from the rest of the population to be victimized for no other reason than his or her race, religion, disability, sexual orientation, ethnicity, gender, or gender identity. There is nothing this person can do; indeed, there is nothing he or she ought to do to change his or her race, religion, disability, sexual orientation, ethnicity,

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<sup>455</sup> Ibid.

<sup>456</sup> Ibid.

<sup>457</sup> Ibid; *see also*, <https://ucr.fbi.gov/ucr-publications#Hate>.

<sup>458</sup> A.C. Thompson, Rohan Naik, and Ken Schwencke, “Hate Crime Training for Police is Often Inadequate, Sometimes Nonexistent,” ProPublica, Nov. 29, 2017, <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>.

<sup>459</sup> Ibid.

<sup>460</sup> Wisconsin State Advisory Committee to the U.S. Commission on Civil Rights, “Hate Crime and Civil Rights in Wisconsin,” June 2017, at 34, <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf>.

<sup>461</sup> Law Enforcement Support Section & Crime Statistics Management Unit, *Hate Crime Data Collection Guidelines and Training Manual*, FBI, (last updated Feb. 27, 2015, at 33, <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>).

gender, and gender identity. And yet, it is because of these very innate qualities that he or she was victimized.

This type of personal experience can result, many times, in a feeling of loss of control over one's life. By recognizing these dynamics, the responding officer can address the special needs of the victim, thereby placing him or her at some ease and thereby making it easier to elicit from him or her necessary information concerning the alleged offense.<sup>462</sup>

Furthermore, responding officers should determine if the victim needs additional resources or a liaison, such as community affairs/relations representatives, mental/physical health professionals, and/or a clergy member. But, at a minimum, the victim should be referred to appropriate social and legal services.<sup>463</sup>

Additionally, many police departments recognize that increased training and hate crime investigations can also be a potential strategy to address victim underreporting. For instance, Milwaukee Officer Karla Lehmann testified that while the state of Wisconsin does not require hate crime training, her department already includes some hate crime related training during their in-service training. Lehmann stated: "We have a full curriculum on fair and impartial policing which directly relates to bias, teaches cultural competency, so there is some touch on hate crimes in that forum as well."<sup>464</sup> Similarly, Madison Detective David Gouran noted that his department has annual in-service trainings that include a section on hate crimes. The training is intended to increase officer sensitivity "so they can be cognizant of the hate crime situation and investigate according. We also familiarize officers with the existence of hate groups and things, the symbols and the tattoos and the language, the cultural things that go with those groups to help them recognize."<sup>465</sup>

The FBI training manual suggests that when officers arrive at a potential hate crime scene they can use various factors to determine if the crime is a suspected bias-motivated crime, such as:

- Is the motivation of the alleged offender known?
- Was the incident known to have been motivated by racial, religious, disability, sexual orientation, ethnic, gender, or gender identity bias?
- Does the victim perceive the action of the offender to have been motivated by bias?
- Is there no clear other motivation for the incident?
- Were any racial, religious, disability, sexual orientation, ethnic, gender, or gender identity bias remarks made by the offender?
- Were there any offensive symbols, words, or acts which are known to represent a hate group or other evidence of bias against the victim's group?
- Did the incident occur on a holiday or other day of significance to the victim's or offender's group?

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<sup>462</sup> Ibid., 33-34.

<sup>463</sup> Ibid., 34.

<sup>464</sup> Wisconsin State Advisory Committee to the U.S. Commission on Civil Rights, "Hate Crime and Civil Rights in Wisconsin," June 2017, at 34, <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf>.

<sup>465</sup> Wisconsin State Advisory Committee to the U.S. Commission on Civil Rights, "Hate Crime and Civil Rights in Wisconsin," June 2017, at 44, <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf>.

- What do the demographics of the area tell you about the incident?<sup>466</sup>

At the Commission's briefing, Cynthia Deitle, Programs and Operations Director for the Matthew Shepard Foundation and former Chief of the Civil Rights Unit at the FBI, testified that proper training also builds trust between law enforcement and community members and ultimately works to increase public safety.<sup>467</sup> She stated that for reporting practices to improve there has to be an effective working relationship between law enforcement and communities.

If officers trust civilians to report crimes in an honest and timely manner, and the victims have confidence that the officers will conduct a thorough and professional investigation, everyone is safer. This symbiotic relationship however, assumes that each player starts at the same place. This equation takes for granted that the officers have been trained to recognize a hate crime, how to collect evidence of bias, and how to use that evidence to successfully prosecute the perpetrator...If the biased motivation of the crime is ignored, the victim will not feel validated, safe, or protected in her community.<sup>468</sup>

Thus, if this trust between victims and law enforcement is not established and subsequently reinforced through positive actions, bias incidents and hate crimes are likely to continue to remain underreported. The Leadership Conference also testified that the DOJ should continue its anti-bias trainings for law enforcement officers and put funding toward additional trainings.<sup>469</sup>

A third challenge that affects hate crime data collection is the variability of definitions of hate crimes among states. Only 12 states plus D.C. have fully inclusive hate crime statutes that cover all of the federally protected classes. Breaking these statutes down, 46 states plus D.C. have protections covering hate crimes on the basis of race, ethnicity, national origin, and religion; 33 states plus D.C. cover disability related hate crimes; 32 states plus D.C. cover sexual orientation and gender; and 17 states plus D.C. cover gender identity (for breakdown of state statutes, see Appendix B). This variability can have serious consequences for victims of hate crimes, especially if they reside in states without protections. For instance, hate crimes against LGBT communities continue to account for approximately 20 percent of the total number of reported hate crimes each year since 2015; yet, about 28 percent of LGBT individuals live in states with hate crime statutes that cover only sexual orientation but not gender identity, 23 percent live in states that do not have hate crime laws covering sexual orientation or gender identity, and 2 percent live in states without any hate crime law.<sup>470</sup>

A fourth challenge impeding a more complete national data collection follows from the multiple reasons why individuals may not report when an incident occurs. While the NCVS collects data

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<sup>466</sup> Law Enforcement Support Section & Crime Statistics Management Unit, *Hate Crime Data Collection Guidelines and Training Manual*, FBI, (last updated Feb. 27, 2015, at 34), <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>.

<sup>467</sup> Cynthia Deitle, Programs and Operations director for the Matthew Shepard Foundation and former Chief of the Civil Rights Unit at the FBI, Briefing Transcript at 252-53.

<sup>468</sup> *Ibid.*, 252-53.

<sup>469</sup> Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and the Leadership Conference Education Fund, Written Public Statement to U.S. Commission on Civil Rights, at 8-9.

<sup>470</sup> Movement Advancement Project, "Equality Maps: Hate Crime Laws," [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws) (last updated Nov. 7, 2019).

on incidents not reported to law enforcement, thus it can also capture non-reported incidents, the UCR is reliant upon reported offenses. According to the Bureau of Justice Statistics, about half (54 percent) of hate crime victimizations were not reported to law enforcement during the years of 2011-2015.<sup>471</sup> Researchers found that between 2003-2015, individuals age 12 or older experienced an average of over 250,000 hate crime victimizations yearly, of which under half (41 percent) were reported to law enforcement.<sup>472</sup> Of those that were reported, about 14 percent were confirmed by police investigators as hate crimes; and the remaining 86 percent of those reported to police were classified as hate crimes in the NCVS due to the offender using hate language or leaving hate symbols at the crime scene.<sup>473</sup> As addressed previously, NCVS respondents stated that they did not report to police because they handled it in another way such as privately or through a non-law enforcement official.<sup>474</sup>

The Matthew Shepard Foundation, a Colorado based advocacy organization that played an essential role in the passage of HCPA, sampled Denver residents about being victimized and asked them to explain why they chose to report or not to report the incident to the police. Some respondents chose not to report the offense because they were confused if they should report, or if the incident would qualify as a hate crime, thought officers would not be helpful, or were afraid of retaliation.<sup>475</sup> For instance, a lesbian with short hair stated that another woman tried to keep her from entering a public bathroom at a McDonald's in Denver because the other woman believed she was transgender.<sup>476</sup> When asked in a survey why she did not report the incident, she stated that it was "pointless to report" despite the fact that she had to physically move the other woman from her path.<sup>477</sup> Similarly, Shelby Chestnut, National Organizing and Policy Strategist at the Transgender Law Center testified that many victims do not report hate incidents because the behavior has become normalized. "I think the reality of it is, find me a LGBT person who hasn't at some time in their life been called an anti-LGBT epithet or worse and just normalized it and started to sort of say like, well, you know, at least I wasn't beat up today, I was just called an anti-LGBT epithet while walking to work."<sup>478</sup> Another woman, who is a lesbian with a disability who lives in the Denver suburbs wrote that a neighbor tried to run her over with his car. She stated that she wanted to report the incident to the police, but was afraid. "I often think I will not be believed or taken seriously."<sup>479</sup> However, she did inform the police of the offense, but she asked the police not to further investigate the issue with the neighbor, because she was afraid of retaliation for filing a police report: "I knew that reporting the incident was important—both to notify authorities to have the incident documented, to have evidence of harassment on file in the event of a future

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<sup>471</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, U.S. Dep't of Justice, June 2017, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

<sup>474</sup> Ibid.

<sup>475</sup> Ken Schwencke, "Confusion, Fear, Cynicism: Why People Don't Report Hate Incidents," ProPublica, July 31, 2017, <https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents>.

<sup>476</sup> Ibid.

<sup>477</sup> Ibid.

<sup>478</sup> Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, testimony, Briefing Transcript, pp. 219.

<sup>479</sup> Ken Schwencke, "Confusion, Fear, Cynicism: Why People Don't Report Hate Incidents," ProPublica, July 31, 2017, <https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents>.

incident, and because no matter who I am or what my sexuality is, I knew this was wrong and potentially criminal.”<sup>480</sup>

Other victims chose not to report due to fear of retaliation, humiliation, or having to disclose their sexual orientation or gender identity. Karen Gotzler of the Milwaukee LGBT Community Center recounted the story of one of her program participants whose partner was shot and killed by their neighbor for being gay.<sup>481</sup> Despite the crime being reported by the media, it was not reported that the victim was a lesbian, and the incident was not reported as a hate crime. Gotzler explained that: “This is in large part because family, and sometimes even victims want to stay invisible. They are afraid of retaliation. They are afraid of being known. They are afraid of humiliation.” Gotzler further explained that fear is a common reaction that victims have after a hate incident, she testified that at a discussion group of at least 18 members at the Community Center that “every single person there had been a victim of at least one hate crime as defined by law, but not a single group participant had reported it or would. . .”<sup>482</sup>

Other victims do report, but do not feel that police officers appropriately handled the incident or took their report seriously.<sup>483</sup> In Denver, a gay, black man at a political rally against the Trump Administration’s travel ban stated that a passenger in a passing vehicle threw an egg at him, hitting him in the face. He contacted the Denver Police Department, but “the dispatcher seemed unsympathetic. . . No police officer came to my assistance, although I felt I was in distress.”<sup>484</sup> But in other cases, Denver police officers responded quickly and thoughtfully. For instance, a gay man with a disability said he was attacked by another man, and when he tried to call the police, the assailant prevented him from calling the police by punching him. He reported that the man said, “[Anti-gay explicative], you calling the police?”<sup>485</sup> Fortunately, a bystander called the police for him and the victim said that the police were “very compassionate” and said the officers also offered to have a “victim advocate talk with him, and came back later to check on him.”<sup>486</sup> A spokesperson for the Denver Police Department, Christine Downs told ProPublica that individuals should always report the incident to the police, regardless of whether they think it is a hate crime. Downs stated, “The Denver Police Department strongly encourages all residents to report crime, regardless of how insignificant they may think it is, especially bias-motivated crimes.”<sup>487</sup>

Recognizing the existence and potential for hesitation to report to police, some local law enforcement agencies are working to forge better relationships and build trust with community members so they can feel safe reporting incidents if they occur. For example, in Atlanta, the police department established a two-person LGBT Liaison Unit that has been working with members in

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<sup>480</sup> Ibid.

<sup>481</sup> Wisconsin State Advisory Committee to the U.S. Commission on Civil Rights, “Hate Crime and Civil Rights in Wisconsin,” June 2017, at 32, <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf>.

<sup>482</sup> Ibid.

<sup>483</sup> Ken Schwencke, “Confusion, Fear, Cynicism: Why People Don’t Report Hate Incidents,” ProPublica, July 31, 2017, <https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents>.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid.

the community and increasing awareness, training, and knowledge of LGBT issues within the department itself. Officer Eric King, who is assigned to the unit, stated that:

One of the biggest challenges that I think will take many years to resolve is the general mistrust the police have with the LGBT community, especially in terms of LGBT people of color. The community has to feel confident that if they experience something, that we will be there to not only listen, but take action and help them toward some sort of resolution, whatever that might be.<sup>488</sup>

Similarly, some communities of color report feeling unsafe and unsupported by law enforcement due to prolonged experiences of racial profiling and surveillance.<sup>489</sup> Lena Masri, National Litigation Director and Acting Civil Rights Director at the Council on American-Islamic Relations (CAIR), testified that “there is a genuine fear among Muslims of reporting any hate crime that occurs because they fear additional consequence from their interaction with government officials.”<sup>490</sup> Similar to some LGBT hate crime victims, Muslims may also normalize the behavior. Masri testified that “anti-Muslim sentiment and hate crimes, harassment, intimidation has become so commonplace that people underestimate it or they set it aside as a common occurrence. They don’t think that their individual circumstances are important enough to report it or bring it to anybody’s attention. So, it is important that the government first establish trust in order to increase the reporting.”<sup>491</sup>

This lack of trust in reporting crimes to law enforcement not only makes data insufficient on the types of issues members in these communities face, but also threatens overall public safety.<sup>492</sup> Cynthia Deitle also testified that to gain this trust with communities, officers have to “accept and acknowledge the past. We are all aware that it wasn’t that long ago that law enforcement officers were some of the very people who initiated and facilitated lynchings of African-Americans, targeted LGBTQ community members for harassment and violence, and intentionally failed to protect many other minorities from hate crimes.”<sup>493</sup>

While all communities struggle with the underreporting of hate crime offenses to the authorities for a variety of reasons (discussed below), immigrant communities, including those who are mixed-status families or communities consisting of some immigrants and some citizens, may also face additional barriers when reporting to law enforcement. One reason that some members may

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<sup>488</sup> Christina Cassidy, “AP: Patchy reporting undercuts national hate crime count,” *Associated Press*, June 6, 2016, <https://apnews.com/13412889b85640cfb0adcd3c28ad0093>.

<sup>489</sup> See e.g., SAALT, “Communities on Fire, 2018,” <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>; Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

<sup>490</sup> Lena Masri, National Litigation Director and Acting Civil Rights Director at the Council on American-Islamic Relations (CAIR), testimony, Briefing Transcript, pp. 219-20).

<sup>491</sup> Ibid.

<sup>492</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>; SAALT, “Power, Pain, Potential,” 2017, [http://saalt.org/wp-content/uploads/2017/01/SAALT\\_Power\\_rpt\\_final3\\_lorez.pdf](http://saalt.org/wp-content/uploads/2017/01/SAALT_Power_rpt_final3_lorez.pdf); Melissa Garlick, testimony, *Briefing Transcript*, pp. 106.

<sup>493</sup> Cynthia Deitle, Programs and Operations Director at the Matthew Shepard Foundation and Former Civil Rights Unit Chief at the FBI, testimony, *Briefing Transcript* at 252-53.



choose not to report bias incidents or hate crimes is due to the threat of deportation of themselves or their family or close community members.<sup>494</sup> Immigrants and many in the Latinx community are increasingly worried that bias-incidents against their communities are rising, yet they cannot report these incidents to the police without fear of deportation to sometimes dangerous conditions.<sup>495</sup> Pricila Garcia, a 20-year-old living in Cleburne, Texas and a daughter of Mexican immigrants, told investigative reporters that “[w]e’re told not to draw any unnecessary attention to ourselves. Even if you get robbed or exploited or you’re in danger, you just don’t want that unnecessary attention.”<sup>496</sup>

Monica Bauer, director of Hispanic affairs at the ADL, noted that “[i]n immigrant communities, the fear is palpable. It’s so much fear that I think the word doesn’t really convey. It’s almost terrified, like it’s beyond fear. It’s paralyzing fear.”<sup>497</sup> Maria Hinojosa, host of NPR’s *Latino USA*, also explained in an NPR interview that some community members are speaking out against the violence that occurring, but there are others

who are undocumented. The last thing that they’re going to do is be drawing attention to themselves or be going to the police and saying, I’m getting harassed. If you’re undocumented, when you make that step to engage with the police, you’re possibly going to end up deported. So, when this [hate incident and/or hate crime] happens to them, they cannot react. It puts them into a very precarious situation. So, some people are speaking up, but I’m thinking about the ones who are too fearful to even report these kinds of hate crimes.<sup>498</sup>

Kristen Clarke, president and executive director of the Lawyers’ Committee for Civil Rights Under Law, testified at the Commission’s briefing that it is imperative that when law enforcement are trying to encourage undocumented and immigrant communities to report these crimes they guarantee victims’ and their families’ safety from deportation. Clarke explained that there needs to be a “very clear and unmistakable policy that someone’s status will not be used against them if they call to report a crime or incident.”<sup>499</sup> Otherwise the underreporting of bias incidents and hate crimes against immigrant communities will continue to go underreported and unresolved.<sup>500</sup>

To address these concerns, some community groups have started working with local law enforcement to increasing hate crime reporting among immigrant communities. For instance, in Long Island, New York, the group Hispanics Across America set up a community space for victims

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<sup>494</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

<sup>495</sup> *Ibid.*

<sup>496</sup> *Ibid.*

<sup>497</sup> *Ibid.*

<sup>498</sup> Lulu Garcia-Navarro, “Hate Crimes Against Latinos Increase In California,” *NPR*, July 15, 2018, <https://www.npr.org/2018/07/15/629212976/hate-crimes-against-latinos-increase-in-california>.

<sup>499</sup> Kristen Clarke, President and Executive Director of the Lawyers’ Committee for Civil Rights Under Law, *Briefing Transcript* at 222.

<sup>500</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

of hate crimes to come and report the crimes to the Suffolk County police and district attorney's office without the fear of being asked about their immigration status.<sup>501</sup> Many in the community have been victims of hate crimes, but are too fearful to report when a crime occurs. Following the meeting, Suffolk County Police Commissioner Richard Dormer issued a statement saying: "Any information that comes forth tonight from anyone claiming to be the victim of a hate crime will be thoroughly and immediately investigated with the goal of ensuring that justice be served."<sup>502</sup>

Moreover, in 2010 the Department of Homeland Security (DHS) recognized that immigrants may be fearful of reporting crimes because they are afraid of deportation. DHS recognizes that this underreporting is a threat to public safety and urges local law enforcement, healthcare providers, judges, and prosecutors to provide information and assistance to victims of violence. DHS states that "U.S. law provides several protections for legal and undocumented immigrants who have been victims of a crime. Often victims are unaware of such protections, thus frontline workers serve as a critical link for immigrant victims." These protections extend to those who are victims of domestic violence, victims of certain crimes (e.g., felony and sexual assault, rape, murder), and victims of human trafficking.<sup>503</sup>

The Vera Institute of Justice offers several recommendations for law enforcement to work with victims who may be fearful or previously had negative experiences with police or other authorities in hope to encourage them to come forward and report.<sup>504</sup> The report suggests that law enforcement can utilize a "victim-centered approach" which can build trust between victims and authorities. It states that officer who are able to work with victims of hate crimes are aware that:

- Conventional police interrogation techniques may be experienced by victims as aggressive or insensitive, and result in victims being less responsive to questions and to appear less cooperative. Respectful dialogue that does not treat them as criminals, and tactfully acknowledges their victimization, builds trust. This approach can ultimately facilitate cooperation in an investigation.
- Perpetrators of hate crimes may use accusations about immigration status to threaten foreign-born victims, who fear immigration consequences as a result of contact with law enforcement. Some immigrant victims can obtain a U visa and associated benefits at the discretion of authorities if they fully cooperate in criminal investigations, which can be a complex, difficult process. There is no guarantee that a cooperative victim will obtain a U visa.
- Meaningful follow-up with the victim is crucial to instill confidence in the reporting process. To the extent possible, information about progress in investigations or other case outcomes should be shared with the victim. In some instances, sharing information about

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<sup>501</sup> News12 Staff, "Hispanic hate crime victims coaxed out of the shadows," *News12*, Dec. 3, 2008, <http://longisland.news12.com/story/34765842/hispanic-hate-crime-victims-coaxed-out-of-the-shadows>.

<sup>502</sup> Ibid.

<sup>503</sup> U.S. Dep't of Homeland Security, "Immigration Options for Victims of Crimes Information for Law Enforcement, Healthcare Providers, and Others," (Feb. 2010), [https://www.dhs.gov/xlibrary/assets/ht\\_uscis\\_immigration\\_options.pdf](https://www.dhs.gov/xlibrary/assets/ht_uscis_immigration_options.pdf).

<sup>504</sup> Vera Institute of Justice, "Bias Crime Assessment: A Tool and Guidelines for Law Enforcement and Concerned Communities," U.S. Dep't of Justice, Office of Justice Programs' National Criminal Justice, Aug. 2018, <https://www.ncjrs.gov/pdffiles1/nij/grants/252011.pdf>.

incidents or crime with the affected community can increase public safety and cooperation between law enforcement and community members.

- Enlisting victim specialists and other service providers helps to meet victims' needs, and therefore allows victims to be of more assistance to the authorities during investigations or prosecutions. Although there is no certainty that victims can access benefits, providing information about health or other services may be helpful, even if the incident is not considered a crime.<sup>505</sup>

Some victims of bias-motivated incidents are hesitant to report offenses to law enforcement because they were not able to cite tangible evidence (e.g., hate speech) that could be used in an investigation by law enforcement, therefore were worried that the offense would not be considered a hate crime or taken as seriously.<sup>506</sup> For instance, in 2016, Brandon Ballone was a victim of a violent crime in New York City. Ballone was wearing a shirt that advertised his drag-queen persona, when he was beaten by a group of teenagers with a glass bottle that left him with a severed tendon in his hand, a torn ear, and a damaged jaw.<sup>507</sup> He told reporters that shock and his desire to get to safety meant that he could not remember if the attackers used homophobic slurs when they attacked him.<sup>508</sup> As a result, police initially did not investigate his case as a hate crime. Ballone told reporters that in his opinion, “[a]nybody who attacks someone in that kind of way, it seems to me that there is a lot of hate there. But apparently, a hate crime, to (the police), means I would have had to hear them say the word [anti-gay expletive].”

Another case involved the murder of 17-year-old Nabra Hassanen, a Muslim teenager who was kidnapped and murdered as she walked back to a mosque with friends before a Ramadan service in Virginia. Hassanen's family and many in the Muslim community argue that the accused, Darwin Martinez Torres, killed her due to an anti-Muslim bias.<sup>509</sup> As discussed previously, Muslim women wearing hijabs are often the most targeted of bias and hate incidents due to the intersection of gender, race, skin color, religion, and immigrant background they represent or are perceived as representing.<sup>510</sup> However, law enforcement are not investigating the crime as a possible hate crime, stating that it was a case of “road rage” and there was not enough direct evidence of hate or bias (e.g., no racial or religious slurs used) at the time of the assault to classify it as a hate crime.<sup>511</sup> Martinez-Torres was indicted on eight counts, including abduction, rape, sexual assault, and

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<sup>505</sup> Ibid., 4.

<sup>506</sup> Catherine Devine and Lillianna Byington, “Millions are Victims of Hate Crimes, Though Many Never Report Them,” Center for Public Integrity, Aug. 16, 2018, <https://publicintegrity.org/federal-politics/millions-are-victims-of-hate-crimes-though-many-never-report-them/>.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid.

<sup>509</sup> Fox 5 staff, “Suspect charged in killing of Muslim teen pleads guilty,” *Fox 5 News*, Nov. 28, 2018, <http://www.fox5dc.com/news/local-news/muslim-teen-killed>; Jessica Suerth, “Nabra Hassanen’s murder highlights the challenges of designating a crime a hate crime,” *CNN*, June 21, 2017, <https://www.cnn.com/2017/06/21/us/nabra-hassanen-hate-crime-designation-challenge-trnd/index.html>; BBC staff, “Nabra Hassanen: Virginia man admits murder of teenage girl,” *BBC*, Nov. 28, 2018, <https://www.bbc.com/news/world-us-canada-46376292>.

<sup>510</sup> South Asian Americans Leading Together, “Communities On Fire,” 2018, at 14, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>511</sup> Jessica Suerth, “Nabra Hassanen’s murder highlights the challenges of designating a crime a hate crime,” *CNN*, June 21, 2017, <https://www.cnn.com/2017/06/21/us/nabra-hassanen-hate-crime-designation-challenge-trnd/index.html>.

capital murder, and pled guilty to rape and murder.<sup>512</sup> In March 2019, Martinez-Torres was sentenced to eight consecutive life sentences, but investigators stated that there was not enough evidence to charge him with a hate crime.<sup>513</sup>

Roy Austin, former Deputy Assistant Attorney General of the Civil Rights Division at the Justice Department, stresses that, especially in these types of potentially bias-motivated cases:

It's important to look at the number of people who suspect they were a victim of a hate crime and not just the FBI data. People's perception is their reality. A lot of these law enforcement agencies don't believe that they have a problem with hate crimes. If they don't think they have a problem, they won't deal with it well.<sup>514</sup>

The former deputy assistant attorney general of the Civil Rights Division also recommended very specific improvements in how hate crimes data should be collected by the federal government, including requiring participation by LEAs as a condition for federal funding, publishing data on a quarterly basis, requiring auditing for accuracy, and working with affinity groups to report the data to the federal government even if the victim does not want to prosecute.<sup>515</sup> The Commission notes that although state and local LEAs have an important role to play, the widespread and national nature of the problem shows that improvements to the federal data collection system are needed. For instance, National Litigation Director and Acting Civil Rights Director at CAIR Lena Masri testified that “there are also other mechanisms of getting reports and that is through state and local agencies that do reporting but [] their records are not being transferred into any type of central database. There should be a focus on the federal government to create a central database from all the rights commissions [and] state agencies that are collecting that will at least increase the numbers that are coming in.”<sup>516</sup>

## Targeted Communities

Compared to victims of non-hate crimes, hate crime victims are more likely to sustain severe physical injury, and are also more likely to suffer from extreme emotional and psychological effects because these crimes are seen as an attack on the very “core of the [victim's] identity.”<sup>517</sup> Susan Bro, chair and president of the Heather Heyer Foundation, testified at the Commission's

<sup>512</sup> BBC staff, “Nabra Hassanen: Virginia man admits murder of teenage girl,” *BBC*, Nov. 28, 2018, <https://www.bbc.com/news/world-us-canada-46376292>; Nicole Chavez and Janet DiGiacomo, “Man pleads guilty to rape and murder in killing of Muslim teen attacked near mosque,” *CNN*, Nov. 29, 2018, <https://www.cnn.com/2018/11/29/us/slain-muslim-teen-plea-deal/index.html>.

<sup>513</sup> Carmel Delshad, “Emotional, Legal Conclusion For Family as Man Sentenced for Murdering Muslim Teen,” *NPR*, March 28, 2019, <https://wamu.org/story/19/03/28/virginia-man-sentenced-to-life-in-prison-in-murder-of-nabra-hassanen/>; BBC staff, “Nabra Hassanen: Virginia man sentenced for Muslim teen's murder,” *BBC*, March 28, 2019, <https://www.bbc.com/news/world-us-canada-47738365>.

<sup>514</sup> Catherine Devine and Lillianna Byington, “Millions are Victims of Hate Crimes, Though Many Never Report Them,” Center for Public Integrity, Aug. 16, 2018, <https://publicintegrity.org/federal-politics/millions-are-victims-of-hate-crimes-though-many-never-report-them/>.

<sup>515</sup> Roy Austin, testimony, *Briefing Transcript* pp. 248-49.

<sup>516</sup> Lena Masri, testimony, *Briefing Transcript* p. 220.

<sup>517</sup> Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law*, Harvard University Press, 1999, at 40.

briefing to the widespread effects that these types of crimes inflict. She stated: “I’m here to tell you the hate crimes impacted not only the individuals involved but the community as well.”<sup>518</sup>

Hate crime victims report experiencing “psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation.”<sup>519</sup> Melissa Garlick, Civil Rights National Counsel with the ADL, testified to the broad societal effects that these crimes inflict, as follows:

When we talk about hate crimes, we talk about the fact that they can’t just be measured in terms of dollars or cents, but they make – and they’re intended to make – the targeted communities feel isolated, feel intimidated, and feel suspicious of other groups. They’re intended to divide. And so, if law enforcement are not trained or if elected officials or if community leaders are not effectively preventing and responding to those hate crimes when they occur, it can cause that isolated hate crime to explode more widely into more community tension as a result.<sup>520</sup>

2017 is the third consecutive year that reported hate crimes have increased in the United States, but also, the year with the largest increase since 2001 (9,730 reported incidents),<sup>521</sup> when hate crimes targeting Arab and Muslim Americans and those perceived to be Arab or Muslim, spiked after 9/11 (375 reported incidents in 2017).<sup>522</sup> As with previous years, race and religious bias remained the two highest categories of hate crimes in 2017 (which will be discussed in detail below). And according to the ADL’s Center on Extremism, they found that white supremacists and far-right extremists accounted for 59 percent of all reported hate and extremist-related fatalities in 2017, which is a 20 percent increase from the previous year.<sup>523</sup>

FBI data are far from comprehensive and state and federal data have shown to have discrepancies in the number of crimes reported.<sup>524</sup> For instance, federal data does not reflect the August 2017 killing of Heather Heyer at a white nationalist rally in Charlottesville, Virginia; the fatal stabbing of two men who confronted a man shouting racial slurs at a woman wearing a hijab and her friend on a Portland, Oregon train; or the shooting of two Indian men in Olathe, Kansas, despite

<sup>518</sup> Susan Bro, President and Chair of the Heather Heyer Foundation, testimony, *Briefing Transcript*, pp.136.

<sup>519</sup> *Ibid.*, 40; see also Carter Coker, *Hope-Fulfilling Or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 Vand. L. Rev.1, 275 (2011).

<sup>520</sup> Melissa Garlick, Civil Rights National Counsel with the ADL, testimony, *Briefing Transcript*, p. 131-32.

<sup>521</sup> FBI, UCR, Hate Crimes 2001, at 5, <https://ucr.fbi.gov/hate-crime/2001>.

<sup>522</sup> FBI, UCR, Hate Crimes 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>; see also, Arab American Institute, *Hate Crimes*,

[https://d3n8a8pro7vhm.cloudfront.net/aai/pages/12067/attachments/original/1525723498/HATE\\_CRIMES\\_ISSUE\\_BRIEF\\_2018.pdf?1525723498](https://d3n8a8pro7vhm.cloudfront.net/aai/pages/12067/attachments/original/1525723498/HATE_CRIMES_ISSUE_BRIEF_2018.pdf?1525723498); Masood Farivar, “FBI Reports Largest Spike in Hate Crimes Since 9/11,” *VOA News*, Nov. 13, 2018, <https://www.voanews.com/a/fbi-hate-crimes-report/4656468.html>.

<sup>523</sup> ADL, “ADL Report: White Supremacist Murders More Than Doubled in 2017,” <https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017>.

<sup>524</sup> Omar Baddar, “Hate Crimes Continue to Surge in the US,” Arab American Institute, Nov. 13, 2018, [http://www.aaiusa.org/hate\\_crimes\\_continue\\_to\\_surge\\_in\\_the\\_us](http://www.aaiusa.org/hate_crimes_continue_to_surge_in_the_us); Arab American Institute Foundation, *Under Reported, Under Threat*, July 2018, at 2,

[https://d3n8a8pro7vhm.cloudfront.net/aai/pages/14141/attachments/original/1534353696/Underreported\\_Under\\_Threat.pdf?1534353696](https://d3n8a8pro7vhm.cloudfront.net/aai/pages/14141/attachments/original/1534353696/Underreported_Under_Threat.pdf?1534353696); see also Discussion *infra* 1220 (Seattle PD responses to the Commission), 1283 (Columbus PD responses to the Commission); see also, Roy Austin testimony *supra* 375.

prosecutions for hate crimes in two of these three incidents.<sup>525</sup> Researchers and advocacy organizations point to these discrepancies as examples of how the FBI's numbers largely underrepresent the magnitude of the issue of hate crimes, due to multiple reasons such as victims' not reporting incidents to the police and the insufficient reporting practices by local and state law enforcement officials.

Yet, some of these discrepancies may be due to prosecutorial reasons and not a discrepancy in reporting. For example, in the Charlottesville case, Joe Platania who was the state prosecutor for the case testified to the Virginia State Advisory Committee to the Commission that they chose to charge Fields with aggravated malicious wounding instead of a hate crime because "it was strategically one less thing we had to prove and one less thing that we needed to have evidence of in state court."<sup>526</sup> Platania explained that while racial animus was "so clearly part of the case, [i]t was in some ways almost more powerful left unsaid because it was just so clear what was motivating these individuals on August 12<sup>th</sup> of 2017."<sup>527</sup> Thus, this case exposes "some of the statistical problems...when you look at the prosecutions from August 12<sup>th</sup> of 2017 for none of them qualify statistically as a hate crime, [and] I think that is what give many people pause."<sup>528</sup> This decision is in contrast to the DOJ's decision in that case to charge Fields under federal hate crimes laws.<sup>529</sup>

Trends of reported hate crime from the mid-1990s show that race-based hate crimes still constitute the highest number of these crimes, having fallen only slightly as the overall percentage of hate crimes (e.g., from representing about 60 percent in 2010 to about 57 percent in 2017), while sexual orientation bias crimes have risen in terms of overall share of hate crimes (e.g., from 11 percent in 1996 to 22 percent in 2012).<sup>530</sup> And religious hate crimes have remained mostly steady, generally remaining the second highest bias category reported by the FBI.

As discussed previously, an individual does not have to necessarily identify with a particular community to be the target of hate violence; one's status or membership in a group may be actual or perceived. Hate crimes and bias-motivated incidents may occur against an individual due to multiple parts of their identity or how various components or aspects of a person's identity or various social, racial (including multiple races and/or ethnicities), or religious "markers" may be assumed to be associated with a particular group that could put someone at risk of being targeted for hate violence. Moreover, these risks may be intersectional. Intersectionality is an analytical framework that examines the relationships between social identities (e.g., race, class, gender) and

<sup>525</sup> Omar Baddar, "Hate Crimes Continue to Surge in the US," Arab American Institute, Nov. 13, 2018, [http://www.aaiusa.org/hate\\_crimes\\_continue\\_to\\_surge\\_in\\_the\\_us](http://www.aaiusa.org/hate_crimes_continue_to_surge_in_the_us); Maya Berry and Kai Wiggins, "FBI stats on hate crimes are scary. So is what's missing," *CNN*, Nov. 14, 2018, <https://www.cnn.com/2018/11/14/opinions/fbi-hate-crimes-data-whats-missing-berry-wiggins/index.html>; Arjun Singh Sethi, "The FBI recorded a surge of hate crimes last year. But it undercounted – by a lot," *Washington Post*, Nov. 14, 2018, [https://www.washingtonpost.com/outlook/2018/11/14/fbi-recorded-surge-hate-crimes-last-year-it-undercounted-by-lot/?utm\\_term=.0aad9d4c8f6e](https://www.washingtonpost.com/outlook/2018/11/14/fbi-recorded-surge-hate-crimes-last-year-it-undercounted-by-lot/?utm_term=.0aad9d4c8f6e); Masood Farivar, "FBI Reports Largest Spike in Hate Crimes since 9/11," *VOA*, Nov. 13, 2018, <https://www.voanews.com/a/fbi-hate-crimes-report/4656468.html>.

<sup>526</sup> Joe Platania, Charlottesville Commonwealth Attorney, Virginia State Advisory Committee, *Briefing Transcript*, pp. 6.

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*

<sup>529</sup> See sources cited at pp. 90-91 and further discussion of federal prosecution.

<sup>530</sup> FBI, Uniform Crime Reporting, Hate Crime Statistics, <https://ucr.fbi.gov/hate-crime>.

how these identities create overlapping and interlocking systems that affect marginalized individuals and communities in society.<sup>531</sup> Thus, the concept of intersectionality informs not only an individual's sense of self, but also affects how others perceive the individual.

This means that victims of hate crimes and bias-motivated incidents may also be targeted on the basis of multiple identity characteristics, such as, for example, religious faith and race. South Asian Americans Leading Together (SAALT), a nonpartisan non-profit organization, explains that intersectionality “plays a key role to animate the hate violence against South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities.”<sup>532</sup> Women who wear hijabs or head scarves are among the most targeted for hate violence due to the “intersection of gender, skin color, religious presentation, and immigrant background they represent.”<sup>533</sup> Other examples include alleged bullying incidents that occurred in February 2019, in Grand Forks, North Dakota where multiple Somali and black students reported many incidents of bullying by fellow students and even teachers at their school.<sup>534</sup> These incidents consisted of students using racist and anti-Muslim slurs, where students were called pejorative terms like “monkey,” “Ebola,” the “n-word,” and “terrorist” and one Somali student had her hijab pulled off by another student.<sup>535</sup>

In many cases law enforcement only records a crime as a hate crime when there is clear evidence that the crime was a hate crime (e.g., slurs or symbols were used during the attack or left at the scene of the crime).<sup>536</sup> Therefore, hate crimes are reported based on the motivating factor that the perpetrator used during the crime, even if there could be possible multiple factors driving the hate crime. The lack of intersectional data reporting is further complicated when an individual's multiple identities may be part and parcel to why they were targeted. For example, if a mosque was attacked and the person used anti-Muslim slurs during the attack or on social media, in most cases, the attack would be marked as anti-Muslim, not a crime against national origin, despite the fact that the race, ethnicity, or national origin of many members in the congregation may be a potential factor. Or in cases of hate crimes against black transgender women, where if a perpetrator assaults a woman and use anti-transgender slurs during the attack, in most cases the attack would be recorded as an anti-trans hate crime, despite the fact that she is a woman of color. And this is due to the motivating factor being that she is transgender, not the fact that she is black and a woman. It can be argued that these other identity characteristics may also play a role as motivating factors, even if the attack is only recorded as anti-transgender and not also anti-Black and/or anti-woman.

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<sup>531</sup> Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *The University of Chicago Legal Forum*, 140:139-167 (1989).

<sup>532</sup> South Asian Americans Leading Together, *Communities on Fire*, 2018, 5, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>533</sup> Ibid.

<sup>534</sup> Ken Chase, “Parents claim pattern of racist bullying at Grand Forks middle school,” *Grand Forks Herald*, Feb. 14, 2019, <https://www.grandforksherald.com/news/970151-Parents-claim-pattern-of-racist-bullying-at-Grand-Forks-middle-school>.

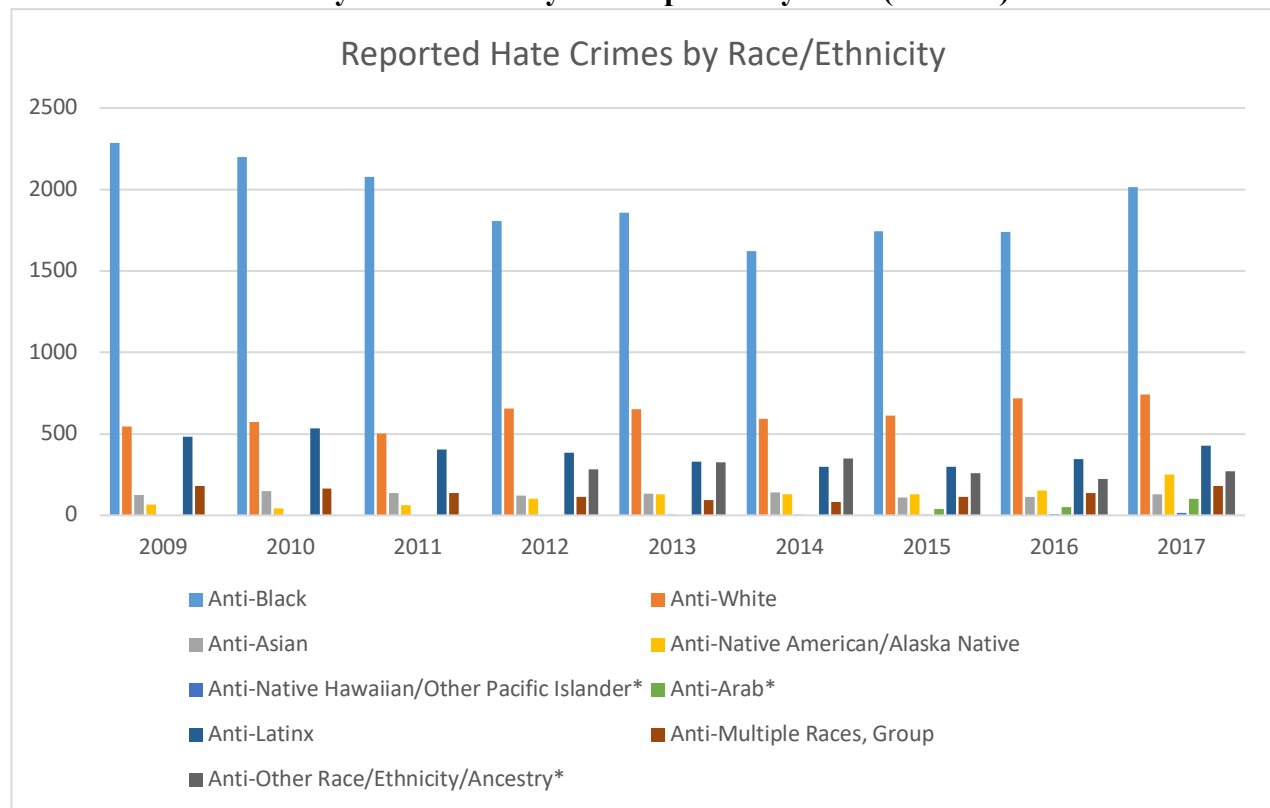
<sup>535</sup> Ibid.

<sup>536</sup> Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Dep’t of Justice, June 2017, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

## Racial/Ethnic Bias Hate Crimes

Since the passage of HCPA of 2009 through 2017, FBI data show that hate crimes motivated by race or ethnicity bias have consistently made up more than half of all reported hate crimes offenses (see chart 8).<sup>537</sup> Similarly, NCVS surveys aggregated from 2011-15 found that racial bias was the most common motivation for hate crimes (48 percent) followed by ethnicity at 35 percent.<sup>538</sup> According to the NCVS, between 2007 and 2015, researchers found that percentages of hate crimes believed by respondents to be motivated by racial bias decreased from 62 percent to 48 percent.<sup>539</sup> Analyzing UCR data overtime, while there was a marked decrease between 2012 (with 3843 reported racially biased hate crime incidents) and 2014 (3215), reported incidents have continued to increase since; and in 2017, incidents have reached their highest reported numbers since the passage of HCPA (4131 reported incidents).<sup>540</sup>

**Chart 8: Hate Crimes by Race/Ethnicity Bias reported by UCR (2009-17)**



Source: FBI, UCR; data compiled and chart created by Commission staff

\*Note: 2013 was the first year the FBI disaggregated hate crimes against Asians and Native Hawaiians or Other Pacific Islanders, and 2015 was the first year FBI collected data on anti-Arab (formerly included in anti-white or anti-Hindu and anti-Sikh under religious bias attacks)

<sup>537</sup> Federal Bureau of Investigation, “2017 The Crime Statistics,” <https://ucr.fbi.gov/hate-crime/2016/tables/table-1>.

<sup>538</sup> Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Department of Justice, June 2017, at 6.

<sup>539</sup> Ibid., 3.

<sup>540</sup> See generally FBI, UCR, Hate Crime Statistics (2009:3896), (2010: 3982), (2011: 3634), (2012: 3843), (2013: 3526), (2014: 3215), (2015: 3310), (2016: 3489), (2017: 4131).



In 2017, there were 4,832 single-bias reported hate crime offenses that were motivated by a bias on the basis of race, ethnicity, or national origin. The FBI reported that 59 percent of victims reported being targeted because of their race, ethnicity, or national origin. Of those, anti-Black or anti-African American bias constituted just under half (48.8 percent) of the race-based offenses for that year. Hate crime offenses against Latinx communities accounted for almost 11 percent of race-based offenses (although as discussed herein, disaggregating data to count all impacted Latinx shows that this percentage almost doubles).<sup>541</sup> While bias offenses against white people was about 17 percent of race-based offenses; when accounting for total population, white people were much less likely to suffer a hate crime than were people of color (see table 2). Furthermore, it is significant to point out that, analyzing the year-over-year percentage difference from 2015 to 2017, there was an approximately 175 percent increase in reported hate crimes against Arab communities.<sup>542</sup>

**Table 2. Hate Crime Victimization by Race/Ethnicity, 2017**

Race/Ethnicity/National Origin	Hate Crime Offenses (percentages) <sup>1</sup>	Overall U.S. Population (percentages) <sup>2</sup>
Black	48.8	13.4
White	17.5	60.7
Latinx	10.8	18.1
Two or More Races	6.5	2.7
Native American/Alaska Native	5.8	1.3
Asian	3.1	5.8
Arab	2.6	0.7*
Native Hawaiian/Pacific Islander	0.4	0.2

Source: <sup>1</sup>FBI, UCR; <sup>2</sup>United States Census, QuickFacts, Population Estimates as of July 1, 2018

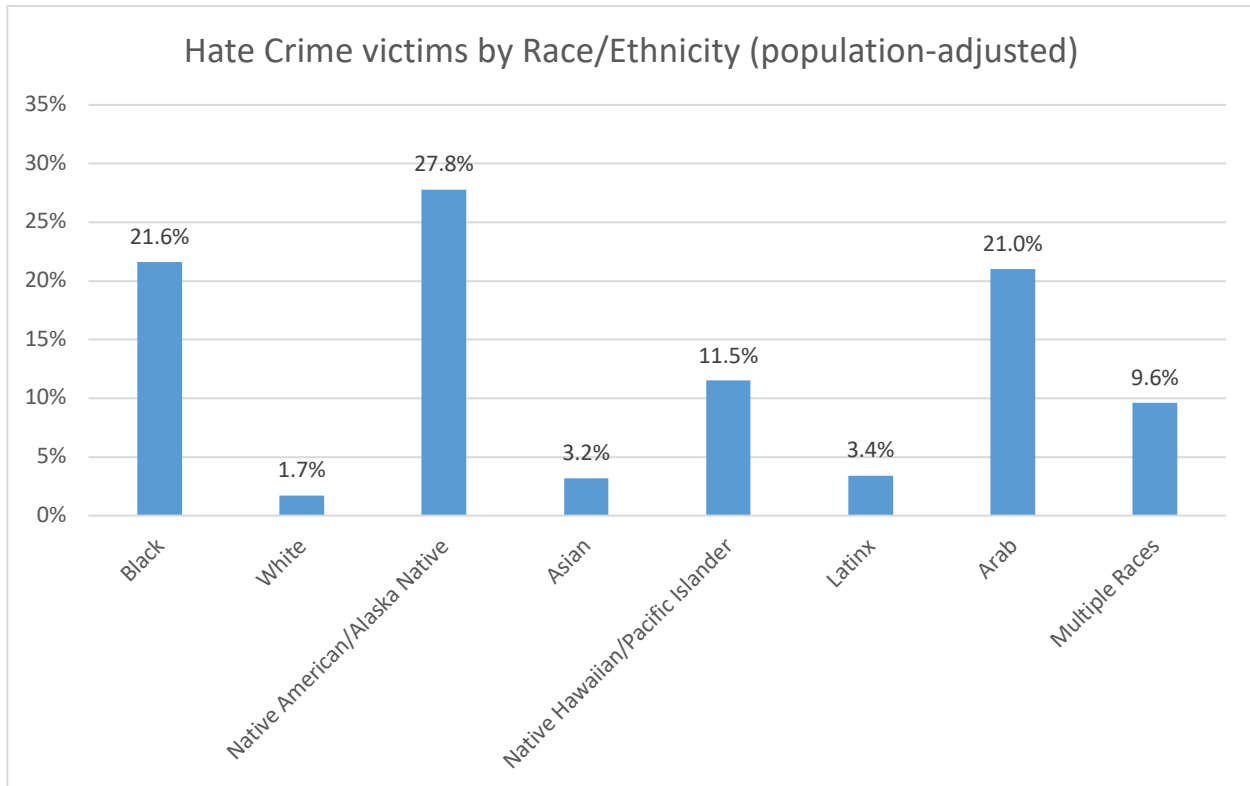
\*Note: The U.S. Census estimates approximately 2,041,484 Arab Americans, however advocates argue that research suggests that this estimate is significantly lower than the actual percentage of Arab Americans due to the limited nature of census questions. According to the Arab American Institute Foundation, in 2017 there were approximately 3,665,789 Arab Americans living in the U.S. See Arab American Institute Foundation, Demographics, 2018, [https://assets.nationbuilder.com/aai/pages/9843/attachments/original/1551198642/National\\_Demographics\\_SubAncestries\\_2018.pdf?1551198642](https://assets.nationbuilder.com/aai/pages/9843/attachments/original/1551198642/National_Demographics_SubAncestries_2018.pdf?1551198642). This table reflects the percentage of this population according to the census to remain consistent with the other groups presented.

Adjusting these data to reflect the relative population size of each of these groups also demonstrates how wide-spread this issue is for many communities. Data from the UCR show that based on the relative population sizes of each racial or ethnic demographic show that crimes against Native Americans and Alaska Natives were some of the highest in 2017, followed by crimes against black and Arab people, Native Hawaiian and Pacific Islanders, people who identify as two or more races, Latinx and Asian people, and lastly white people (see chart 9).

### Chart 9: Hate Crimes by Race/Ethnicity Bias reported by UCR, Population-Adjusted (2017)

<sup>541</sup> *But Cf. infra* notes 42-417 and 424 (disaggregated data shows that this percent is nearly double when counting all Latinx).

<sup>542</sup> FBI, UCR, Hate Crimes, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses>.



\*Source: FBI, UCR; United States Census, QuickFacts, Population Estimates as of July 1, 2018.

### *Hate Crimes against Black Communities*

Since the FBI began collecting hate crime data in the 1990s, hate crimes against the black community have made up a significant percentage of reported race-based hate crimes year after year.<sup>543</sup> Further, since the passage of the HCPA in 2009, black Americans have been targeted in approximately 28 to 35 percent of all hate crimes, despite representing about 13 percent of the U.S. population.<sup>544</sup>

While black communities have long been the targets of racial violence, in 2015 and 2017, two incidents turned a national spotlight on how deep-seated this racial animus runs in the United States. In June 2015, Dylann Roof, a white supremacist, killed nine black churchgoers at Emanuel African Methodist Episcopal Church, a historically black church in South Carolina. Since South Carolina does not have a hate crime statute, federal prosecutors charged him with 33 federal hate crime counts.<sup>545</sup> Hate crime expert Carolyn Petrosino, professor at Bridgewater State University,

<sup>543</sup> Ibid.

<sup>544</sup> Calculations by Commission staff (utilizing UCR data, FBI, UCR, Hate Crimes, <https://ucr.fbi.gov/hate-crime>).

<sup>545</sup> He was found guilty of 33 counts for the attack and was sentenced to death by a federal jury in January 2017. The federal government brought charges against Roof and proved the element of racial animus by using all available, admissible evidence to support the charges (e.g., a manifesto that Roof published online, among others). See *United States v. Roof*, 252 F. Supp. 3d 469 (D.S.C. 2017). In April 2017, Roof was sentenced to nine consecutive life sentences in state court. See Khushbu Shah and Elliott McLaughlin, “Victim’s dad warns Dylann Roof: ‘Your creator ... he’s coming for you’,” CNN, Jan. 11, 2017, <https://www.cnn.com/2017/01/11/us/dylann-roof-sentencing/index.html>; Associated Press, “Dylann Roof: Charleston Church Shooter Gets Nine Life Sentences in

argues that this attack on the congregation was possibly a product of racial anxiety or fear of social change; however, as data show, white supremacist ideologies and racial animus continue to be drivers of hate violence against black Americans.<sup>546</sup> Petrosino maintains that “the root of hate crime has not changed. The urgency of maintaining control has.”<sup>547</sup> Heidi Beirich, a project director at the Southern Poverty Law Center argues that “Dylann Roof thought he was saving the world. [White supremacists] have come to believe they’re saviors of the white race... [they think] I’m doing this to protect my race.”<sup>548</sup> While awaiting his sentence Roof wrote, “I would like to make it crystal clear, I do not regret what I did . . . I am not sorry. I have not shed a tear for the innocent people I killed.”<sup>549</sup> Assistant U.S. Attorney Nathan Williams stated that this attack was not only against these nine individuals, but also against the black community in Charleston. “He killed them because of the color of their skin . . .” Roof chose that church “to magnify and incite violence in others.”<sup>550</sup>

Then in August 2017, a “Unite the Right” rally was held in Charlottesville, Virginia where white nationalist groups, such as the KKK, delivered speeches, and participants shouted racist and anti-Semitic chants such as “Jews will not replace us,” “White Lives Matter,” and “Go the [expletive] back to Africa.”<sup>551</sup> The rally turned violent and cost Heather Heyer, a counter-protestor, her life when she was struck and killed by James Alex Fields, an alleged white nationalist who was indicted on state murder and federal hate crime charges for deliberately driving his car into the crowd.<sup>552</sup>

Aryeh Tuchman, associate director for the ADL’s Center on Extremism, argues that “racists and white supremacists and other anti-Semites have felt more free to speak out and voice their hatred for minorities, including Jews.”<sup>553</sup> For many, the rally in Charlottesville highlighted the deep-seated racism and anti-Semitism in the United States. An associate pastor at the First United Methodist Church in Charlottesville, Phil Woodson told reporters that he had previously been

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State Case,” NBS News, April 10, 2017, <https://www.nbcnews.com/news/us-news/dylann-roof-charleston-church-shooter-pleads-guilty-state-charges-n744746>.

<sup>546</sup> Terrence McCoy, “‘Saviors of the white race’: Perpetrators of hate crimes see themselves as heroes, researchers say,” *Washington Post*, Oct. 31, 2018, [https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb\\_story.html?utm\\_term=.c215ad03671e](https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.c215ad03671e).

<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid.*

<sup>549</sup> Matt Zapposky, “Charleston church shooter: ‘I would like to make it crystal clear, I do not regret what I did,’” *Washington Post*, Jan. 4, 2017, [https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd\\_story.html?noredirect=on&utm\\_term=.509af2a869fc](https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html?noredirect=on&utm_term=.509af2a869fc).

<sup>550</sup> *Ibid.*

<sup>551</sup> Lillianna Byington, Brittany Brow, and Andrew Capps, “Black Americans still are victims of hate crimes more than any other group,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/black-americans-hate-crime-victims-more-than-any-group/>; Joe Heim, “Recounting a day of rage, hate, violence and death,” *The Washington Post*, Aug. 14, 2017, [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.2317e87dc496](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.2317e87dc496).

<sup>552</sup> Dakin Andone and Laura Dolan, “Charlottesville suspect shared posts showing car driving into protestors before attack,” *CNN*, Nov. 30, 2018, <https://www.cnn.com/2018/11/30/us/charlottesville-james-fields-trial/index.html>.

<sup>553</sup> News21 Staff, “As Intolerance Grows, Targeted Religious Groups Join Forces,” *Public Integrity*, Aug. 27, 2018, <https://publicintegrity.org/federal-politics/as-intolerance-grows-targeted-religious-groups-join-forces/>.

“completely oblivious” to white supremacy until a few years ago.<sup>554</sup> “White supremacy and this culture of racism is America’s original sin. We hear that talked about from a lot of very prophetic faith and civic leaders. It is a deep wound that has never healed because we’ve never got down into it.”<sup>555</sup>

In June 2018, the federal government charged Fields with 30 hate crime charges: 29 counts of violating HCPA—28 counts of federal hate crime acts causing bodily injury involving an attempt to kill; and 1 resulting in death—and 1 count of interfering with a federally protected activity<sup>556</sup> resulting in death. In December 2018, following a state trial, Fields was found guilty of first-degree murder (and other offenses) and a recommended sentence of life in prison with an additional 419 years.<sup>557</sup> The prosecutors for the commonwealth of Virginia argued that Fields’ actions were premeditated with the intent to harm counter-protestors, and in December 2018, Fields was sentenced to life in prison.<sup>558</sup> Fields pleaded guilty to 29 federal charges in March 2019.<sup>559</sup>

The violent act that resulted in Heather Heyer’s death was not the only violent incident to occur at the rally; however, (as of the timing of this report) Fields has been the only individual federally charged with a hate crime. Four men, Benjamin Daly, Thomas Gillen, Michael Miselis, and Cole White were all charged with traveling with the intent to incite riots and conspiracy to riot.<sup>560</sup> As of November 2018, White entered a guilty plea and admitted to traveling across the country to commit acts of violence, while the other three men await trial.<sup>561</sup> Three other men, Richard Preston, Jacob Scott Goodwin, and Alex Michael Ramos who are all alleged to belong to white supremacists

<sup>554</sup> Ibid.

<sup>555</sup> Ibid.

<sup>556</sup> 18 U.S.C. 245.

<sup>557</sup> Dep’t of Justice, “Ohio Man Charged with Federal Hate Crimes Related to August 2017 Rally in Charlottesville,” June 27, 2018, <https://www.justice.gov/opa/pr/ohio-man-charged-federal-hate-crimes-related-august-2017-rally-charlottesville>; Vanessa Romo, “Charlottesville Jury Convicts ‘Unite the Right’ Protestor Who Killed Woman,” NPR, Dec. 7, 2018, <https://www.npr.org/2018/12/07/674672922/james-alex-fields-unite-the-right-protester-who-killed-heather-heyer-found-guilt>.

<sup>558</sup> Vanessa Romo, “Charlottesville Jury Convicts ‘Unite the Right’ Protestor Who Killed Woman,” NPR, Dec. 7, 2018, <https://www.npr.org/2018/12/07/674672922/james-alex-fields-unite-the-right-protester-who-killed-heather-heyer-found-guilt>; Emanuella Grinberg and Laura Dolan, “What you missed last week in the trial of the Charlottesville driver – and what to expect this week,” CNN, Dec. 3, 2018,

[https://www.cnn.com/2018/12/03/us/charlottesville-james-fields-trial/index.html?utm\\_term=image&utm\\_source=twCNN&utm\\_medium=social&utm\\_content=2018-12-03T14%3A39%3A31](https://www.cnn.com/2018/12/03/us/charlottesville-james-fields-trial/index.html?utm_term=image&utm_source=twCNN&utm_medium=social&utm_content=2018-12-03T14%3A39%3A31);

Paul Duggan, “James A. Fields Jr. sentenced to life in prison in Charlottesville car attack,” *Washington Post*, Dec. 11, 2018, [https://www.washingtonpost.com/local/public-safety/james-a-fields-jr-sentenced-to-life-in-prison-in-charlottesville-car-attack/2018/12/11/8b205a90-fcc8-11e8-ad40-cdfd0e0dd65a\\_story.html?noredirect=on&utm\\_term=.0294be5da03c](https://www.washingtonpost.com/local/public-safety/james-a-fields-jr-sentenced-to-life-in-prison-in-charlottesville-car-attack/2018/12/11/8b205a90-fcc8-11e8-ad40-cdfd0e0dd65a_story.html?noredirect=on&utm_term=.0294be5da03c).

<sup>559</sup> Mitch Smith, “James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville,” *New York Times*, Jun. 28, 2019, <https://www.nytimes.com/2019/06/28/us/james-fields-sentencing.html>; Karen Zraick and Julia Jacobs, “Charlottesville Attacker Pleads Guilty to Federal Hate Crime Charges,” *New York Times*, March 27, 2019, <https://www.nytimes.com/2019/03/27/us/james-alex-fields-charlottesville.html>.

<sup>560</sup> Associated Press, “Man pleads guilty to riot conspiracy after Virginia rally, Nov. 30, 2018, <https://www.seattletimes.com/nation-world/man-pleads-guilty-to-riot-conspiracy-after-virginia-rally/>.

<sup>561</sup> Associated Press, “Man pleads guilty to riot conspiracy after Virginia rally, Nov. 30, 2018, <https://www.seattletimes.com/nation-world/man-pleads-guilty-to-riot-conspiracy-after-virginia-rally/>; Ruth Serven Smith, “Rally rioting defendants denied bond,” *The Daily Progress*, Dec. 3, 2018, [https://www.dailyprogress.com/news/local/courts/rally-rioting-defendants-denied-bond/article\\_c6273f98-f758-11e8-aa4c-1700c64c2218.html](https://www.dailyprogress.com/news/local/courts/rally-rioting-defendants-denied-bond/article_c6273f98-f758-11e8-aa4c-1700c64c2218.html).

groups were also charged with committing violent acts at the rally. Preston, who is described as an imperial wizard of the Ku Klux Klan was sentenced to four years in prison for firing a gun within 1,000 feet of a school;<sup>562</sup> Goodwin and Ramos, both affiliated with white nationalist groups were convicted of the “malicious wounding” of DeAndre Harris (who is black) and were sentenced to eight years and six years in prison, respectively.<sup>563</sup> Following the events in Charlottesville, the ADL found there was a spike in anti-Semitic hate crimes, with 221 of the reported 306 incidents in the third quarter of 2017, occurring on or after the rally. This amounted to a 182 percent increase in anti-Semitic hate incidents.<sup>564</sup>

As indicated by the formal name of HCPA legislation, the murder of James Byrd, Jr., a black man, shows Congress’ intention to particularly point to violence against black Americans as an example of hate crimes that the legislation was intended to address. Three men were convicted and harshly sentenced for the murder of James Byrd, Jr. The State of Texas executed Lawrence Russell Brewer in 2011, at which time he became the first white person to be executed for killing a black man in Texas. Texas executed John William King on April 24, 2019, and Shawn Allen Berry, the driver of the truck, was sentenced to life in prison.<sup>565</sup> The prosecutor in the case, Guy James Gray, told News21 in its Documenting Hate investigation, that despite the horrific incident, “the real problem was getting an all-white jury to convict a white man for killing a black man in east Texas. I made a mistake. I let one guy get on the jury that I should have cut, and that one guy was the reason he [Berry] got life instead of the death penalty.”<sup>566</sup> When the jury went to deliberate, Gray stated that he overheard this juror say to the others, “what’s all the ruckus, it’s just a crack-head [n-word].”<sup>567</sup> Louvon Harris, James Byrd, Jr.’s sister, told News21 that “you have a freedom to speak your peace, but you don’t have the freedom to kill because people don’t agree with what you’re speaking of. America is divided now. We have a long way to go.”<sup>568</sup>

Even though James Byrd Jr.’s murder was over 20 years ago, many in his Texas community feel that racism is still a prevalent issue. For example, in Jasper, Texas, Byrd’s grave is protected by an iron fence because it has been desecrated twice,<sup>569</sup> and in 2012, the NAACP asked the DOJ to

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<sup>562</sup> Christine Hauser and Julia Jacobs, “Three Men Sentenced to Prison for Violence at Charlottesville Rally,” *New York Times*, Aug. 23, 2018, <https://www.nytimes.com/2018/08/23/us/kkk-charlottesville-richard-preston.html>; Associated Press, “Maryland Ku Klux Klan leader gets 4 years in prison for gunshot at Charlottesville rally,” *Baltimore Sun*, Aug. 21, 2018, <https://www.baltimoresun.com/news/maryland/crime/bs-md-preston-sentencing-20180820-story.html>.

<sup>563</sup> Christine Hauser and Julia Jacobs, “Three Men Sentenced to Prison for Violence at Charlottesville Rally,” *New York Times*, Aug. 23, 2018, <https://www.nytimes.com/2018/08/23/us/kkk-charlottesville-richard-preston.html>.

<sup>564</sup> Anti-Defamation League, “ADL Data Shows Anti-Semitic Incidents Continue to Surge in 2017 Compared to 2016,” <https://www.adl.org/news/press-releases/adl-data-shows-anti-semitic-incidents-continue-surge-in-2017-compared-to-2016>.

<sup>565</sup> Kristin Lam, “Texas executes white supremacist convicted in gruesome 1998 hate crime,” *USA Today*, April 24, 2019, <https://www.usatoday.com/story/news/nation/2019/04/24/james-byrd-jr-killer-execution-john-william-king/3567572002/?csp=chrome-push>; Lillianna Byington, Brittany Brow, and Andrew Capps, “Black Americans still are victims of hate crimes more than any other group,” News21, Aug. 15, 2018, <https://hateinamerica.news21.com/black-americans-hate-crime-victims-more-than-any-group/>.

<sup>566</sup> Lillianna Byington, Brittany Brow, and Andrew Capps, “Black Americans still are victims of hate crimes more than any other group,” News21, Aug. 15, 2018, <https://hateinamerica.news21.com/black-americans-hate-crime-victims-more-than-any-group/>.

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.*

<sup>569</sup> *Ibid.*

“monitor race relations in Jasper” and requested that federal funds be withheld from Jasper due to an issue of alleged racial discrimination regarding the hiring and firing of the city’s first black police chief.<sup>570</sup>

### *Crimes against Immigrant and Perceived Immigrant Communities*

Starting in 2009, Congress mandated the National Institute of Justice (NIJ) to “evaluate trends in hate crimes against new immigrants, individuals who are perceived to be immigrants, and Hispanic-Americans, and to assess the underlying causes behind any increase in hate crimes against such groups.”<sup>571</sup> Congress mandated the focus on Latinos because many are often perceived as immigrants and targeted as such, even though the majority are U.S. citizens.<sup>572</sup> This project was also designed in part to disaggregate data about Latinx people, as the Census and generally the U.S. government does not count Latinx as a separate race (but rather as an ethnicity intersecting with all other races) and therefore there was an undercount in the raw NCVS data,<sup>573</sup> which showed in 2017 for example that Latinx were 10.8 percent of victims of hate crimes.<sup>574</sup> But according to the NIJ’s disaggregation of such data, during 2011-15, Latinx people (1.3 per 1,000) experienced higher rates of violent hate crime offenses than black people (1.0 per 1,000) or white people (0.7 per 1,000).<sup>575</sup> And a higher percentage of violent hate crime victims were hate victimizations (25 percent) than non-hate victimizations (14 percent).<sup>576</sup> This NIJ report evaluating data over time did not include information about Arab, Asian and Pacific Islander or Native Americans.<sup>577</sup> These communities are also often targeted due to being perceived as “foreign.”<sup>578</sup> NCVS data from 2017 show that 0.4 percent of hate crime victims were victims of anti-Native

<sup>570</sup> Manny Fernandez, “Racial Tensions Flare Anew in a Texas Town,” *New York Times*, June 21, 2012, <https://www.nytimes.com/2012/06/22/us/in-jasper-texas-racial-tensions-flare-again.html>.

<sup>571</sup> See, National Institute of Justice, “Research Needed on Hate Crimes,” Office of Justice Programs, U.S. Department of Justice, Dec. 22, 2010, <https://www.nij.gov/topics/crime/hate-crime/pages/research-needed.aspx>; See also, “Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010,” House Report 111-366, Dec. 8, 2009 at 679, <https://www.gpo.gov/fdsys/pkg/CRPT-111hrpt366/pdf/CRPT-111hrpt366.pdf#page=683>.

<sup>572</sup> See, National Institute of Justice, “Research Needed on Hate Crimes,” Office of Justice Programs, U.S. Department of Justice, Dec. 22, 2010, <https://www.nij.gov/topics/crime/hate-crime/pages/research-needed.aspx>.

<sup>573</sup> H.R. 223, Hate Crimes Victim Assistance Act of 2019, § 2, Findings, <https://www.congress.gov/bill/116th-congress/house-bill/223/text?r=41>. This way of counting Latinos as an ethnicity is a subject of intense debate; the Supreme Court has found that Latinos (or Mexican Americans) are legally considered to be a separately identifiable class protected by the Equal Protection clause as they are subjected to racial profiling and discrimination. See *Hernandez v. Texas*, 347 U.S. 475, 477-78 (1954) (finding that Equal Protection is not limited to the paradigm of white discrimination against black people); see also *Westminster School Dist. of Orange Cty. v. Mendez*, 161 F.2d 774, 781 (9<sup>th</sup> Cir. 1947) (voiding the segregation of students of Mexican American descent and holding that any plan also segregating students of Latin descent would also be void due to Equal Protection violations).

<sup>574</sup> FBI, UCR Hate Crimes, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/victims> (note that the undercount due to not including Latinos of all races also explains why the numbers in the Table 2 of this report also show that Latinos are not the most targeted).

<sup>575</sup> Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Department of Justice, June 2017, at 6.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.* (*passim*).

<sup>578</sup> See, e.g., *infra* notes 585, 649, 842, 922.

American or Other Pacific Islander bias, and 2.6 percent were victims of anti-Arab bias, and 6.3 percent were victims of anti-American Indian or Alaskan Native bias.<sup>579</sup>

According to disaggregated NCVS data, from 2011 to 2015, more than 20 percent of hate crime offenses targeted Latinx communities. In a report released by the Center for the Study of Hate and Extremism, researchers found that 34 anti-Latinx hate crimes were reported two weeks after the 2016 election or about 2.4 per day, which is a 176 percent increase over the year-to-date daily average.<sup>580</sup> The Southern Poverty Law Center found that of the 867 reported hate incidents collected by the organization, 32 percent were motivated by anti-immigrant bias.<sup>581</sup>

Janice Iwama, sociology professor at the University of Massachusetts, argues that the combination of increased immigration to the U.S. from 1990 to 2015, and the anti-immigration legislation that followed, has contributed not only to anti-immigrant sentiment broadly, but also may have correlations to the uptick of hate crimes targeting these communities.<sup>582</sup> Iwama further asserts that there is a “common misconception that all Latinos are immigrants” which may also contribute to the racist beliefs that they are all “outsiders” which can spur anger and violence.<sup>583</sup> In fact, a 2017 Pew Research Study found that two-thirds of the 57 million Latinx persons residing in the U.S. in 2015 were U.S.-born citizens.<sup>584</sup> United States Representative Ruben Gallego from Arizona argues that anti-immigrant and anti-Latino sentiment emerged following the 9/11 terrorist attacks, and now they have become one and the same. “By 2010, there were Latino families in Arizona that were being told to go back to their country, to go back to Mexico – these are people that have lived in Arizona for generations.”<sup>585</sup> And Gallego said that he has also experienced anti-immigrant hatred and received death threats from white supremacists when he was fighting against anti-immigrant legislation in 2010.<sup>586</sup>

Anti-immigrant hate crimes do not only target Latinx communities; other immigrant communities, such as Asian communities have also experienced an increase in violence and hate incidents.<sup>587</sup>

<sup>579</sup> FBI, UCR, Hate Crimes, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/victims>.

<sup>580</sup> Brian Levin, James Nolan, and John Reitzel, “New data shows U.S. hate crimes continued to rise in 2017,” *CBS News*, June 26, 2018, <https://www.cbsnews.com/news/new-data-shows-us-hate-crimes-continued-to-rise-in-2017/>.

<sup>581</sup> Southern Poverty Law Center, “Ten Days After: Harassment and Intimidation in the Aftermath of the Election,” November 2016, at 7.

<sup>582</sup> Janice Iwama, “Understanding hate crimes against immigrants: Considerations for future research,” *Sociology Compass*, Feb. 15, 2018.

<sup>583</sup> *Ibid.*

<sup>584</sup> Pew Research Center, “Facts on U.S. Latinos, 2015,” Sept. 18, 2017, <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos/>.

<sup>585</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

<sup>586</sup> *Ibid.*

<sup>587</sup> *See generally*, FBI, Hate Crimes 2017, <https://ucr.fbi.gov/hate-crime/2017>. While these are just a few recent examples hate crimes against immigrant communities has a long history in the U.S. For instance, in 1982 Vincent Chin who was a Chinese American was attacked by two men who yelled anti-Japanese epithets at him and assaulted him with a baseball bat that led to Chin’s death four days later. While his death was not reported as a hate crime, his killing is credited with beginning the Asian American civil rights movement. *See e.g.*, Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 Mich. J. Race & L. 347, 473 (1996) (“[T]he Vincent Chin litigation has been called a ‘landmark for Asian Americans.’ The case is invariably cited as epitomizing anti-Asian violence in American society.”); Roland Hwang, *Killing Spawned Asian*

For instance, in February 2017, Adam Purinton, who is white, yelled “Get out of my country!” before shooting two Indian nationals, Srinivas Kuchibhotla and Alok Madasani and a fellow bar patron, Ian Grillot, in Olathe, Kansas.<sup>588</sup> Kuchibhotla was shot at least four times and died from his injuries and Madasani and Grillot were both shot, but survived. In May 2018, Purinton plead guilty to federal hate crime and firearm charges and in August he was sentenced to life in prison without the possibility of parole.<sup>589</sup> Following the plea, then-Attorney General Jeff Sessions expressed his support for the outcome:

The crimes at issue in this case are detestable. The defendant acted with clear premeditation in murdering one man, and attempting to murder a second man, simply because of their race, religion, and national origin. As a result, a promising young life has been tragically cut short, and other lives have been filled with suffering. Securing this sentence is important not only to the victims and their loved ones, but also to our justice system and our nation as a whole. While we cannot undo the irreparable harm that this defendant has done, some measure of justice for the victims’ families has been achieved.<sup>590</sup>

### Religion-Based Hate Crimes

Similar to other hate crimes, incidents can occur based on individuals’ actual or perceived membership or association with a targeted religious group. In many cases, victims of hate incidents and hate crimes are targeted due to the visible markers of religious identity such as through headwear (e.g., yarmulke, hijab, turban) or facial hair (e.g., uncut beards, sidelocks). For instance, many reported incidents refer to attackers spitting or attempting to pull off a Muslim woman’s

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*American Civil Rights Movement 34th Milestone to Highlight Vincent Chin Case*, Mich. B. J., 30-31 (2009) (“[T]he case is recognized for giving birth to the Asian American victims and civil rights movement.”). *See generally*, FBI, Hate Crimes 2017, <https://ucr.fbi.gov/hate-crime/2017>.

<sup>588</sup> Press Release: U.S. Department of Justice, “Kansas Man Pleads Guilty to Hate Crime and Firearm Offenses in Shooting of Two Indian Nationals and Third Man at a Bar,” May 21, 2018, <https://www.justice.gov/opa/pr/kansas-man-pleads-guilty-hate-crime-and-firearm-offenses-shooting-two-indian-nationals-and>.

<sup>589</sup> Indictment, *United States v. Adam Purinton*, 2:17-cr-20028, (D.Kan. June 9, 2017)(No. 17-20028-CM/JPO) <https://www.justice.gov/opa/press-release/file/973006/download>.

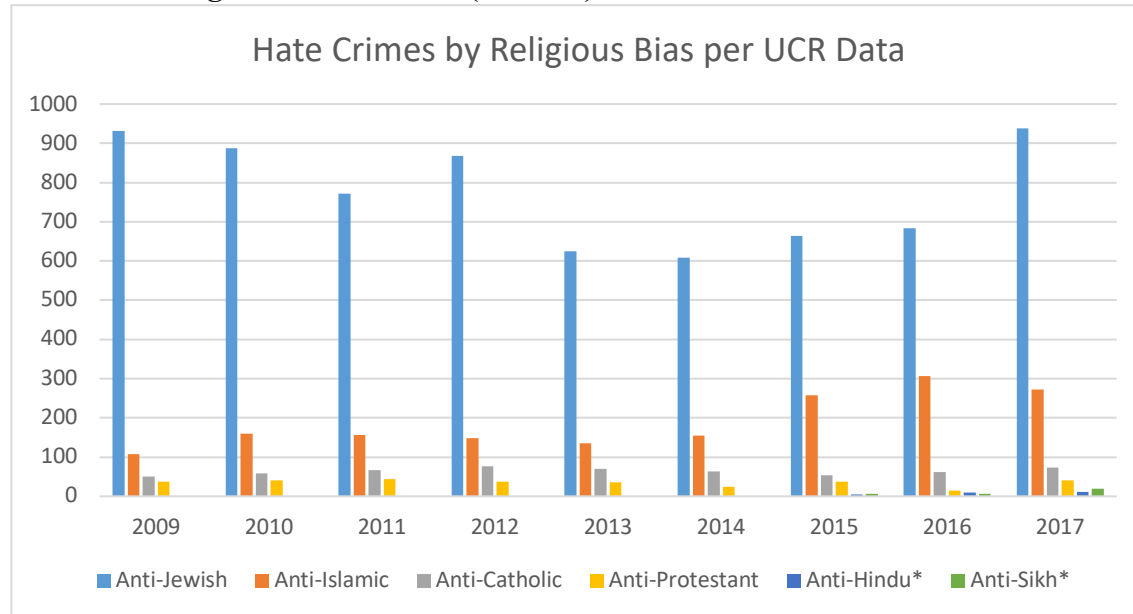
<sup>590</sup> Press Release: U.S. Department of Justice, “Kansas Man Sentenced to Life in Prison Without Parole for Racially Motivated Shooting at Olathe Bar,” Aug. 7, 2018, <https://www.justice.gov/opa/pr/kansas-man-sentenced-life-prison-without-parole-racially-motivated-shooting-olathe-bar>.



hijab,<sup>591</sup> or a Sikh man's turban,<sup>592</sup> to government officials warning Jewish men that it may not be safe to wear yarmulkes.<sup>593</sup>

According to NCVS reported data during 2011 to 2015, approximately one in six (17 percent) hate crime victimizations were believed to be motivated by religious bias.<sup>594</sup> According to UCR numbers, there were a total of 1,564 anti-religious hate crime offenses reported by law enforcement to the FBI in 2017, making 2017 the highest year of reported religious hate crimes (see chart 10).

**Chart 10: Religious Hate Crimes (2009-17)**



Source: FBI, UCR; data compiled and chart created by Commission staff

\*2015 was the first year FBI collected data on anti-Hindu and anti-Sikh hate crimes

<sup>591</sup> See e.g., Carol Kuruvilla, "Muslim Woman Was Allegedly Assaulted, Her Hijab Pulled, In Possible Hate Crime," *Huffington Post*, Jan. 8, 2019, <https://www.cairoklahoma.com/blog/muslim-woman-was-allegedly-assaulted-her-hijab-pulled-in-possible-hate-crime/>; Robert Pozarycki, "Cops launch hate crime probe after man spit on woman in hijab on a Long Island City street," *QNS*, Feb. 2, 2019, <https://qns.com/story/2019/02/02/cops-launch-hate-crime-probe-as-they-look-for-man-who-spit-on-hijab-wearing-woman-on-a-long-island-city-street/>; Eyewitness News, "Hate crime investigation into attack on Muslim woman walking in Brooklyn," *ABC7*, March 19, 2019, <https://abc7ny.com/hate-crime-probe-into-attack-on-muslim-woman-on-brooklyn-street/5204397/>.

<sup>592</sup> Donna St. George, "Sikh school bus driver reported years of harassment over his turban and beard," *Washington Post*, May 28, 2019, [https://www.washingtonpost.com/local/education/sikh-school-bus-driver-reported-years-of-harassment-over-his-turban-and-beard/2019/05/25/089e5c3a-7b2f-11e9-a5b3-34f3edf1351e\\_story.html?utm\\_term=.1e75c7d10645](https://www.washingtonpost.com/local/education/sikh-school-bus-driver-reported-years-of-harassment-over-his-turban-and-beard/2019/05/25/089e5c3a-7b2f-11e9-a5b3-34f3edf1351e_story.html?utm_term=.1e75c7d10645); Sarah Mervosh and Melissa Gomez, "Sikh Man Attacked in Hate Crime: 'My Turban Really Saved Me,'" *New York Times*, Aug. 6, 2018, <https://www.nytimes.com/2018/08/06/us/sikh-hate-crime-turban.html>; Manveena Suri and Huizhong Wu, "Sikhs: Religious minority target of hate crimes," *CNN*, March 7, 2017, <https://www.cnn.com/2017/03/06/asia/sikh-hate-crimes-us-muslims/index.html>.

<sup>593</sup> Matthew Robinson, "German Jews warned not to wear kippahs in public following spike in anti-Semitism," *CNN*, May 27, 2019, <https://www.cnn.com/2019/05/26/europe/germany-antisemitism-kippah-intl-scli-ger/index.html>.

<sup>594</sup> Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," U.S. Department of Justice, Bureau of Justice Statistics, June 2017, at 2, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

*Crimes against Jewish Communities*

According to FBI statistics, from 2009 through 2017, anti-Jewish hate crimes have constituted more than half of all religion-based bias crimes reported.<sup>595</sup> In 2017, there were 976 reported offenses, which is a 17 percent increase from 2016 (834 offenses).<sup>596</sup> In 2017, the ADL found that the number of anti-Semitic bias incidents increased by 57 percent compared to 2016 (from 1,267 to 1,986), making 2017 the single largest year increase since the FBI began collecting statistics on hate crimes and the second largest increase since ADL began collecting hate crime data in 1979.<sup>597</sup> The ADL also found that for the first time since 2010, an anti-Jewish bias incident occurred in every state, and some states had over 100 reported incidents.<sup>598</sup> Vandalism largely accounted for this overall uptick of hate incidents against Jewish communities. The ADL argues that these acts of vandalism are particularly troubling because perpetrators are feeling “emboldened” enough to very publicly break the law.<sup>599</sup>

While the total number of reported incidents decreased in 2018 compared to 2017 (1,879 and 1,986 respectively), the ADL found that reported cases of assaults and harassment increased compared to the previous year.<sup>600</sup> In 2018, there was 1,066 reported incidents of harassment which is an increase of 5 percent over 2017; 774 reported incidents of vandalism, signifying a decrease in reported incidents from 2017; and 39 cases of assault, which is a 105 percent increase from the previous year.<sup>601</sup>

This increase correlates with a large uptick in anti-Semitic bias incidents reported in schools and on campuses, which nearly doubled for the second year in a row.<sup>602</sup> While most of these incidents typically happen in public spaces, in 2017, more incidents occurred in K-12 schools across the nation (457 and 455, respectively).<sup>603</sup> This means for K-12 schools, there was a 94 percent increase from 2016 (235 incidents). Anti-Semitic incidents reported on college and university campuses also increased 89 percent in 2017 compared to 2016 (204 and 108, respectively).<sup>604</sup>

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<sup>595</sup> FBI, UCR, “Hate Crime,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>596</sup> FBI, Hate Crime Statistics, 2016, “Incidents and Offenses,” <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses>.

<sup>597</sup> Anti-Defamation League, “Audit of Anti-Semitic Incidents: Year in Review 2017,” 2018, at 4. Note: these incidents were divided in three main categories: harassment, vandalism, or assault.

<sup>598</sup> *Ibid.*, 6.

<sup>599</sup> *Ibid.*, 5.

<sup>600</sup> Anti-Defamation League, *Audit of Anti-Semitic Incidents: Year in Review 2018*, 2019, at 16, <https://www.adl.org/media/12857/download>.

<sup>601</sup> *Ibid.*, 13.

<sup>602</sup> Melissa Garlick, Civil Rights National Counsel at the ADL, *Briefing Transcript* pp. 106.

<sup>603</sup> ADL, “Anti-Semitic Incident Surged Nearly 60% in 2017, According to New ADL Report,” Feb. 27, 2018, <https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report>.

<sup>604</sup> *Ibid.*

Not only have the overall number of reported hate crimes increased in the United States, but in 2018, Americans witnessed the deadliest attack on the Jewish community in American history.<sup>605</sup> In October 2018, at the Pittsburgh Tree of Life synagogue, Robert Bowers, a white man, murdered 11 Jewish people during a Saturday morning Shabbat service. According to *Washington Post* reporters, after surrendering to law enforcement, Bowers explained his actions to a SWAT officer stating: “[t]hey’re committing genocide to my people. I just want to kill Jews.”<sup>606</sup> On October 31, 2018, a federal grand jury indicted Bowers on 44 counts, including federal hate crime charges; and in January 2019, Bowers was charged in superseding indictment with an additional 19 charges, 13 of which are violations under HCPA.<sup>607</sup> According to the indictment, Bowers entered the building armed with multiple firearms and opened fire, killing and injuring members of the congregation and public safety officers. While inside the synagogue, Bowers made statements indicating his desire to “kill Jews.”<sup>608</sup> After the attack, ADL CEO Jonathan Greenblatt released a statement in response: “It is simply unconscionable for Jews to be targeted during worship on a Sabbath morning, and unthinkable that it would happen in the United States of America in this day and age.”<sup>609</sup> Allen Fagin, executive vice president of the Orthodox Union also released a statement expressing sympathy for the victims: “This senseless act of anti-Semitic violence was not only an egregious attack on the Jewish community, but an attack on the very foundations of civil society and our collective democratic values.”<sup>610</sup>

At the Commission’s briefing, Melissa Garlick, Civil Rights National Counsel at the ADL testified that the organization released a new report that examined anti-Semitic speech on social media and found that there were at least 4.2 million anti-Semitic tweets that were shared or re-shared on Twitter over a 12-month period ending in January 2018.<sup>611</sup> While Garlick acknowledges that these are not criminal, they do offer an important “snapshot into the state of hate right now.”<sup>612</sup> For example, the morning before the attack at the Pittsburgh Tree of Life synagogue, Robert Bowers posted on social media: “HIAS likes to bring invaders in that kill our people. I can’t sit by and watch my people get slaughtered. Screw your optics, I’m going in.”<sup>613</sup> Similar to other hate crime

<sup>605</sup> Dakin Andone, Jason Hanna, Joe Sterling, and Paul Murphy, “Hate crime charges filed in Pittsburgh synagogue shooting that left 11 dead,” *CNN*, Oct. 29, 2018, <https://www.cnn.com/2018/10/27/us/pittsburgh-synagogue-active-shooter/index.html>.

<sup>606</sup> Terrence McCoy, “‘Saviors of the white race’: Perpetrators of hate crimes see themselves as heroes, researchers say,” *Washington Post*, Oct. 31, 2018, [https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb\\_story.html?utm\\_term=.c215ad03671e](https://www.washingtonpost.com/local/social-issues/saviors-of-the-white-race-perpetrators-of-hate-crimes-see-themselves-as-heroes-researchers-say/2018/10/31/277a2bdc-daeb-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.c215ad03671e).

<sup>607</sup> See U.S. Dep’t of Justice, “Additional Charges Filed in Tree of Life Synagogue Shooting,” Jan. 29, 2019, <https://www.justice.gov/opa/pr/additional-charges-filed-tree-life-synagogue-shooting>.

<sup>608</sup> U.S. Dep’t of Justice, “Pennsylvania Man Charged with Federal Hate Crimes for Tree of Life Synagogue Shooting,” Oct. 31, 2018, <https://www.justice.gov/opa/pr/pennsylvania-man-charged-federal-hate-crimes-tree-life-synagogue-shooting>.

<sup>609</sup> Anti-Defamation League, “ADL Statement on Synagogue Shooting in Pittsburgh,” Oct. 27, 2018, [https://www.adl.org/news/press-releases/adl-statement-on-synagogue-shooting-in-pittsburgh?fbclid=IwAR2iPkF9USJW0miwjsqwRFO6GrHi8\\_rn9iarlCt5Gw\\_-eTMSHEIGEclt1O4](https://www.adl.org/news/press-releases/adl-statement-on-synagogue-shooting-in-pittsburgh?fbclid=IwAR2iPkF9USJW0miwjsqwRFO6GrHi8_rn9iarlCt5Gw_-eTMSHEIGEclt1O4).

<sup>610</sup> Orthodox Union, “Joint OU and RCA Statement on the Synagogue Shooting in Pittsburgh,” Oct. 27, 2018, <https://www.ou.org/blog/uncategorized/joint-ou-and-rca-statement-on-the-synagogue-shooting-in-pittsburgh/>.

<sup>611</sup> Melissa Garlick, Civil Rights National Counsel at the ADL, *Briefing Transcript* pp.at 106.

<sup>612</sup> *Ibid.*

<sup>613</sup> Kevin Roose, “On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full,” *New York Times*, Oct. 28, 2018, <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

perpetrators, Bowers' attack on the synagogue was driven by white supremacist ideology and his belief that he was "saving" his "people" (i.e., white people) and the white race more broadly.

### *Crimes against Muslim Communities*

Reports of hate crimes and hate incidents have also been increasing against Muslim communities over the past several years in both the U.S. and abroad. "People who study extremism say attacks against immigrants and Muslims have been on the rise as anti-immigrant views have gained traction across the world, including on the political stage."<sup>614</sup> Goleen Samari, Assistant Professor of Population and Family Health at Columbia University, argues that since Muslims are commonly represented as coming from non-white groups, their religious identity becomes linked to their racial identity.<sup>615</sup> Further, due to the racial frame in the U.S. these assumptions about racial or ethnic identity may also mark an individual as an immigrant.<sup>616</sup> This combination of factors may then work in unison to increase the possibility of an individual being the target of a hate crime.

Since 2017, the organization Muslim Advocates, a national legal, advocacy, and educational civil rights organization, has tracked more than 80 incidents of violence and threats against American Muslims and individuals who are perceived to be Muslim.<sup>617</sup> Lena Masri, National Litigation Director and Acting Civil Rights Director at the Council on American-Islamic Relations (CAIR), which is the nation's largest Muslim civil rights and advocacy organization, testified at the Commission's briefing that her organization had recorded a 65 percent increase in anti-Muslim bias incidents and "a staggering 584 percent increase in hate crimes targeting American Muslims from 2014 through 2016."<sup>618</sup> Moreover, in 2017 alone, CAIR tracked 300 anti-Muslim hate crimes and found that "incidents are becoming not only more frequent, but also more violent."<sup>619</sup> A report released in the second quarter (April-June) of 2018 by CAIR indicated that anti-Muslim bias incidents and hate crimes were up by 83 and 21 percent respectively, compared to the first quarter of 2018.<sup>620</sup> The organization received 1,006 reports of potential bias incidents during this time, and were able to confirm that 431 of these reports contained an identifiable element of anti-Muslim bias. CAIR found that victims were most often targeted due to their ethnicity or national origin (33

<sup>614</sup> Gretchen Frazee, "What the New Zealand shootings tell us about the rise in hate crimes," *NPR*, March 15, 2019, <https://www.pbs.org/newshour/world/what-the-new-zealand-shootings-tell-us-about-the-rise-in-hate-crimes>.

<sup>615</sup> Goleen Samari, "Islamophobia and public health in the United States," *American Journal of Public Health*, 2016, vol. 106, 1921.

<sup>616</sup> Craig Considine, "The Racialization of Islam in the United States: Islamophobia, Hate Crimes, and 'Flying while Brown,'" *Religions*, 2017, vol. 8, no. 165; Charu, Chandrasekhar, 2003. "Flying while Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians," *Asian American Legal Journal*, 2003, vol. 10: 215-52; Arthur Chu, "Targeted for 'looking Muslim': The Dawkins/Harris worldview and a twisted new hypocrisy which feeds racism," *Salon*, March 12, 2015, [https://www.salon.com/2015/03/12/targeted\\_for\\_looking\\_muslim\\_the\\_dawkinsharris\\_worldview\\_and\\_a\\_twisted\\_new\\_hypocrisy\\_which\\_feeds\\_racism/](https://www.salon.com/2015/03/12/targeted_for_looking_muslim_the_dawkinsharris_worldview_and_a_twisted_new_hypocrisy_which_feeds_racism/).

<sup>617</sup> Muslim Advocates, Public Comments to U.S. Commission on Civil Rights; *see also*, Muslim Advocates, "Map: Recent Incidents of Anti-Muslim Hate Crimes," <https://www.muslimadvocates.org/map-anti-muslim-hate-crimes/>.

<sup>618</sup> Lena Masri, National Litigation Director and Acting Civil Rights Director at the Council on American-Islamic Relations, *Briefing Transcript* at 168-69.

<sup>619</sup> *Ibid*.

<sup>620</sup> Council on American-Islamic Relations, "Civil Rights Data Quarter Two Update: Anti-Muslim Bias Incidents April-June 2018," [https://www.cair.com/cair\\_report\\_anti\\_muslim\\_bias\\_incidents\\_hate\\_crimes\\_spike\\_in\\_second\\_quarter\\_of\\_2018](https://www.cair.com/cair_report_anti_muslim_bias_incidents_hate_crimes_spike_in_second_quarter_of_2018).

percent), followed by being perceived as a Muslim (17 percent), and wearing a hijab accounted for 16 percent.<sup>621</sup> Of the cases where the ethnicity or national origin were identified, the most frequent targeted ethnicity was “Middle Eastern/North African” (39 percent), followed by “Black/African-American” (17 percent), and “South Asian” (14 percent).<sup>622</sup>

According to the FBI, of the total anti-religious bias offenses reported in 2017, anti-Islamic or anti-Muslim attacks constituted 17 percent.<sup>623</sup> In 2016, reported hate crimes against Muslims increased by 67 percent compared to previous years. There were 381 reported anti-Muslim hate offenses reported by law enforcement in 2016, which is a 20 percent increase from 2015 (301 offenses).<sup>624</sup> This increase makes 2016 the year with the highest number of reported hate crimes against Muslims since 9/11. Moreover, researchers at the Center for the Study of Hate and Extremism found that hate crimes against Muslims increased by 99 percent between 2014 and 2016.<sup>625</sup> However, anti-Muslim incidents reported to the FBI decreased from 307 in 2016 to 273 in 2017.<sup>626</sup>

These increases in reported hate incidents inevitably have a significant effect on Muslim communities. According to a survey conducted by the Pew Research Center, a majority (75 percent) of Muslim American adults stated that there is “a lot” of discrimination against Muslims in the U.S. This view is shared also by a majority of the general public (69 percent).<sup>627</sup> Moreover, half of U.S. Muslim adults say that it has become more difficult to be a Muslim in America in recent years, many attributing this difficulty to an increase in discrimination, racism, and prejudice.<sup>628</sup> Overall, nearly a quarter of Muslim Americans reported that discrimination, racism, or prejudice were the most important problems facing Muslims in the U.S. today.<sup>629</sup> At the Commission’s briefing, Suman Raghunathan, Executive Director at SAALT, testified that South Asian Americans are the second most rapidly growing demographic in the United States. The communities have more than doubled since 2000, now representing about five million people; roughly one in three South Asian Americans are Muslim.<sup>630</sup>

Alongside this growing population, Raghunathan testified to the growing rise of hate crimes towards these communities:

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<sup>621</sup> Council on American-Islamic Relations, “Civil Rights Data Quarter Two Update: Anti-Muslim Bias Incidents April-June 2018,” 3, [https://d3n8a8pro7vhm.cloudfront.net/cairhq/pages/1125/attachments/original/1531335495/07.09.18\\_-\\_Q2\\_Report\\_%281%29.pdf?1531335495](https://d3n8a8pro7vhm.cloudfront.net/cairhq/pages/1125/attachments/original/1531335495/07.09.18_-_Q2_Report_%281%29.pdf?1531335495).

<sup>622</sup> Ibid., 4.

<sup>623</sup> FBI, UCR, Hate Crime Statistics, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>624</sup> FBI, Hate Crime Statistics, 2016, “Incidents, Offenses, Victims, and Known Offenders,” <https://ucr.fbi.gov/hate-crime/2016/tables/table-1>.

<sup>625</sup> Center for the Study of Hate & Extremism, *Report to the Nation: Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference*, California State University, San Bernardino, May 2018.

<sup>626</sup> FBI, UCR, Hate Crime Statistics, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>627</sup> Pew Research Center, “U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream,” July 26, 2017, <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>.

<sup>628</sup> Ibid.

<sup>629</sup> Ibid.

<sup>630</sup> Suman Raghunathan, Executive Director at SAALT, *Briefing Transcript* at 95-96.

This is a critical moment for South Asian, Muslim, Arab, Sikh, Hindu, and Middle Eastern communities as we see our nation become a melting pot of hate, rather than a melting pot of diversity...communities are existing in a moment where we are the targets of hate that are actively spurred by the anti-immigrant, anti-Muslim, anti-people of color policies advanced by the current administration, including the Department of Justice.<sup>631</sup>

Moreover, she stated that:

SAALT documented 302 incidents of hate violence and xenophobic political rhetoric aimed at South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities. This was an over 45 percent increase from the previous year. Eighty-two percent of the incidents that we documented were animated by anti-Muslim sentiment. And perhaps most troubling, one in five of the hate violence perpetrators that we documented explicitly referred to President Trump, a President Trump policy such as the Muslim ban, or a Trump campaign slogan as they were violently assaulting our community members.<sup>632</sup>

According to SAALT, researchers found 302 incidents occurred between November 9, 2016 and November 7, 2017, an over 45 percent increase from the previous year.<sup>633</sup> Of these, 213 incidents were hate incidents and 85 percent were motivated by anti-Muslim sentiment, which is a 64 percent increase from the previous year.<sup>634</sup> SAALT also found that one in five perpetrators of anti-Muslim hate incidents specifically referenced xenophobic political rhetoric, policies, or campaign slogans.<sup>635</sup> Furthermore, it is important to note that targets of hate crimes and bias incidents may be targeted based on their actual or perceived identities. Therefore, not only has the U.S. witnessed an increase in anti-Arab and anti-Muslim hate crimes, but crimes against the Sikh and Hindu communities have also risen sharply in the last year (17 and 100 percent, respectively), which could potentially be due to the perpetrator mistakenly perceiving the victim was Arab or Muslim.<sup>636</sup>

Some examples of these incidents include a customer at a Chicago, Muslim-owned restaurant leaving a “tip” of a dollar bill that read: “‘NO MUSLIM IMMIGRANTS IN THE USA’ in bright, red ink.”<sup>637</sup> Another incident in Washington state included graffiti “threatening anti-Muslim vandalism and slurs” on the Kent-Meridian High School campus, which included threats such as “‘All Muslims dead on 10/30 #MAGA,’ ‘towel heads at KM are gonna [sic] DIE,’ and a Nazi swastika sign, in addition to other slurs.”<sup>638</sup> While these bias incidents may not elevate to the level of a hate crime, these verbal and written threats can be traumatic for victims and their communities.

<sup>631</sup> Ibid., 97.

<sup>632</sup> Suman Raghunathan, Executive Director at SAALT, *Briefing Transcript* at 99.

<sup>633</sup> South Asian Americans Leading Together, *Communities on Fire*, Jan. 2018, 3, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>634</sup> Ibid.

<sup>635</sup> Ibid.

<sup>636</sup> South Asian Americans Leading Together, *Communities on Fire*, Jan. 2018, 4, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>. Note: as mentioned previously, 2015 was the first year that the FBI reported incidents against Arabs, Sikhs, and Hindus, which continues to remain one of the reporting barriers. See FBI, UCR, Hate Crimes Statistics.

<sup>637</sup> South Asian Americans Leading Together, *Communities on Fire*, Jan. 2018, 10, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>638</sup> Ibid., 11.

These messages are symbolic and not only send a message of hate, but also one of exclusion and belonging to the broader society.<sup>639</sup> Moreover, although there are certainly First Amendment considerations, such messages can be particularly problematic if they rise to the level of threatening harassment or intimidation, or create a hostile and discriminatory environment in educational settings.<sup>640</sup>

Additionally, some recent incidents targeting Muslim communities were found to be hate crimes. For example, in July 2018, a federal jury returned guilty verdicts on all counts against Marq Vincent Perez, for the hate crime of burning down the Victoria Islamic Center in Texas on January 28, 2017, and for the use of fire to commit a federal felony.<sup>641</sup> Perez was sentenced to 24 years in prison in October 2018.<sup>642</sup> Then-Acting Assistant Attorney General John Gore stated in response that: “Everyone in this country has the right to worship freely without fear of violence. This defendant terrorized the Muslim community in Victoria, and the Department [DOJ] partnered with federal, state, and local agencies to ensure that the person responsible for this heinous hate crime would be found and prosecuted.”<sup>643</sup>

According to DOJ, evidence presented at the trial described how Perez broke into the mosque and used a lighter to set papers on fire, and how excited he was upon seeing it in flames moments later.<sup>644</sup> A witness for the prosecution testified that Perez stated that he burned down the mosque because he wanted to “send a message” to the Muslim community, and other witnesses testified that Perez had often expressed anti-Muslim animus and used derogatory language directed at Muslims.<sup>645</sup> Further, after Perez learned that the community had raised money to rebuild the mosque, he told a witness that he would burn it down again if it were rebuilt.<sup>646</sup>

### *Crimes against Sikh Communities*

Reports of crimes against other faith-based communities have also been increasing,<sup>647</sup> and communities like the Sikh community are often the target of anti-immigrant and/or anti-Muslim sentiment despite the fact that they may not be Muslim or immigrants.<sup>648</sup> For instance, in March

<sup>639</sup> See e.g., *Ibid.*, 13.

<sup>640</sup> See *supra* notes 119-120 (discussing types of hate incidents that can and cannot be legally sanctioned).

<sup>641</sup> U.S. Dep’t of Justice, “Jury Convicts Texas Man of Hate Crime in the Burning of Victoria, Texas, Mosque,” July 16, 2018, <https://www.justice.gov/opa/pr/jury-convicts-texas-man-hate-crime-burning-victoria-texas-mosque>.

<sup>642</sup> U.S. Dep’t of Justice, “Texas Man Sentenced to Almost 25 Years for Hate Crime in Burning Down Mosque in Victoria, Texas,” Oct. 17, 2018, <https://www.justice.gov/opa/pr/texas-man-sentenced-almost-25-years-hate-crime-burning-down-mosque-victoria-texas>.

<sup>643</sup> *Ibid.*

<sup>644</sup> *Ibid.*

<sup>645</sup> U.S. Dep’t of Justice, U.S. Attorney’s Office, Southern District of Texas, “Victoria Man Gets Significant Sentence for Hate Crime in Burning of Local Mosque,” Oct. 17, 2018, <https://www.justice.gov/usao-sdtx/pr/victoria-man-gets-significant-sentence-hate-crime-burning-local-mosque>.

<sup>646</sup> *Ibid.*

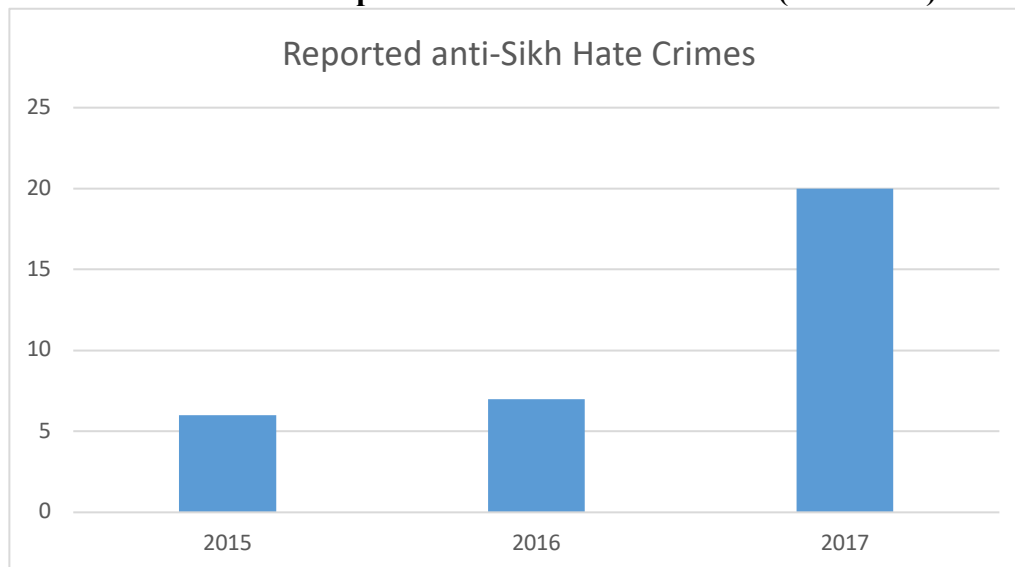
<sup>647</sup> See generally, FBI UCR Hate Crime Statistics, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>648</sup> Steven Yaccino, Michael Schwirtz, & Marc Santora, “Gunman Kills 6 at a Sikh Temple Near Milwaukee,” *New York Times*, Aug. 5, 2012, <https://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html>; Sarah Parvini, “Being Sikh in Trump’s America: ‘You have to go out of your way to prove you’re

2017, the FBI opened an investigation into the shooting of a Kent, Washington Sikh resident who claims to have been shot by a man who ran up his driveway and told him to “go back to your own country.”<sup>649</sup> Jasmit Singh, leader of the Sikh community in Renton, Washington said that in the Puget Sound region, hate crimes and bias-motivated incidents targeting Sikh men in particular have been on the rise. Singh told reporters that this rise is “a kind of prejudice, a kind of xenophobia that is nothing that we’ve seen in the recent past.”<sup>650</sup>

The FBI officially began collecting data on anti-Sikh bias in 2015, but as with other targeted communities, many feel like reported cases under-report the increase of violence against these communities. Some advocacy organizations state that they use statistics on anti-Muslim hate crimes to determine if anti-Sikh sentiment is on the rise.<sup>651</sup> According to UCR data collected by the FBI, reported hate crimes in 2017 against the Sikh community have increased by 233 percent compared to reported numbers in 2015 (20 incidents and 6 incidents, respectively) (see chart 11 below).

**Chart 11: Numbers of Reported Anti-Sikh Hate Crimes (2015-2017)**



Source: FBI, UCR Hate Crime Statistics. Data compiled and chart created by Commission staff

Another hate crime which brought national attention to the violence faced by this community occurred in 2012 in Oak Creek, Wisconsin where a gunman opened fire on a Sikh temple during

not a threat,” *Los Angeles Times*, June 11, 2017, <https://www.latimes.com/local/california/la-me-trump-sikhs-20170509-htmstory.html>.

<sup>649</sup> Mike Carter and Evan Bush, “FBI opens federal civil-rights investigation into shooting of Sikh man in Kent,” *The Seattle Times*, March 6, 2017, <https://www.seattletimes.com/seattle-news/crime/sikh-man-shot-in-kent-recovering-at-home-wants-to-keep-to-himself/>.

<sup>650</sup> Matt Day, “Sikh man in Kent says he was told, ‘Go back to your own country,’ before being shot,” *The Seattle Times*, March 4, 2017, <https://www.seattletimes.com/seattle-news/crime/kent-shooting-victim-says-he-was-told-go-back-to-your-own-country/>.

<sup>651</sup> Sarah Parvini, “Being Sikh in Trump’s America: ‘You have to go out of your way to prove you’re not a threat,’” *Los Angeles Times*, June 11, 2017, <https://www.latimes.com/local/california/la-me-trump-sikhs-20170509-htmstory.html>.



services, killing six people and wounding three others.<sup>652</sup> The attack in Oak Creek prompted the Wisconsin Advisory Committee to the Commission to examine the incidence and impact of hate crimes in the state of Wisconsin; the Committee also found that the attack prompted a Senate hearing on domestic extremism and a “national conversation on the rise and impact of hate crimes, hate groups, and the country’s legislative responses.”<sup>653</sup>

The gunman was later identified as Wade Michael Page, a noted white supremacist who took his own life after being shot by police, so no official hate crime charges can be brought.<sup>654</sup> Members of the community, however, saw this attack as a clear example of a hate crime. Manjit Singh told reporters that “everyone here is thinking this is a hate crime for sure. People think we are Muslim.”<sup>655</sup> The rise in violence against the Sikh communities across the nation is often associated with anti-Muslim bias, such as the spikes of violence against these communities following the September 11 attacks. Ravi Chawla, a resident in the Wisconsin area asserts that “most people are so ignorant they don’t know the difference between religions. Just because they see the turban they think you’re Taliban.”<sup>656</sup> Many followers of Sikhism or Gurmat choose to not cut their hair or beards and often wear turbans, which can lead perpetrators to target them for bias and hate crimes.<sup>657</sup> Executive Director of SAALT Suman Raghunathan explains that the “overwhelming motivation for these attacks or intimidation are part and parcel of a growing wave of hostility based on perception that Sikhs are Muslim.”<sup>658</sup>

In another attack in Richmond, California in 2016, Maan Singh Khalsa was attacked by two men who ran up to Khalsa’s car and punched his face, yelled profanities, cut off some of his hair, and stabbed him in his finger as he tried to shield himself, causing him to have to later amputate it.<sup>659</sup> In court documents, Khalsa explained that “By cutting my hair, the attackers did not just attack my body; they attacked my dignity, my spirit, my faith, my religion and my entire community.”<sup>660</sup> His attackers were each sentenced to three years in prison after the attack.<sup>661</sup> After the sentencing, Khalsa stated that:

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<sup>652</sup> Steven Yaccino, Michael Schwartz, & Marc Santora, “Gunman Kills 6 at a Sikh Temple Near Milwaukee,” *New York Times*, Aug. 5, 2012, <https://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html>.

<sup>653</sup> Wisconsin Advisory Committee to the U.S. Commission on Civil Rights, *Hate Crime and Civil Rights in Wisconsin*, June 2017, at 3-4, <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf>.

<sup>654</sup> CNN wire staff, “Police identify Army veteran as Wisconsin temple shooting gunman,” *CNN*, Aug. 7, 2012, <https://www.cnn.com/2012/08/06/us/wisconsin-temple-shooting/index.html>; Molly Hennessy-Fiske, “Before suicide, Sikh temple gunman was felled by ‘amazing shot,’” *Los Angeles Times*, Aug. 8, 2012, <https://www.latimes.com/nation/la-xpm-2012-aug-08-la-na-nn-sikh-temple-officer-shot-suspect-20120808-story.html>.

<sup>655</sup> Steven Yaccino, Michael Schwartz, & Marc Santora, “Gunman Kills 6 at a Sikh Temple Near Milwaukee,” *New York Times*, Aug. 5, 2012, <https://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html>.

<sup>656</sup> *Ibid.*

<sup>657</sup> *Ibid.*

<sup>658</sup> Sarah Parvini, “Being Sikh in Trump’s America: ‘You have to go out of your way to prove you’re not a threat,’” *Los Angeles Times*, June 11, 2017, <https://www.latimes.com/local/california/la-me-trump-sikhs-20170509.htmlstory.html>.

<sup>659</sup> *Ibid.*

<sup>660</sup> *Ibid.*

<sup>661</sup> Sikh Coalition, “Justice for Maan Singh Khalsa,” Sikh Coalition, n.d., <https://www.sikhcoalition.org/our-work/legal-and-policy/maan-singh-khalsa/>

It will take me many years, maybe the rest of my life to heal from this attack. But the recognition of the attack as a hate crime – as harm to my dignity and my entire community – is the first step in the process.<sup>662</sup>

The Sikh Coalition who provided legal and advocacy support to Khalsa after the attack, issued a response after the sentencing stating that: “Hate crime charges are not about enforcing a harsher criminal penalty, but rather confronting the impact that hate has on Sikhs and other communities in America.”<sup>663</sup> Pawanpreet Kaur, senior staff attorney for the Sikh Coalition explained the importance of the ruling and that:

[a]cknowledging that this bias-based attack is a hate crime under state law both recognizes the deep dignitary harm to Mr. Khalsa, and ensures that we, as a society, confront the problems of Islamophobia, racism and xenophobia that make the Sikh community a target for violence.<sup>664</sup>

Rajdeep Singh Jolly, interim managing director of programs at the Sikh Coalition points to these attacks and explains that “[a]t the moment, the risk of anti-Sikh hate crime is high. Any time there is a flare-up in anti-immigrant rhetoric, we see an uptick in even an apprehension about hate crimes.”<sup>665</sup> However, Valarie Kaur, a Sikh civil rights advocate, argues that while these attacks against Sikhs may be fueled by anti-Muslim bias and ignorance about the differences between the two communities, the xenophobic violence targets “all of our communities at once” and ultimately it does not matter if it is an attack against Muslims or Sikhs.<sup>666</sup> Kaur maintains that “it seems to make very little difference if the brown, bearded man with the turban calls himself a Sikh and not a Muslim. They read us as un-American.”<sup>667</sup>

### Sexual Orientation and Gender Identity<sup>668</sup> Bias Crimes

During the early morning of June 2016, Omar Mateen opened fired upon patrons at Pulse, a gay nightclub in Orlando, Florida, killing 49 people and wounding over 50 others. At the time, this

<sup>662</sup> Ibid.

<sup>663</sup> Ibid.

<sup>664</sup> Sikh Coalition, “Attackers Found Guilty in CA Hate Crime,” Sikh Coalition, May 18, 2017, <https://www.sikhcoalition.org/blog/2017/attackers-found-guilty-ca-hate-crime/>.

<sup>665</sup> Sarah Parvini, “Being Sikh in Trump’s America: ‘You have to go out of your way to prove you’re not a threat,’” *Los Angeles Times*, June 11, 2017, <https://www.latimes.com/local/california/la-me-trump-sikhs-20170509-htmlstory.html>.

<sup>666</sup> Ibid.

<sup>667</sup> Ibid.

<sup>668</sup> Gender identity is understood as an individual’s understanding of themselves as either female, male, a combination of these genders, or neither. The concept refers to how an individual perceives themselves, what they call themselves, and how they wish others to see them and call them. One’s gender identity can be the same (i.e., cisgender) or different from their assigned sex at birth (e.g., transgender). *See generally*, Candace West and Don Zimmerman, “Doing Gender,” *Gender & Society*, Vol. 1, No. 2, June 1987, pp. 125-151, <http://www.csun.edu/~snk1966/West%20and%20Zimmerman%20Doing%20Gender.pdf>; Kristen Schilt and Laural Westbrook, “Doing Gender, Doing Heteronormativity: ‘Gender Normals,’ Transgender People, and the Social Maintenance of Heterosexuality,” *Gender & Society*, Vol 23, No. 4, Aug. 2009, [https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1002&context=soc\\_articles](https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1002&context=soc_articles); B. Aultman, “Cisgender,” *TSQ: Transgender Studies Quarterly*, Vol. 1, No. 1-2, at 62.

attack was the deadliest mass shooting in the United States, and still remains the deadliest attack against LGBT communities.<sup>669</sup> Once the authorities managed to get into the club, Mateen shot and killed himself. President Barack Obama released the following statement expressing sympathy for the victims and the broader community:

For so many people here who are lesbian, gay, bisexual, transgender, the Pulse Nightclub has always been a safe haven, a place to sing and dance, and most importantly, be who you truly are – including for so many people whose families are originally from Puerto Rico... This was an attack on the LGBT community. And hatred towards people because of sexual orientation, regardless of where it comes from, is a betrayal of what's best in us.<sup>670</sup>

Following this attack, there were many debates about whether the attack was a hate crime against these communities or an act of domestic terrorism that happened to have LGBT victims, but did not necessarily target these communities.<sup>671</sup> Frederick Lawrence, senior research scholar at Yale Law School, argues that while there may not be a definitive legal determination about whether this massacre was in fact a hate crime, it is important to designate it as one. He argues that how a crime

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<sup>669</sup> Ralph Ellis, Ashley Fantz, Faith Karimi, and Elliott McLaughlin, “Orlando Shooting: 49 killed, shooter pledged ISIS allegiance,” *CNN*, June 13, 2016, <https://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html>; Kayla Cockrel, “The Lives Lost or Changed Forever in the Pulse Nightclub Attack,” *New York Times*, June 12, 2018, <https://www.nytimes.com/2018/06/12/us/pulse-nightclub-shooting-anniversary.html>. Note: The Las Vegas shooting on October 1, 2017 is now the deadliest mass shooting in U.S. history. While not designated a hate crime, it is widely believed to be an act of domestic terrorism, where 58 people died and more than 800 were injured when Stephen Paddock, the alleged gunman opened fire at a country music festival in Las Vegas, Nevada. See e.g., Vanessa Romo, “Las Vegas Shooting Investigation Closed. No Motive Found,” *NPR*, Aug. 3, 2018, <https://www.npr.org/2018/08/03/635507299/las-vegas-shooting-investigation-closed-no-motive-found>. Kieran Corcoran and Sinéad Baker, “It has been one year since the Las Vegas shooting rocked the US. Here’s exactly how the nation’s worst modern gun massacre unfolded,” *Business Insider*, Oct. 1, 2018, <https://www.businessinsider.com/timeline-shows-exactly-how-the-las-vegas-massacre-unfolded-2018-9>.

<sup>670</sup> Melanie Garunay, “President Obama on the Tragic Shooting in Orlando,” *The White House Blog*, June 16, 2016, <https://obamawhitehouse.archives.gov/blog/2016/06/12/president-obama-tragic-shooting-orlando>. The Commission also released a unanimous statement in support to the victims and community of the Pulse mass shooting, stating that:

This tragedy reminds us that we are united as a country in protecting each other and in protecting the collective values of America. We are a diverse nation, and when one is hurt, all of us are hurt and grieve with the families of the victims . . . As an act of hate, we must stand against it and stand with the victims of this crime whose civil rights have been violated and whose lives have been shattered and lost.

See U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights by a Unanimous Vote Joins the Nation in Mourning the Horrific Loss of Life in Orlando, Florida,” June 14, 2016, [https://www.usccr.gov/press/2016/PR\\_USCCRJoinstheNationinMourningtheLossofVictimsinOrlandoFlorida.pdf](https://www.usccr.gov/press/2016/PR_USCCRJoinstheNationinMourningtheLossofVictimsinOrlandoFlorida.pdf).

<sup>671</sup> Jane Coaston, “New evidence shows the Pulse nightclub shooting wasn’t about anti-LGBTQ hate,” *Vox*, April 5, 2018, <https://www.vox.com/policy-and-politics/2018/4/5/17202026/pulse-shooting-lgbtq-trump-terror-hate>; Tim Fitzsimons, “What really happened that night at Pulse,” *NBC News*, June 12, 2018, <https://www.nbcnews.com/feature/nbc-out/what-really-happened-night-pulse-n882571>; Christopher Stults, Sandra Kupprat, Kristen Krause, Farzana Kapadia, and Perry Halkitis, “Perceptions of Safety Among LGBTQ People Following the 2016 Pulse Nightclub Shooting,” *Psychology of Sexual Orientation and Gender Diversity*, vol. 4, no. 3, 251-256.

is described is important because of the “expressive quality of the criminal law.”<sup>672</sup> While the Orlando mass shooting was an act of domestic terror, since Mateen pledged allegiance to an active terrorist organization, the massacre can also be understood as a hate crime due to the effects of these crimes on targeted communities.<sup>673</sup> Professor Lawrence explains that:

On Sunday morning, the LGBTQ community felt not only threatened but directly targeted. This devastating psychological impact on a minority group is the particularly dangerous and pernicious effect of bias motivated crimes... Not only does a hate crime have an overwhelming personal effect on an individual victim, it inflicts an intended harm on other members of the target community who experience psychological trauma vicariously. . . . Failing to label and understand bias-motivated crimes as a thing apart fails to validate the specific and deep harm caused to the target minority community. It renders the harm legally invisible, thus invalidating the pain of the community. It thereby inflicts a fresh wound on the victim community, this time coming from their fellow citizens. It is precisely because of crimes such as the one that occurred at Pulse that hate crime legislation was ultimately adopted in most states over the past three decades or so, and on the federal level by Congress when it passed the Matthew Shepard Hate Crimes Prevention Act of 2009... We must see this as a moment to knit the fabric of our society more closely together and to commit ourselves to that which connects us, rather than that which divides us. Not all acts of terrorism are hate crimes. The mass murder at Pulse was both.<sup>674</sup>

According to the Human Rights Campaign (HRC), more than 50 percent of the LGBT population fears that they will be the victim of a hate crime; and of those polled, 20 percent of gay men and 27 percent of lesbians reported being “extremely concerned” about being a victim of a hate crime.<sup>675</sup> Comparatively, fewer than 10 percent of the general population stated that they frequently worry about hate violence, and just over half stated that they “never worry” about being a victim of hate violence. Moreover, analyzing the trends of hate crime data, these fears are not unfounded.<sup>676</sup> In 2017, of the 7,106 single-bias incidents reported by law enforcement, 1,130 were motivated by sexual orientation bias, which is a five percent increase from 2016. (see chart 12).

### Chart 12: Hate Crime Incidents by Sexual Orientation Bias (2009-17)

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<sup>672</sup> Frederick Lawrence, “Why calling the Orlando shooting a hate crime matters: analysis,” *MSNBC*, June 15, 2016, <http://www.msnbc.com/msnbc/mass-shooting-orlando-represents-both-terrorism-and-hate-crime-analysis>. By “expressive quality” Lawrence argues that:

When we label something as illegal, we set the bounds of what is legal. And when we describe the harm done by a crime, and why some crimes are worse than others, we articulate our hierarchy of values. Assault is punished more severely than theft because we value bodily integrity more than physical objects. Murder is the most serious crime of all precisely because of the value we place on human life.

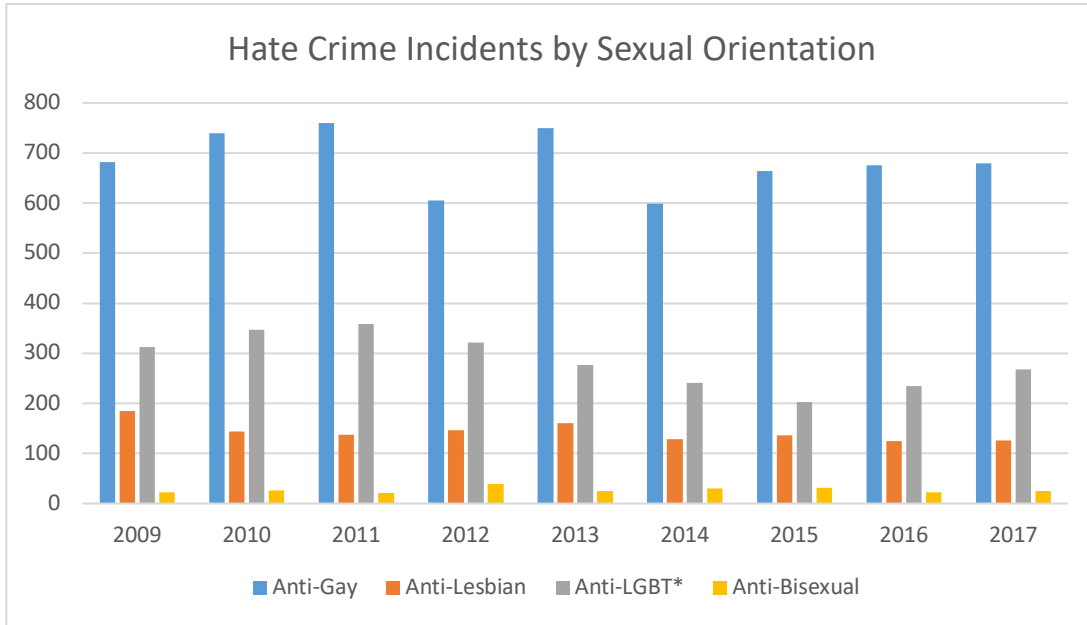
Ibid.

<sup>673</sup> Ibid.

<sup>674</sup> Ibid.

<sup>675</sup> Michelle Marzullo and Alyn Libman, “Hate Crimes and Violence against Lesbian, Gay, Bisexual and Transgender People,” Human Rights Campaign, May 2009, 10, [http://assets2.hrc.org/files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople\\_2009.pdf](http://assets2.hrc.org/files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople_2009.pdf).

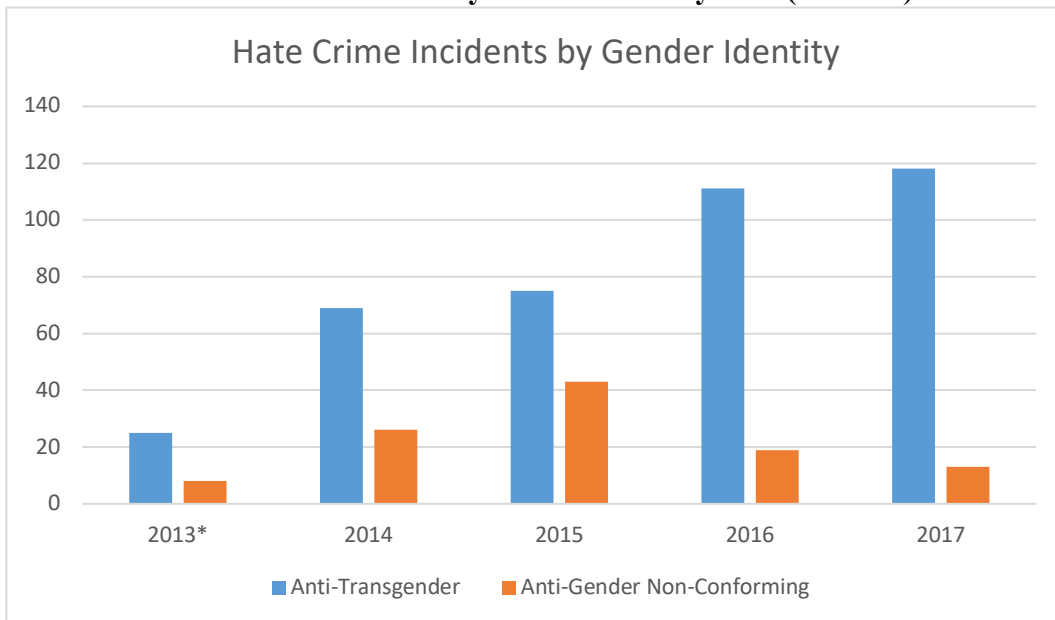
<sup>676</sup> Ibid.



Source: FBI, UCR; data compiled and chart created by Commission staff  
 \*denotes “mixed group” in FBI reporting

In 2017, there were also 119 reported hate crime incidents motivated by gender identity bias that occurred nationwide.<sup>677</sup> Of these 119 incidents based on gender identity, 13 crimes targeted gender non-conforming persons, which is a 31 percent decrease from the previous year. Of those 119 incidents, 106 targeted transgender people, which is about a one percent increase from 2016 (see chart 13).<sup>678</sup>

**Chart 13: Hate Crime Incidents by Gender Identity Bias (2009-17)**



<sup>677</sup> FBI, UCR, Hate Crime Statistics, 2017.

<sup>678</sup> Ibid.

Source: FBI, UCR; data compiled and chart created by Commission staff  
 \*2013 was the first year that the FBI collected data on gender identity

In 2017, the FBI also reported 1,303 hate crime offenses that were motivated by sexual orientation bias. Of these offenses, approximately 58 percent were based on anti-gay bias; about 25 percent were based on LGBT bias (as a group); approximately 12 percent were based on anti-lesbian bias; 2 percent were based on anti-bisexual bias; and about 3 percent were the result of anti-heterosexual bias.<sup>679</sup> In terms of gender identity bias, in 2017, the FBI recorded 131 offenses and of these, 118 were offenses against transgender persons and 13 were offenses against gender non-conforming persons.<sup>680</sup>

The HRC and the Trans People of Color Coalition have recorded that at least 102 transgender people have been victims of fatal violence since January 2013.<sup>681</sup> Between 2009 and 2015, the percentage of hate crimes these groups suspected to be based on anti-gender identity bias nearly doubled from 16 percent in 2009 to 29 percent in 2015.<sup>682</sup> According to the NCVS, during 2011-15, approximately 1 in 5 respondents believed that they were targeted due to sexual orientation bias (22 percent) and about a third of victims reported that they believe they were targeted based on their gender identity (29 percent).<sup>683</sup> In 2017, the National Coalition of Anti-Violence Programs documented that there were 28 transgender and gender non-conforming people who were the victims of hate violence in the United States. 2017 was the deadliest year on record for transgender people, and showing the impact of the intersectional nature of discrimination,<sup>684</sup> a majority of the victims were black transgender women.<sup>685</sup> Isa Noyola, deputy director of the Transgender Law Center asserts that

the same stigma and the same sort of fear that is trying to be embedded in our society are the driving factors of the extreme forms of violence that are taking place. A lot of these

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<sup>679</sup> FBI, Hate Crime Statistics, 2017, “Incidents, Offenses, Victims, and Known Offenders,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>. According to a study conducted by ProPublica, they found that many of these cases reported by law enforcement to the FBI were not actually anti-heterosexual bias crimes but were mislabeled by the investigating police officer. The investigative reporters sent Freedom of Information Act (FOIA) requests to every police department that reported a heterosexual bias crime in 2016 and to every department that reported two or more anti-heterosexual bias since 2010. They received 58 cases and none of these cases were incidents of heterosexual bias. <https://www.propublica.org/article/police-are-mislabeling-crimes-as-anti-heterosexual-hate-crimes#comment-3902383712>.

<sup>680</sup> FBI, Hate Crime Statistics, 2017, “Incidents, Offenses, Victims, and Known Offenders,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>681</sup> Human Rights Campaign and Trans People of Color Coalition, *A Time to Act*, 2017, [http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf).

<sup>682</sup> Lynn Langton, Briefing Materials to the U.S. Commission on Civil Rights, May 11, 2018.

<sup>683</sup> Ibid.

<sup>684</sup> Using the intersectional model of analysis, this statistic reflects discrimination based on transgender status combined with race and gender discrimination against women, as the former two identities combine with and heighten the discrimination against transgender persons in general. *See supra* notes 531-33 (for an explanation and examples of the intersectional model).

<sup>685</sup> Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, *Briefing Transcript*, p. 174.

cases are happening in regions where there are a lack of protections and there's a lack of understanding and infrastructure for trans folks to live their daily lives.<sup>686</sup>

In 2016, the Los Angeles County Commission on Human Relations reported that in Los Angeles alone, there were a reported 31 hate crimes against transgender and gender non-confirming people, which was a 72 percent increase from the previous year.<sup>687</sup> Taking into account intersectionality shows that hate crimes against transgender Latinas accounted for 20 of the 31 incidents that were motivated by gender identity bias that year.<sup>688</sup> Further, the Los Angeles Commission found that 97 percent of these incidents were violent crimes (e.g., simple or aggravated assaults) which is a higher percentage than for any other group that the organization tracks, including bias against cisgender Latinx persons.<sup>689</sup> Similarly, Brian Levin, Director at the Center for the Study of Hate and Extremism found that in 2017, there were 23 hate crimes that targeted transgender people in Los Angeles alone. And he noted that these crimes are not only on the rise across the nation, but are also often “extraordinarily violent.”<sup>690</sup>

For instance, in January 2018, Victoria Ramos Gutierrez, who was a transgender woman from Honduras, died after she was stabbed several times in her home in Los Angeles. Her home was then set on fire, which left her body unrecognizable.<sup>691</sup> The accused attacker, Kevyn Ramirez pleaded not guilty to first degree murder and two counts of arson, and awaits trial (at the timing of this report).<sup>692</sup> Robin Toma, executive director of the Los Angeles Commission on Human Relations asserts that

there is every reason to believe that it was hate motivated...stabbing someone, obviously, is not good, but the fact that he went the extra mile to make sure that there was no way for us to recognize her – it was very intentional. When we walk out into the streets, violence follows us everywhere we go – whether it's because we're Latinas, whether it's because we're immigrants, whether it's because we're trans, or maybe because we're all of those things.<sup>693</sup>

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<sup>686</sup> Maggie Astor, “Violence Against Transgender People Is on the Rise, Advocates Say,” *The New York Times*, Nov. 9, 2017, <https://www.nytimes.com/2017/11/09/us/transgender-women-killed.html>.

<sup>687</sup> Los Angeles County Commission on Human Relations, “2016 Hate Crime Report,” <http://hrc.lacounty.gov/wp-content/uploads/2019/08/2016-Annual-Report-of-Hate-Crime-in-Los-Angeles-County.pdf>.

<sup>688</sup> Ibid.

<sup>689</sup> Ibid.

<sup>690</sup> Rachel Janik, “Hate crimes are up in major U.S. cities for the fourth year in a row, study says,” Southern Poverty Law Center, July 5, 2018, <https://www.splcenter.org/hatewatch/2018/07/05/hate-crimes-are-major-us-cities-fourth-year-row-study-says>; Brian Levin and John David Reitzel, “Report to the Nation: Hate Crimes Rise in U.S. Cities and Counties in time of Division & Foreign Interference,” Center for the Study of Hate & Extremism, May 2018, [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf).

<sup>691</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

Toma is also a member of the California Advisory Committee to the Commission.

<sup>692</sup> Ibid.

<sup>693</sup> Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

A report released by the HRC and the Trans People of Color Coalition found that “at least”<sup>694</sup> 25 transgender people have been the target of hate crimes since the beginning of 2017. They also found that 84 percent were people of color, 80 percent were women, and more than three out of four were under the age of 35.<sup>695</sup> According to the National Center for Health Statistics, for the years 2010-2014, the annual murder rate for Americans between the ages of 15 and 34 is approximately one in 12,000. But for young, black transgender women in that same age cohort, the rate was one in 2,600.<sup>696</sup> This means that “if in 2015 all Americans had the same risk factor of murder as young, black trans women there would have been 120,087 murders instead of 15,696 murders.”<sup>697</sup> And crime experts agree that these numbers are underreported.<sup>698</sup> The full extent of hate crimes against transgender persons is impossible to determine, but according to LGBT advocacy organizations, each of the past three years have become the deadliest on record for the transgender community.<sup>699</sup>

Marshall Wong, Senior Intergroup Relations Specialist with the Los Angeles Commission on Human Relations, argues that these statistics are likely much higher, since transgender Latinas in particular are more reluctant to report an attack to the authorities than are other transgender people. Transgender Latinas state that police rarely take offenses against their community seriously and often they are blamed for their own victimization.<sup>700</sup> Furthermore, data can also be incomplete or unreliable because victims may not be identified as transgender or may be misgendered<sup>701</sup> in the media, by authorities, or due to family members’ refusal to acknowledge their gender identity.<sup>702</sup>

<sup>694</sup> The report states that they use the phrase “at least” because the stories detailed in the report “very likely undercount the number of transgender people who were killed in the United States” in 2017. See <https://www.hrc.org/blog/new-fbi-data-shows-increased-reported-incidents-of-anti-lgbtq-hate-crimes-i> at 4.

<sup>695</sup> Human Rights Campaign and Trans People of Color Coalition, *A Time to Act*, 2017,

[http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf).

<sup>696</sup> Meredith Talusan, “Unerased: Counting Transgender Lives,” *Mic*, (last updated December 2016),

<https://mic.com/unerased>.

<sup>697</sup> *Ibid*.

<sup>698</sup> See e.g., *Ibid*.; Brian Levin and John David Reitzel, “Report to the Nation: Hate Crimes Rise in U.S. Cities and Counties in time of Division & Foreign Interference,” Center for the Study of Hate & Extremism, May 2018, [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf); Abigail Hauslohner, “Hate crimes reports are soaring – but we still don’t know how many people are victimized,” *Washington Post*, Nov. 17, 2017, [https://www.washingtonpost.com/news/post-nation/wp/2017/11/17/hate-crimes-are-soaring-but-we-still-dont-know-how-many-people-are-victimized/?utm\\_term=.5315f61f0f20](https://www.washingtonpost.com/news/post-nation/wp/2017/11/17/hate-crimes-are-soaring-but-we-still-dont-know-how-many-people-are-victimized/?utm_term=.5315f61f0f20); Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Dep’t of Justice, June 2017, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>699</sup> Human Rights Campaign and Trans People of Color Coalition, *A Time to Act*, 2017, [http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf); Emily Waters, Larissa Pham, and Chelsea Convery, “A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017,” National Coalition of Anti-Violence Programs, 2018, <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>700</sup> Brenan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News 21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>.

<sup>701</sup> Misgendering is a term that refers to when a transgender or gender non-conforming person is referred to by a pronoun that does not match the person’s correct gender identity.

<sup>702</sup> Human Rights Campaign and Trans People of Color Coalition, *A Time to Act*, 2017, 3, [http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf).



Moreover, they may have additional fear of law enforcement due to experiences in their country of origin.<sup>703</sup>

According to the National Coalition of Anti-Violence Programs (NCAVP) in 2017, the organization recorded 52 anti-LGBTQ homicides, which is an 86 percent increase in single incident reports from 2016.<sup>704</sup> This makes 2017 the deadliest year for LGBTQ individuals reported in the organization's 20-year history of tracking hate crime data.<sup>705</sup> Of these incidents, 27 homicides targeted transgender and gender non-conforming people, compared to 19 in 2016; and 22 of these homicide victims were transgender women of color.<sup>706</sup> Anti-LGBTQ homicides have also increased for cisgender<sup>707</sup> queer, bisexual, and gay men. The NCAVP recorded 20 sexual orientation bias homicides in 2017, compared to 4 reports in 2016, and a majority were men of color (55 percent).<sup>708</sup>

At the Commission's briefing, David Stacy, Government Affairs Director with the Human Rights Campaign testified to the horrific incidents that have occurred against LGBT communities in 2017.

Ally Steinfeld was a 17-year-old transgender girl living in rural Missouri. Her lifeless body was found partially burned with stab wounds to her genitals and with her eyes gouged out. Mercedes Williamson was also only 17 when she was stabbed multiple times and beaten to death by a hammer while trying to flee. Her attacker admitted to killing her because she was transgender. This extreme violence is often seen with hate crimes.

There are also survivors who must live with the emotional and physical scars like Anthony Gooden and Marquez Tolbert. Anthony, who had recently come out as gay to his family, was sleeping next to Marquez after working a long day. A family friend staying at the house saw them sleeping together, boiled a pot of water, poured the scalding water on the couple while they slept, screaming "get out of my house with all that gay." Anthony was placed in a medically-induced coma for weeks; over 60 percent of his body burned. Although we know the reported incidents of hate are on the rise, we also know that the statistics are drastically under-counted.<sup>709</sup>

<sup>703</sup> See, e.g., Public Comments of Laura Rivera, Southern Poverty Law Center and Manoj Govindaia, Director of Litigation at the Refugee and Immigrant Center for Education and Legal Services, U.S. Comm'n on Civil Rights Public Comment Session on Immigration Detention (April 12, 2019). Note: Chair Lhamon is recused from the Commission's work regarding the conditions of immigration detention in the United States.

<sup>704</sup> Emily Waters, Larissa Pham, and Chelsea Convery, "A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017," National Coalition of Anti-Violence Programs, 2018, 9, <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>705</sup> Ibid., 5.

<sup>706</sup> Ibid., 9.

<sup>707</sup> Cisgender refers to those individuals whose sex assigned at birth corresponds to their gender identity. See generally, B. Aultman, "Cisgender," *TSQ: Transgender Studies Quarterly*, Vol. 1, No. 1-2, at 62; Kristen Schilt and Laural Westbrook, "Doing Gender, Doing Heteronormativity: 'Gender Normals,' Transgender People, and the Social Maintenance of Heterosexuality," *Gender & Society*, Vol 23, No. 4, Aug. 2009, [https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1002&context=soc\\_articles](https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1002&context=soc_articles).

<sup>708</sup> Emily Waters, Larissa Pham, and Chelsea Convery, "A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017," National Coalition of Anti-Violence Programs, 2018, at 10, <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>709</sup> David Stacy, Government Affairs Director with the Human Rights Campaign, *Briefing Transcript* at 326-28.

While the details of Steinfeld’s murder are extremely violent and ultimately found to be premeditated, the crime is not being designated as a hate crime. According to police statements, Andrew Vrba, 18, admitted to stabbing Steinfeld in the living room of a friend’s residence. Two other friends, 24-year-old Briana Calderas, and 18-year-old Isis Schauer were also present and helped burn Steinfeld’s body; all three were charged with first-degree murder, abandonment of a corpse and armed criminal action. A fourth suspect, 25-year-old James Grigsby, also faced lesser charges for helping the others hide Steinfeld’s body. Director of the Transgender Rights Project for Lambda Legal Dru Levasseur, argued that “[t]here couldn’t be a more vivid example of someone being targeted because of their gender identity than being stabbed in their genitals.”<sup>710</sup> However, none of the alleged perpetrators were charged with a hate crime.<sup>711</sup>

The prosecutor for the case, Parke Stevens Jr., stated that he was not going to pursue hate crime charges because a first-degree murder charge carries the “highest and most severe form of punishment available in the State of Missouri”<sup>712</sup> and that “murder in the first-degree is all that matters [and] [t]hat is a hate crime in itself.”<sup>713</sup> However, as of January 2019, Stevens stated that he is seeking the death penalty and intends to prove “statutory aggravating circumstances” and the alleged murder in the first was “outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind.”<sup>714</sup>

Moreover, in Missouri, hate crime charges cannot be added to a first-degree murder charge, only to lesser charges such as assault, harassment, or property damage.<sup>715</sup> Levasseur states that:

regardless of whether the choices are life in jail or execution, having a hate crime prosecution matters...It’s an opportunity for the state of Missouri to take a stand and say, ‘Even though it wouldn’t make a difference in terms of sentencing, we are going to

<sup>710</sup> Dakin Andone and Deanna Hackney, “Prosecutor: No hate crime charges in murder of mutilated transgender teen,” *CNN*, Oct. 1, 2017, <https://www.cnn.com/2017/09/30/us/transgender-teen-murdered-not-hate-crime-trnd/index.html>.

<sup>711</sup> Max Londberg, “Gruesome details of transgender teen’s Ozarks slaying emerge as four are charged,” *The Kansas City Star*, Sept. 26, 2017, <https://www.kansascity.com/news/local/crime/article175459621.html>.

<sup>712</sup> Ibid.

<sup>713</sup> Kyle Swenson, “Missouri prosecutors: Brutal murder of transgender teen is not a hate crime,” *Washington Post*, Sept. 28, 2017, [https://www.washingtonpost.com/news/morning-mix/wp/2017/09/28/missouri-prosecutors-brutal-murder-of-transgender-teen-is-not-a-hate-crime/?utm\\_term=.5e6449c17766](https://www.washingtonpost.com/news/morning-mix/wp/2017/09/28/missouri-prosecutors-brutal-murder-of-transgender-teen-is-not-a-hate-crime/?utm_term=.5e6449c17766); Jarrett Lyons, “Why is the brutal murder of this trans teen not a hate crime?” *Salon*, Sept. 28, 2017, <https://www.salon.com/2017/09/28/ally-lee-steinfeld/>.

<sup>714</sup> See Jackie Rehwald, “Trans teen murder case: Main suspect’s trial to start in 2020 in Greene County,” *Springfield News-Leader*, Jan. 5, 2019, <https://www.news-leader.com/story/news/local/ozarks/2019/01/06/trial-date-set-man-accused-killing-texas-county-trans-teen-greene-county/2486061002/>; see also, 2013 MO Rev Stat § 565.032.

<sup>715</sup> See 2011 MO Rev Stat § 557.035. It is important to note that Missouri is not the only state with these types of limitations. For example, Utah’s hate crime statute only allows a hate crime penalty enhancement to be added onto misdemeanor offense charges, which means that no one has been convicted of a hate crime in the 20 years that it has been a law. See UTAH CODE ANN. § 76-3-203.3; (West 1992); see also, N’dea Yancey-Bragg, “No hate crime charges in ‘terrible attack’ on Latino father, son due to legal loophole in Utah state law,” *USA Today*, Dec. 2, 2018, <https://www.usatoday.com/story/news/nation/2018/12/02/utah-man-wont-face-hate-crime-charge-attack-latino-father-son/2183373002/?fbclid=IwAR2cxIAv4e520LSeHB6YVPf49MfpUJ-y-yfUcXNN3Y8-VaYIcSaMFs8kn5A>.

implement this (hate crime) law because we recognize this is horrific and that transgender people exist.’ We need to be working on looking at the larger picture.<sup>716</sup>

While no hate crime charges were brought against Steinfeld’s attackers, federal hate crime charges were brought following the attack against Mercedes Williamson in 2015. In state court, her attacker Joshua Brandon Vallum pleaded guilty and was convicted of murder charges and sentenced to life in prison by George County, Mississippi Circuit Court.<sup>717</sup> In December 2016, the federal government prosecuted Vallum, because Mississippi’s hate crime statute does not protect individuals from bias crimes based on gender identity; he pleaded guilty to violating HCPA and acknowledged acting because of the actual or perceived gender identity of his victim. As a result of his federal conviction, Vallum was sentenced to 49 years in prison.<sup>718</sup>

Vallum was the first perpetrator prosecuted for anti-gender identity bias under HCPA. Then-Principal Deputy Assistant Attorney General Vanita Gupta stated that:

Congress passed the Shepard-Byrd Act to protect our most vulnerable communities, including the transgender community from harm. No conviction, even such a historic one, can relieve the grief and anguish facing this victim’s family. But this guilty plea sends an unequivocal message that violence based on one’s gender identity violates America’s defining values of inclusivity and dignity. The Justice Department will continue to vigorously prosecute hate crimes, which not only target individual for harm, but also deny entire communities of the promises of true freedom and equal protection.<sup>719</sup>

Another case also drew the attention of the Justice Department in 2017 regarding the murder of Kedarie Johnson, who was a gender-fluid teenager in Iowa. The state charged the accused, Jorge Sanders-Galvez and Jaron Purham, with murder, but not for a hate crime since Iowa’s statute also does not include gender identity. Then-Attorney General Jeff Sessions authorized a federal prosecutor to be cross-designated as a Special Assistant County Attorney to assist in the state trial and convened a federal grand jury to investigate the case as a potential hate crime. While the federal prosecutors did not bring separate charges against Sanders-Galvez and Purham, they were both convicted of first-degree murder.<sup>720</sup>

<sup>716</sup> Dakin Andone and Deanna Hackney, “Prosecutor: No hate crime charges in murder of mutilated transgender teen,” *CNN*, Oct. 1, 2017, <https://www.cnn.com/2017/09/30/us/transgender-teen-murdered-not-hate-crime-trnd/index.html>.

<sup>717</sup> See Plea Agreement, *United States v. Joshua Brandon Vallum* (D.Miss. Nov. 2, 2016)(No. 1:16-cr-00114-LG-RHW). <https://www.justice.gov/opa/file/920161/download>.

<sup>718</sup> Judgment in Criminal Case, *United States v. Joshua Brandon Vallum* (D.Miss. May 17, 2017)(No. 1:16cr114LG-RHW-001), <https://www.courtlistener.com/recap/gov.uscourts.mssd.94285/gov.uscourts.mssd.94285.25.0.pdf>.

<sup>719</sup> U.S. Dep’t of Justice, “Mississippi Man Pleads Guilty to Hate Crime for Murdering Transgender Victim Because of Her Gender Identity,” Dec. 21, 2016, <https://www.justice.gov/opa/pr/mississippi-man-pleads-guilty-hate-crime-murdering-transgender-victim-because-her-gender>.

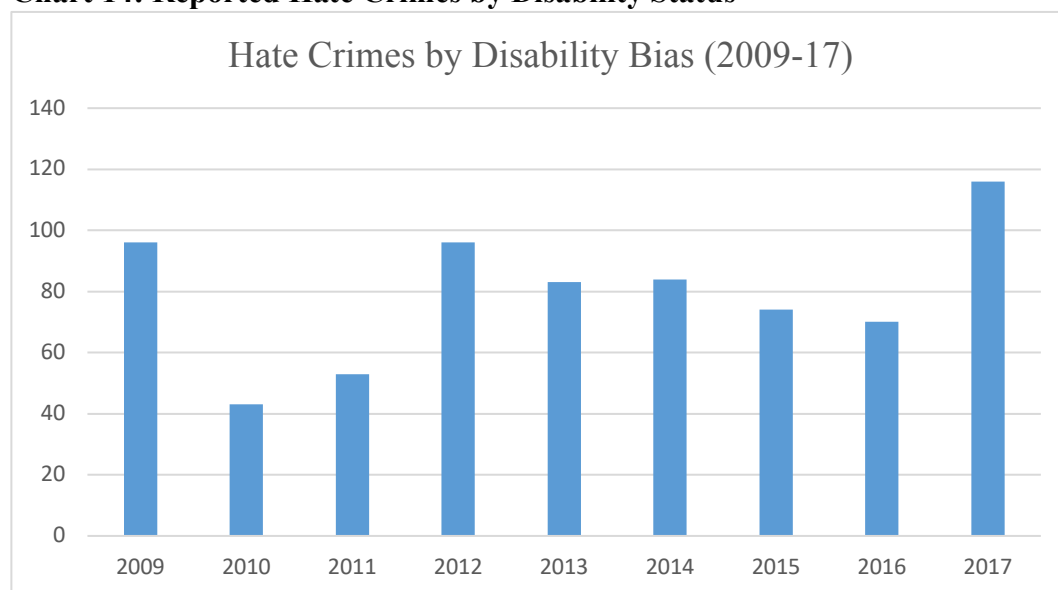
<sup>720</sup> U.S. Dep’t of Justice, “Man Convicted of First-Degree Murder For Joint Kidnapping, Torture, and Execution of Gender-Fluid Teen Kedarie Johnson,” Oct. 6, 2018, <https://www.justice.gov/opa/pr/man-convicted-first-degree-murder-joint-kidnapping-torture-and-execution-gender-fluid-teen>; Margaret Baker, “Gang member admits killing transgender teen he had dated,” *Sun Herald*, July 12, 2016, <https://www.sunherald.com/news/local/crime/article89109952.html>.

## Disability Bias Hate Crimes

Hate-motivated violence against individuals with disabilities is also a serious concern. According to the Bureau of Justice Statistics, in 2014, the rate of violent victimization against persons with disabilities was 2.5 times higher than similarly aged persons without disabilities (31.7 victimization per 1,000 persons age 12 or older compared to 12.5 per 1,000, respectively).<sup>721</sup> This rate remained nearly constant from 2009-2014, during which time the victimization rate against individuals with disabilities was at least twice the rate for similarly aged individuals without disabilities. Further, “one in five violent crime victims with disabilities believed they were targeted because of their disability.”<sup>722</sup> The rate of violent victimization was higher for individuals with disabilities for both women and men, as well as for each racial or ethnic group that was measured (i.e., black, Latinx, white, multiracial, and other, which includes Native American or Alaska Native, Asian, Native Hawaiian, or other Pacific Islander) compared to similarly aged persons without disabilities in 2010-14.<sup>723</sup>

FBI data from 2017 show that reported hate crimes against individuals with disabilities have also increased compared to 2016 reported numbers. In 2017, law enforcement reported 116 incidents compared to 70 reported incidents in 2016, which is a 65 percent increase in a single year.<sup>724</sup>

**Chart 14: Reported Hate Crimes by Disability Status**



Source: FBI, UCR, Hate Crime Statistics; data compiled and chart created by Commission staff

<sup>721</sup> Erika Harrell, “Crime Against Persons with Disabilities, 2009-2014,” U.S. Dep’t of Justice, Bureau of Justice Statistics, Nov. 2016, 1, <https://www.bjs.gov/content/pub/pdf/capd0914st.pdf>.

<sup>722</sup> Ibid, 4.

<sup>723</sup> Ibid, 4-5. The difference in rates of violent victimization between women and men with disabilities was not statistically significant (30.3 per 1,000, 31.2 per 1,000, respectively). Among the racial groups examined, persons with disabilities who identified as of two or more races had the highest rates of violent victimization among persons with disabilities (101.4 per 1,000), but there was no statistically significant difference in the rates between whites (29.7 per 1,000), blacks (28.8 per 1,000), Latinx (28.6 per 1,000), and persons of other races (28.0 per 1,000) with disabilities. Ibid.

<sup>724</sup> FBI, “FBI Releases 2017 Hate Crime Statistics,” <https://www.justice.gov/hatecrimes/hate-crime-statistics>.

However, many advocates point out that these numbers are likely lower than the actual victimization rate, since crimes against persons with disabilities are often underreported.<sup>725</sup>

At the Commission's briefing, Nicole Jorwic, Director of Rights Policy at The Arc, testified that underreporting happens for many reasons. She explained that a "key factor is lack of understanding of stakeholders. Often, individuals with disabilities, their family members, allies, don't know what constitutes a hate crime and there is little outreach about this topic to the disability community specifically. . . . Without that knowledge, reporting will continue to be lower, despite the actual incidence not necessarily being less."<sup>726</sup> Further, Jorwic explained that local law enforcement are often not trained to handle bias crimes against victims with disabilities and also may hold negative impressions of individuals with disabilities, believing that victims with disabilities "lack credibility," which also leads to crimes going unreported.<sup>727</sup> And these negative beliefs about individuals with disabilities are further perpetuated in the court system where "cases of abuse and torture can sometimes be categorized as pranks or bullying, instead of calling them for what they are, hate crimes."<sup>728</sup> The disvaluing of the lives of people with disabilities is in part why hate crimes occur against these communities in the first place. For example, in 2010, Jennifer Daugherty, a 30 year-old woman with intellectual disabilities was attacked, humiliated, and brutalized by six roommates in Greensburg, Pennsylvania for many days before she was stabbed to death. Pennsylvania's hate crime laws do not extend protections to the disability community, and none of her attackers were charged with federal hate crimes; but they were prosecuted and received sentences varying from decades in prison, to life without parole, to the death penalty.<sup>729</sup>

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<sup>725</sup> See e.g., American Network of Community Options and Resources, "Hate Crimes Against People with Disabilities Increase in 2017," Nov. 19, 2018, <https://ancor.org/newsroom/news/hate-crimes-against-people-disabilities-increase-2017>; Debra McKinney, "The Invisible Hate Crime," Southern Poverty Law Center, Aug. 5, 2018, <https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime>; OSCE Office for Democratic Institutions and Human Rights, "Hate Crime against People with Disabilities," <https://www.osce.org/odihr/hate-crime-against-people-with-disabilities?download=true>.

<sup>726</sup> Nicole Jorwic, Director of Rights Policy at The Arc, testimony, *Briefing Transcript* pp. 109-10.

<sup>727</sup> *Ibid*, 110.

<sup>728</sup> *Ibid*, 111.

<sup>729</sup> Peggy Miller and Robert Masters pleaded guilty to third-degree murder charges; Miller is serving a 35 to 74 year prison sentence and Masters is serving 30 to 70 year sentence. Angela Marinucci who was 17 at the time, was convicted of first-degree murder and sentenced to life in prison, but her sentence was overturned and she is expected to appear in court in 2019 for a new penalty hearing. Ricky Smyrnes was convicted of first-degree murder and given the death penalty, which he appealed, however in 2017 the state Supreme Court upheld the first-degree murder conviction and the death penalty. Melvin Knight pleaded guilty and was given the death penalty, however the sentence was overturned in 2016, but in November 2018 he was again given the death penalty. Amber Meidinger was originally charged with first-degree murder and other offenses, but her sentence was lessened after testifying in other trials; she was allowed to plead guilty to lesser charges and was sentenced to prison for 40 to 80 years. See Rich Cholodofsky, "Roommate gives jurors gruesome details of 2010 torture-murder in Greensburg," *Trib Live*, Nov. 8, 2018; Ross Guidotti, "Jury Sentences 'Greensburg 6' Member Melvin Knight to Death," *KDKA-TV*, Nov. 15, 2018, <https://pittsburgh.cbslocal.com/2018/11/15/greensburg-6-melvin-knight-jury-deliberations/>; KDKA, "State High Court Upholds Death Penalty For 'Greensburg 6' Ringleader," Feb. 23, 2017, <https://pittsburgh.cbslocal.com/2017/02/23/state-high-court-upholds-death-penalty-for-greensburg-6-ringleader/>; Tribune-Review, "Woman convicted in Greensburg torture case faces 3<sup>rd</sup> sentencing hearing," *Trib Live*, April 27, 2018, <https://archive.triblive.com/local/westmoreland/woman-convicted-in-greensburg-torture-case-faces-3rd-sentencing-hearing/>.

Another reason why these crimes may go under- or unreported that is not as common in other hate crimes is that many times the victim knows the person who is harassing or abusing the victim.<sup>730</sup> For instance, the NCVS found that “a higher percentage of violence against persons with disabilities (40 percent) was committed by persons the victim knew well or who were casual acquaintances than against persons without disabilities (32 percent).”<sup>731</sup> Jorwic argues that this factor further highlights how outreach by law enforcement is crucial for victims to feel supported and be willing to report these crimes.<sup>732</sup> Data from the NCVS further show that victims who are targeted because of their actual or perceived disability (among others, such as LGBT victims) were much more likely to report these crimes when surveyed than they were to law enforcement.

In light of these concerns about reporting and investigating hate crimes against people with disabilities, Robert Moossy, Deputy Assistant Attorney General at the Justice Department, testified that DOJ has started to conduct more outreach to the disability community, especially as these bias crimes are on the rise. Deputy AG Moossy stated that:

We’re often prosecuting cases today that happened three or four years ago, just because of the time it takes to report, investigate, and prepare for prosecution. But I can say internally, we’ve noted the same thing. We feel like we’re seeing too few transgender and disability matters and we want to do better at that. That is definitely an area where we want to improve.<sup>733</sup>

Another challenge in prosecuting hate crimes targeting persons with disabilities is that state laws vary in whether they offer protections to these communities. While the passage of HCPA expanded hate crime protections to include disability status in 2009, 18 states still do not have any specific hate crime law protections for people with disabilities.<sup>734</sup> For the states that do have protections for the disability community, crimes are more likely to be investigated and potentially prosecuted as a hate crime. For example, in May 2018, a woman in Staten Island, New York was charged with “two counts of burglary as a hate crime, along with multiple counts of burglary, grand larceny and stolen-property possession” after she intentionally tried to rob a visually impaired man in his home.<sup>735</sup> The New York Hate Crime Act of 2000 states that “a person commits a hate crime when he or she commits a specified offense” on the basis of the victim’s actual or perceived identity category; the protected statuses include: race, religion, color, gender, national origin, ancestry, sexual orientation, or disability status.<sup>736</sup> Nicole Jorwic stated that it was “an awful situation, [b]ut a strong sign that the prosecutor labeled her crime as a hate crime. This case highlights that there are individuals who take advantage of perceived vulnerabilities of people with disabilities. And

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<sup>730</sup> Nicole Jorwic, Director of Rights Policy at The Arc, testimony, *Briefing Transcript* p. 111.

<sup>731</sup> Erika Harrell, “Crime Against Persons with Disabilities, 2009-2014,” U.S. Dep’t of Justice, Bureau of Justice Statistics, Nov. 2016, 6, <https://www.bjs.gov/content/pub/pdf/capd0914st.pdf>.

<sup>732</sup> Nicole Jorwic, Director of Rights Policy at The Arc, testimony, *Briefing Transcript* p. 112.

<sup>733</sup> Robert Moossy, Deputy Assistant Attorney General at the Justice Department, testimony, *Briefing Transcript* p. 55.

<sup>734</sup> States without disability protections: Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Montana, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming. See ADL Hate Crime Map, <https://www.adl.org/adl-hate-crime-map>.

<sup>735</sup> Frank Donnelly, “Woman charged with hate crimes for allegedly targeting sight-impaired man,” *Staten Island Advance*, May 2, 2018, [https://www.silive.com/northshore/2018/05/woman\\_charged\\_with\\_hate\\_crime.html](https://www.silive.com/northshore/2018/05/woman_charged_with_hate_crime.html).

<sup>736</sup> N.Y. PENAL LAW § 485.05 (McKinney 2019); New York State Senate, Section 485.05 Hate Crimes, Nov. 1, 2019, <https://www.nysenate.gov/legislation/laws/PEN/485.05>.

that needs to be called out and prosecuted as a hate crime so we can continue to improve the status of individuals with disabilities in our community.”<sup>737</sup>

Emeritus Professor of Sociology at Northeastern University Jack Levin asserts that the majority of society does not think about hate crimes against the disability community. He explains that:

[W]hen people think of hate crimes they think of neo-Nazis, they think of racism, they think of homophobia, they just don't seem to think of people with disabilities as being a protected category... I call it the invisible hate crime... [T]here are people very hostile towards people with disabilities. The sadism indicates some kind of need to feel powerful and special and important by targeting someone seen as inferior.<sup>738</sup>

While the passage of HCPA in 2009 extended protections for people with disabilities, gaining those rights was difficult. Curt Decker, executive director of the National Disability Rights Network, explained that the inclusion of people with disabilities received a lot of pushback. He told the SPLC that:

In the political arena, there was a fair amount of conversation around, “People don't hate people with disabilities, they're very sympathetic.” And it was like, “No, actually that's not necessarily true.” And then we went through a series of discussions like, “Well, isn't it more a crime of opportunity? You rob a blind person or attack someone because they can't run away? That's not really hate, that's just convenience.” It was a constant struggle throughout the whole process.<sup>739</sup>

In 2011, the first federal disability hate crime case tried under the HCPA that became known as the “Tacony Dungeon” case occurred in Philadelphia, Pennsylvania.<sup>740</sup> Five people admitted to kidnapping, torturing, and confining six individuals with mental disabilities for over a decade in subhuman conditions, and two of the victims died as a result of the mistreatment.<sup>741</sup> The group, referred to as “The Weston family” by prosecutors, stole over \$200,000 in Social Security benefits from their captives and forced some into prostitution. The defendants in the case received varying sentences. Linda Weston, considered the ringleader in the case, was charged with 196 criminal counts and sentenced to life in prison plus an additional 80 years;<sup>742</sup> Jean McIntosh was sentenced

<sup>737</sup> Debra McKinney, “New York woman faces hate crime charges for targeting a visually impaired man in a burglary,” Southern Poverty Law Center, July 20, 2018, <https://www.splcenter.org/hatewatch/2018/07/20/new-york-woman-faces-hate-crime-charges-targeting-visually-impaired-man-burglary>.

<sup>738</sup> Debra McKinney, “The Invisible Hate Crime,” Southern Poverty Law Center, Aug. 5, 2018, <https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime>.

<sup>739</sup> Debra McKinney, “The Invisible Hate Crime,” Southern Poverty Law Center, Aug. 5, 2018, <https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime>.

<sup>740</sup> *United States v. Weston, et al.* 2:13-CR-25 (E.D. Pa. 2013).

<sup>741</sup> Jeremy Stahl, “The Details of the ‘Tacony Dungeon’ Case Are Almost Beyond Belief,” *Slate*, Nov. 6, 2015, <https://slate.com/news-and-politics/2015/11/the-details-of-the-tacony-dungeon-case-are-almost-beyond-belief-linda-weston-sentenced-to-life.html>.

<sup>742</sup> U.S. Dep't of Justice, U.S. Attorney's Office, Eastern District of Pennsylvania, “Guilty Plea In Case of Disabled Adults Held Captive In Subhuman Conditions,” Sept. 9, 2015, <https://www.justice.gov/usao-edpa/pr/guilty-plea-case-disabled-adults-held-captive-subhuman-conditions>.

to 40 years in prison;<sup>743</sup> Nicklaus Woodard received 27 years in prison for his role;<sup>744</sup> Eddie Wright was also sentenced to 27 years in prison;<sup>745</sup> and at the time of this writing, Gregory Thomas still awaits sentencing.<sup>746</sup>

In a press release DOJ issued after the McIntosh sentencing, U.S. Attorney William McSwain stated that:

It is hard to fathom this kind of disregard for the dignity of human life. The stomach-turning details of this case and unspeakable acts of cruelty McIntosh inflicted on her helpless victims serve as a stark reminder that pure evil does exist in the world. My sincere hope is that today's sentence brings some measure of closure to the victims and their families.<sup>747</sup>

The Special Agent in Charge of the FBI's Philadelphia Division, Michael Harpster mirrored McSwain's sentiments stating that:

The actions of Jean McIntosh and 'The Weston Family' were nothing short of monstrous. With money as their motive, they used and abused some of society's most vulnerable. The torture inflicted upon their victims is unthinkable; the pain and the fear they caused, incalculable. Right now, my thoughts are with all who suffered at their hands—the survivors, as well as those who lost their lives.<sup>748</sup>

Hate crimes and bias-motivated incidents against people with disabilities can also occur on the basis of multiple aspects of their identities. For example, Dominick Evans, a transgender man who also has progressive spinal muscular atrophy, was the victim of a bias-motivated incident that occurred at his high school.<sup>749</sup> He explained that upon returning to school after undergoing an intensive back surgery, he utilized a wheelchair and relied on an elevator to navigate the school. Evans stated that it was well-known that he was the only student allowed to use the elevator on a daily basis, and as a "prank" a group of football players covered the elevator floor with dead mice.<sup>750</sup> Evan told SPLC researchers that:

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<sup>743</sup> U.S. Dep't of Justice, U.S. Attorney's Office, Eastern District of Pennsylvania, "'Tacony Dungeon' Defendant Jean McIntosh Sentenced to 40 Years Imprisonment," Aug. 21, 2018, <https://www.justice.gov/usao-edpa/pr/tacony-dungeon-defendant-jean-mcintosh-sentenced-40-years-imprisonment>.

<sup>744</sup> Kristen Johnson, "Man Sentenced to 27 years for role in 'Basement of Horrors' case," *KYW News*, Sept. 11, 2018, <https://kywnewsradio.radio.com/articles/news/man-sentenced-27-years-role-basement-horrors-case>.

<sup>745</sup> CBS Philly, "Self-Described Preacher Sentenced to 27 Years in Prison in 'Basement of Horrors' Case," *CBS Philly*, Sept. 13, 2018, <https://philadelphia.cbslocal.com/2018/09/13/self-described-preacher-sentenced-to-27-years-in-prison-in-basement-of-horrors-case/>.

<sup>746</sup> Chris Palmer, "'Pastor Wright' codefendant in Tacony dungeon case, gets 27 years in prison," *The Inquirer*, Sept. 13, 2018, <https://www.philly.com/philly/news/crime/linda-weston-pastor-eddie-wright-sentenced-27-years-tacony-dungeon-federal-prison-philadelphia-20180913.html>.

<sup>747</sup> U.S. Dep't of Justice, "'Tacony Dungeon' Defendant Jean McIntosh Sentenced to 40 Years Imprisonment," U.S. Attorney's Office, Eastern District of Pennsylvania, Aug. 21, 2018, <https://www.justice.gov/usao-edpa/pr/tacony-dungeon-defendant-jean-mcintosh-sentenced-40-years-imprisonment>.

<sup>748</sup> *Ibid.*

<sup>749</sup> Debra McKinney, "The Invisible Hate Crime," Southern Poverty Law Center, Aug. 5, 2018, <https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime>.

<sup>750</sup> *Ibid.*



They thought it would be funny to take the one disabled kid in their school and make them the senior prank. I spent sixth and seventh period hiding out in the disabled (restroom) stall because I couldn't stand to go to class and they wouldn't let me go home. I just cried. I felt like there was no place for me, that my life had no value... Nobody cared about what happened to me; that's how I felt, that nobody cared.<sup>751</sup>

Evans stated that this incident contributed to a suicide attempt a few years later.<sup>752</sup>

Another case that also occurred at a high school was in 2015 in Dietrich, Idaho, where a white high school football player, John R.K. Howard, was accused of kicking a coat hanger into the rectum of a black teammate with an intellectual disability.<sup>753</sup> According to the victim's testimony, Howard also repeatedly called him the n-word and taught him a song glorifying the KKK and the lynching of black people; other teammates also allegedly used other racial slurs, calling him "fried chicken," "watermelon," "Kool-Aid," and "grape soda."<sup>754</sup> Howard was initially charged with sexual assault, but those charges were dropped and he was sentenced to probation and community service for felony injury to a child. Two other football players were also charged, however since they were juveniles at the time the incident occurred, the charges in those cases were private.<sup>755</sup> The victim's family filed a lawsuit against the school alleging that the school was aware of the bullying and did not do enough to intervene to prevent the assault. In October 2017, the school settled the federal lawsuit, however the school maintained that officials were not aware of any alleged abuse or racist behavior until after the sexual assault was reported.<sup>756</sup>

As shown above, while there have been some significant strides to increase reporting (such as the expansion of reporting to include hate crimes against persons with disabilities), which can lead to more thorough investigation and prosecution efforts, hate crimes are still largely underreported in many communities. This underreporting has far-reaching deleterious effects in terms of investigations and also for prevention efforts for all.

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<sup>751</sup> Ibid.

<sup>752</sup> Ibid.

<sup>753</sup> Camila Domonoske, "No Jail Time For 19-Year-Old In Idaho Coat-Hanger Assault Case," *NPR*, Feb. 27, 2017, <https://www.npr.org/sections/thetwo-way/2017/02/27/517510627/no-jail-time-for-19-year-old-in-idaho-coat-hanger-assault-case>; Debra McKinney, "The Invisible Hate Crime," Southern Poverty Law Center, Aug. 5, 2018, <https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime>.

<sup>754</sup> Camila Domonoske, "No Jail Time For 19-Year-Old In Idaho Coat-Hanger Assault Case," *NPR*, Feb. 27, 2017, <https://www.npr.org/sections/thetwo-way/2017/02/27/517510627/no-jail-time-for-19-year-old-in-idaho-coat-hanger-assault-case>; Alex Riggins, "Texas teen sentenced in Dietrich assault, but victim's deposition highlights case's murky facts," *Magic Valley*, Feb. 25, 2017, [https://magicvalley.com/news/local/crime-and-courts/texas-teen-sentenced-in-dietrich-assault-but-victim-s-deposition/article\\_4a0ddb88-aaa6-5c3e-9f6a-ee398bc391df.html](https://magicvalley.com/news/local/crime-and-courts/texas-teen-sentenced-in-dietrich-assault-but-victim-s-deposition/article_4a0ddb88-aaa6-5c3e-9f6a-ee398bc391df.html).

<sup>755</sup> Camila Domonoske, "No Jail Time For 19-Year-Old In Idaho Coat-Hanger Assault Case," *NPR*, Feb. 27, 2017, <https://www.npr.org/sections/thetwo-way/2017/02/27/517510627/no-jail-time-for-19-year-old-in-idaho-coat-hanger-assault-case>.

<sup>756</sup> Kimberlee Kruesi, "Idaho school settles in locker room assault case," *The Salt Lake Tribune*, Oct. 3, 2017, <https://www.sltrib.com/news/2017/10/03/idaho-school-settles-in-locker-room-assault-case/>.

## CHAPTER 3: Federal Enforcement and Strategies to Combat Hate Crimes and Bias-Motivated Incidents

Chapter 3 examines the federal government's role in documenting, investigating, and prosecuting hate crimes. Specifically, this chapter assesses federal agencies' hate crimes prevention, investigation, and prosecution practices and analyzes what gaps may exist in the federal response to hate violence in the United States.<sup>757</sup>

### Department of Justice

As discussed in Chapter 2, while the FBI helps train local law enforcement and collects hate crime statistics for the federal government, the Justice Department houses most programs that federally prosecute and may work towards prevention of hate crimes.

HCPA included Section 4705, which provided that the "Office of Justice Programs of the Department of Justice may award grants, in accordance with such regulations as the Attorney General may prescribe, to State, local, or tribal programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in identifying, investigating, prosecuting, and preventing hate crimes."<sup>758</sup> This is not a mandatory program, and there is no clear record of DOJ including a specific request for funding for hate crimes prevention under the HCPA in FY 2019.<sup>759</sup> It appears that for FY 2019, DOJ requested a decrease in funding for the sum total of all discretionary programs, although it did not specifically cut funding for hate crimes prevention.<sup>760</sup> However, there are some signs of increasing federal activity in this area. In 2019, DOJ's Bureau of Justice Assistance provided a training webinar for law enforcement professionals stating the following:

Hate crimes and bias incidents are occurring throughout the United States, in big cities and small towns, highly publicized or going unreported. They can represent the ultimate in violence, or they can spread their message of fear and intimidation through words and rhetoric.

Hate crimes are different than any other crimes you will encounter as a law enforcement officer. They can happen anywhere, and anyone can be a target. No one is safe, and there is no protection.

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<sup>757</sup> The Commission sent formal requests for information and documentation to the Civil Rights Division of the DOJ regarding their hate crimes prevention, investigation, and prosecution practices. The Commission also sent requests to the Office for Civil Rights and the Office of Safe and Healthy Students at the Department of Education to analyze how the Department investigates and addresses hate crimes and other bias incidents in primary and secondary schools and colleges and universities. Finally, the Commission requested information and documentation from the FBI regarding that agency's investigative and reporting practices. Commission staff also conducted independent research of these agencies' roles and performance regarding hate crimes and incidents.

<sup>758</sup> 123 Stat. 4705; codified at 42 USC 3716a; transferred to 34 U.S.C. 30504.

<sup>759</sup> See, e.g., U.S. Dep't of Justice, Office of Justice Programs, FY 2019 Budget Request at a Glance, <https://www.justice.gov/jmd/page/file/1033166/download>.

<sup>760</sup> Ibid., p. 1 and 4.

And they don't just affect the victim – they can affect an entire community. This webinar will walk you through the three Rs – Recognize, Respond, and Report – so that you can deal with hate crimes properly and promptly.<sup>761</sup>

On June 4, 2019, referencing the hateful attack at the Tree of Life Synagogue in Pittsburgh, the Office of Justice Programs' Principal Deputy Assistant Attorney General published a blog stating that it would implement programs to alleviate victims' anxiety about coming forward:

The Office of Justice Programs plays a significant role in the fight against hate crimes violence, no matter what powers it. We are working to open the door for victims to come forward because, as research by our Bureau of Justice Statistics reveals, victims reported only slightly more than half of all hate crimes—55 percent—to police from 2015 to 2017. According to additional BJS research, victims say they feel vulnerable, and often don't believe police will take their cases seriously.

OJP helps alleviate these anxieties through services offered by state victim assistance and compensation programs supported by our Office for Victims of Crime. OVC makes available statewide assistance to victims of hate crimes, and we encourage law enforcement or state-based agencies to use them. Through funding from the Victims of Crime Act, for example, they could develop a program to provide victim services and educate on the importance of reporting hate crimes. A department-wide Hate Crimes Enforcement and Prevention Initiative includes a website that serves as a one-stop portal to all of DOJ's resources to combat hate crimes. And a recent grant from our National Institute of Justice is surveying 3,000 law enforcement agencies about local policies on reporting hate crimes to help us identify the best ways to encourage victims of individual attacks to come forward and the best ways to support them when they do.

NIJ [National Institutes of Justice] recently released another tool: the Safeguarding Houses of Worship App. Available free of charge, the app helps religious facilities work with local law enforcement officers to evaluate building security and create plans for preventing attacks.<sup>762</sup>

The Safeguarding Houses of Worship App is up and includes a number of tools such as information about ways to protect against violent attacks and procure federal assistance in case of emergency, as well as DOJ's Community Relations Service Safeguarding Places of Worship Program that “educates local communities on how to prevent and respond to hate crimes that target religious institutions and fosters dialogue to strengthen relations among government, law enforcement and faith communities,” are now located in one space in the App.<sup>763</sup> The other programs funded

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<sup>761</sup> See U.S. Dep't of Justice, Bureau of Justice Assistance, National Training and Technical Assistance Center, Webinar: What Justice Professionals Need to Know About Hate Crime, July 16, 2019, <https://bjatta.bja.ojp.gov/media/event/webinar-what-justice-professionals-need-know-about-hate-crime>

<sup>762</sup> Matt Dummermuth, Principal Deputy Assistant Attorney General, Office of Justice Programs (OJP), OJP Blog, “Addressing Religious Hate Crime,” June 4, 2019, <https://ojp.gov/ojpblog/blogs-2019/2019-blog-religious-hate-crimes.htm>.

<sup>763</sup> U.S. Dep't of Justice, Justice Technology Information Center, Safeguarding Houses of Worship, [https://www.justnet.org/resources/Houses\\_of\\_Worship.html](https://www.justnet.org/resources/Houses_of_Worship.html) (last accessed Aug. 9, 2019).

through the Office of Victims of Crime (OVC) mentioned in the blog appear to be in more developmental stages. For background, OVC provides technical assistance to law enforcement.<sup>764</sup> This office also administers the Crime Victims Fund, which is paid through fines and penalties by convicted federal offenders (including all offenses), and through private gifts and donations. As of 2018, the Crimes Victims Fund reached about \$12 billion.<sup>765</sup> OVC gives money to states in order for them to develop programs to partner with community members and assist victims of crime.<sup>766</sup> Funding also may go to community organizations and/or states to raise awareness concerning victims' issues, help in compliance with victims' rights laws, and offer training and technical assistance to victim assistance professionals.<sup>767</sup>

In 2017, more than \$1.8 billion was allocated to the Victims of Crime Act (VOCA) Victim Assistance Formula Grant Program that funded 56 grantees, which provided assistance to 5,088,858 victims of crime.<sup>768</sup> This represents a funding decrease from 2016, when VOCA allocated \$2 billion to 56 grantees that provided assistance to 5,245,303 victims of crimes.<sup>769</sup> Despite the increase in overall reported hate crimes to the FBI, hate crime victims only made up 0.1 percent of the assisted victims (see Table 3).<sup>770</sup> Service providers stated that bias crimes on the basis of race or ethnicity were the most common reported (22 percent), followed by sexual orientation (21 percent), and then gender identity (14 percent). Forty-seven percent of the organizations that assisted hate crimes victims were unable to provide the motivation for the hate crime.<sup>771</sup>

**Table 3: Percentages of Types of Victimization Reported to OVC (2017)**

Domestic and/or Family Violence	43%
Adult Abuse/Assault	14%
Adult Sexual Assault/Stalking	11%
Child Abuse/Assault	10%
Child Sexual Abuse/Assault	10%
Property/Financial Crimes	7%
Vehicular Crimes	3%
Robbery	3%
Human Trafficking	0.5%
Kidnapping	0.3%
Mass Violence	0.2%
<b>Hate Crime</b>	<b>0.1%</b>

Note: Percentages total more than 100 percent due to rounding.

<sup>764</sup> 34 U.S.C. § 20103.

<sup>765</sup> Office for Victims of Crime, "Crime Victims Fund," U.S. Dep't of Justice, Office of Justice Programs, <https://www.ovc.gov/about/victimsfund.html>.

<sup>766</sup> Ibid.

<sup>767</sup> Ibid.

<sup>768</sup> Booz Allen Hamilton, *Victims of Crime Act: Victim Assistance Formula Grant Program Fiscal Year 2017, Data Analysis Report*, Office for Victims of Crime, Office of Justice Programs, U.S. Dep't of Justice, at 1, [https://ojp.gov/ovc/grants/vocanpr\\_val7.pdf](https://ojp.gov/ovc/grants/vocanpr_val7.pdf).

<sup>769</sup> Ibid., 1.

<sup>770</sup> Ibid., 4.

<sup>771</sup> Ibid., 4.

Through its mandate under VOCA, OVC also provides supplemental funding to state programs that offer financial assistance and reimbursement to individuals who have incurred expenses as a direct result of a crime.<sup>772</sup> In 2017, 53 states and U.S. territories received VOCA grants, which provided \$367,525,175 in compensation for a total of 250,583 claims.<sup>773</sup> Comparatively, in 2016, VOCA paid a total of \$348,745,017 toward victim compensation with a total of 288,536 claims that covered 53 states and U.S territories.<sup>774</sup> In terms of victims, when indicated, the types of victimization included bullying, domestic and family violence, elder abuse/neglect, hate crimes, and mass violence (see table 4).<sup>775</sup> Assault was the most common crime indicated (39,781 applications).<sup>776</sup> Domestic and family violence (38,521 applications), bullying (668), and hate crimes (331) were most commonly related to assault.<sup>777</sup> In 2017, there were a total of 383 applications due to hate crime victimization. Comparatively, in 2016, there were 153 reported hate crime victimizations and the majority were due to assault (77 percent).<sup>778</sup>

**Table 4: Numbers of Applicants Across Type of Victimization (2017)**

Domestic & Family Violence	52,461
Elder Abuse/Neglect	928
Bullying	668
<b>Hate Crimes</b>	<b>383</b>
Mass Violence	379

The Community Relations Service (CRS) is another avenue for hate crimes prevention at DOJ. CRS's mandate is to assist communities in addressing community tensions and disputes, and according to its website, CRS is considered the Department's "peacemaker" when intergroup conflicts arise.<sup>779</sup> CRS does not have jurisdiction to investigate or prosecute hate crimes nor any law enforcement authority, rather this agency works with all interested parties (e.g., state and local governments, private and public organizations, civil rights groups) to ameliorate conflict and facilitate mutual understandings and solutions to community challenges.<sup>780</sup> CRS states that it also

<sup>772</sup> The annual grant amount is based on 60 percent of each state's compensation payments from the previous two years and is set by statute. See Booz Allen Hamilton, *Victims of Crime Act: Victim Compensation Formula Grant Program, Fiscal Year 2017, Data Analysis Report*, Office for Victims of Crime, Office of Justice Programs, U.S. Dep't of Justice, at 1, [https://ojp.gov/ovc/grants/vocanpr\\_vc17\\_508.pdf](https://ojp.gov/ovc/grants/vocanpr_vc17_508.pdf).

<sup>773</sup> Ibid.

<sup>774</sup> Booz Allen Hamilton, *Victims of Crime Act: Victim Compensation Formula Grant Program, Fiscal Year 2016, Data Analysis Report*, Office for Victims of Crime, Office of Justice Programs, U.S. Dep't of Justice, at 1, [https://www.ovc.gov/grants/vocanpr\\_vc16.pdf](https://www.ovc.gov/grants/vocanpr_vc16.pdf).

<sup>775</sup> Ibid., 3.

<sup>776</sup> Booz Allen Hamilton, *Victims of Crime Act: Victim Compensation Formula Grant Program, Fiscal Year 2017, Data Analysis Report*, Office for Victims of Crime, Office of Justice Programs, U.S. Dep't of Justice, at 5.

<sup>777</sup> Ibid.

<sup>778</sup> Ibid., 13.

<sup>779</sup> The Community Relations Service (CRS) was established by Title X of the Civil Rights Act of 1964 (42 U.S.C. § 2000g et seq.). With the passage of the Shepard-Byrd Act, the CRS' jurisdiction expanded to protect communities that were not previously protected under the 1964 Civil Rights Act (e.g., LGBT communities, disability community). See HCPA, 18 § 249, §6; Dep't of Justice, Community Relations Service (CRS), <https://www.justice.gov/crs>.

<sup>780</sup> Title X of the Civil Rights Act of 1964, 42 U.S.C. § 2000g.

helps community “stakeholders reduce fear, dispel misunderstandings or misperceptions, and increase cultural competency in the broader community.”<sup>781</sup>

At a briefing of the Virginia State Advisory Committee to the Commission, Harpreet Singh Mocha, CRS’ National Program Manager for the Muslim, Arab, South Asian, Sikh, and Hindu communities, testified that through the office’s work with communities, it strives to have concrete outcomes that can aid in reporting and possibly prevent hate crimes in the future.<sup>782</sup> Mocha stated that these outcomes center around three factors: first, targeted communities having better engagement with law enforcement; second, the public having the knowledge about how to report a hate crime; and third, establishing open lines of communication between communities and their local precincts and neighborhood liaisons so if a crisis does occur, members know what to do and are more likely to report the crime.

An example of some of the work that CRS does after a hate crime incident took place in August 2012 after a white supremacist attacked worshipers at a Sikh Temple in Oak Creek, Wisconsin, killing 6 worshipers and wounding 3 others.<sup>783</sup> After the tragic event, CRS helped to facilitate awareness trainings for the Sikh and Muslim communities as well as facilitating dialogue and community forums between community leaders and law enforcement.<sup>784</sup> Then in June 2015, after the attack on worshipers at the Emanuel AME Church in Charleston, South Carolina, CRS provided consultation to community members and worked with law enforcement on establishing “best practices” for marches and demonstrations.<sup>785</sup> CRS also helped to facilitate “dialogue between community leaders and law enforcement” as well as facilitating “onsite communication and problem solving between marchers and law enforcement” to ensure the safety and security of the community.<sup>786</sup>

CRS’ programs and services fall under three primary categories: Administration of Justice, Education, and General Community Relations.<sup>787</sup> Administration of Justice cases are defined “as those where tension exists between law enforcement and the community . . . Education cases are those that derive from school-related actions or incidents and increase community tension. . . [and] General Community Relations cases derive from events not related to educational institutions or law enforcement action that raise tension in the community.”<sup>788</sup> According to their annual report, CRS completed 449 cases in fiscal year 2017, compared to 447 in 2016 in the United States and its territories.<sup>789</sup> In many of these cases, CRS was invited by local law enforcement and local government officials to

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<sup>781</sup> U.S. Dep’t of Justice, Community Relations Service, (last updated Feb. 14, 2017), <https://www.justice.gov/crs/what-we-do>.

<sup>782</sup> Harpreet Singh Mocha, National Program Manager for the Muslim, Arab, South Asian, Sikh, and Hindu communities, U.S. Dep’t of Justice, Community Relations Services, Virginia State Advisory Committee, *Briefing Transcript*, p. 49.

<sup>783</sup> U.S. Dep’t of Justice, Community Relations Service, “Community Relations Service,” Nov. 28, 2018, 10, <https://www.justice.gov/crs/page/file/1115626/download>.

<sup>784</sup> *Ibid.*

<sup>785</sup> *Ibid.*, 11.

<sup>786</sup> *Ibid.*

<sup>787</sup> U.S. Dep’t of Justice, Community Relations Services, *Annual Report, 2017*, at 18-21, <https://www.justice.gov/crs/file/1034811/download>.

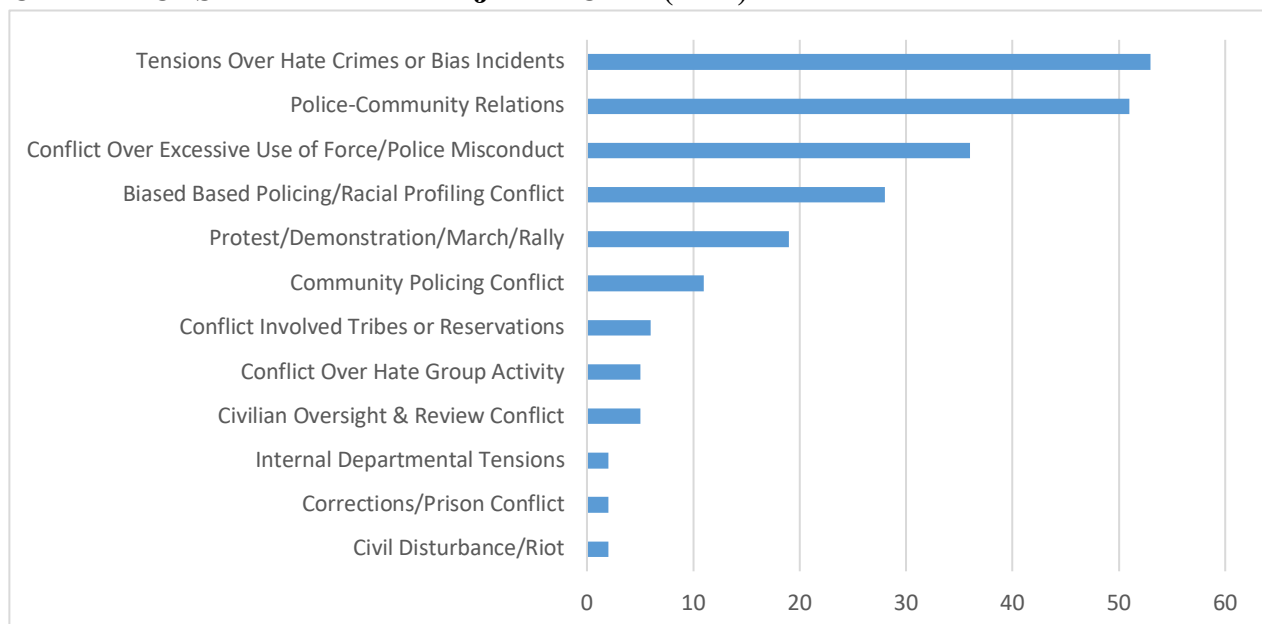
<sup>788</sup> *Ibid.*

<sup>789</sup> *Ibid.*

provide conflict resolution and mediation services, conduct cultural awareness training, and to provide technical assistance in resolving conflicts. In other instances, CRS was asked by community and civil rights organizations to facilitate community dialogues with law enforcement, local government agencies, and other entities within their communities.<sup>790</sup>

In 2017 the CRS was involved in a total of 234 hate crime related cases, compared to 191 in 2016.<sup>791</sup> CRS notes that while these cases went up by almost 23 percent, other civil rights cases decreased by about 18 percent. Breaking these cases into their respective categories, of the 198 completed Administration of Justice cases (decreased from 225 in 2016), there were 53 hate crime related cases in 2017, an increase from 38 cases in 2016.<sup>792</sup> The largest number of these cases resulted from tensions related to alleged hate crime or other bias motivated incidents (see chart 15).<sup>793</sup> The CRS states that a case is “completed” when it finishes providing services to the community members that the agency is working with. These services include four categories: facilitated dialogues, mediation, training, and consultation.<sup>794</sup>

**Chart 15: CRS Administration of Justice Cases (2017)**



Source: U.S. Dep’t of Justice, Community Relations Services, Annual Report, 2017.

In 2017, CRS completed a total of 82 Education cases, compared to 80 cases in 2016.<sup>795</sup> Again, the largest portion of these cases were due to hate or bias-motivated incidents occurring across all

<sup>790</sup> Ibid., 19.

<sup>791</sup> Ibid., 18.

<sup>792</sup> Ibid., 19.

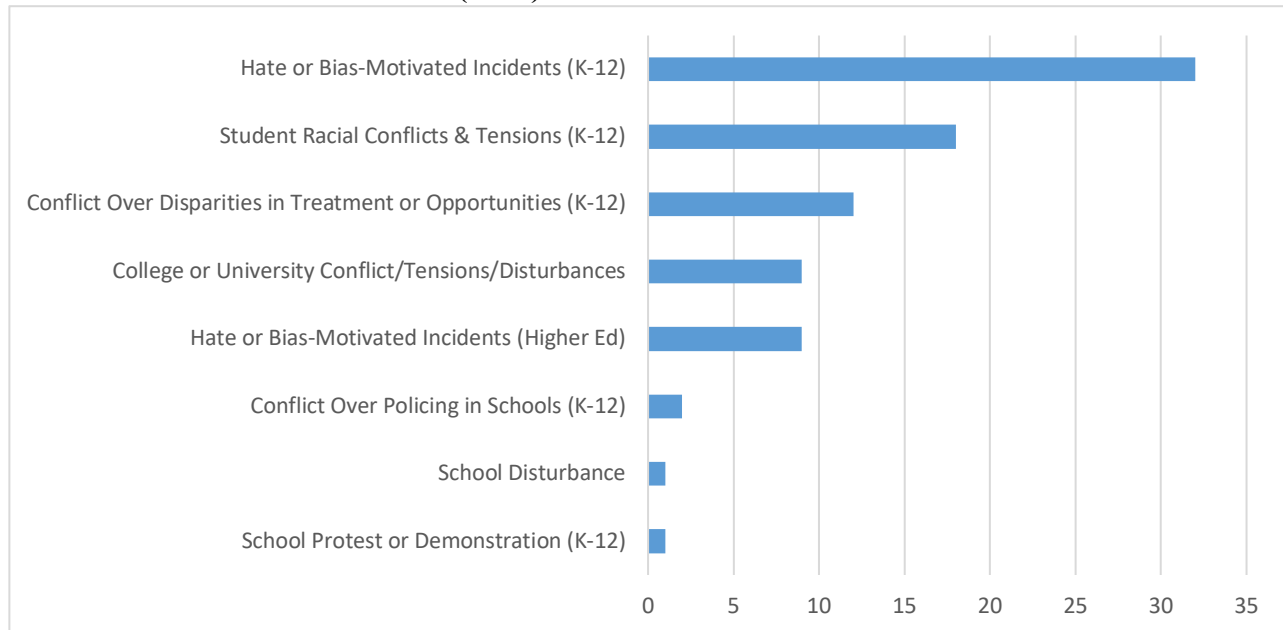
<sup>793</sup> Ibid.

<sup>794</sup> U.S. Dep’t of Justice, Community Relations Services, *Annual Report, 2018*, at 14, <https://www.justice.gov/file/1157421/download>.

<sup>795</sup> Ibid., 20.

levels of school (i.e., primary, secondary, and higher education). The number of these cases increased from 24 in 2016 to 41 in 2017 (see chart 16).<sup>796</sup>

**Chart 16: CRS Education Cases (2017)**



Source: U.S. Dep't of Justice, Community Relations Services, *Annual Report, 2017*.

In 2017, CRS completed 169 General Community Relations cases, compared to 142 cases in 2016.<sup>797</sup> Similar to the other two categories, the largest increase in these cases was also due to hate crimes and bias-motivated incidents (from 44 in 2016 to 78 in 2017); and these cases were by far the largest type in this category (see chart 17).<sup>798</sup>

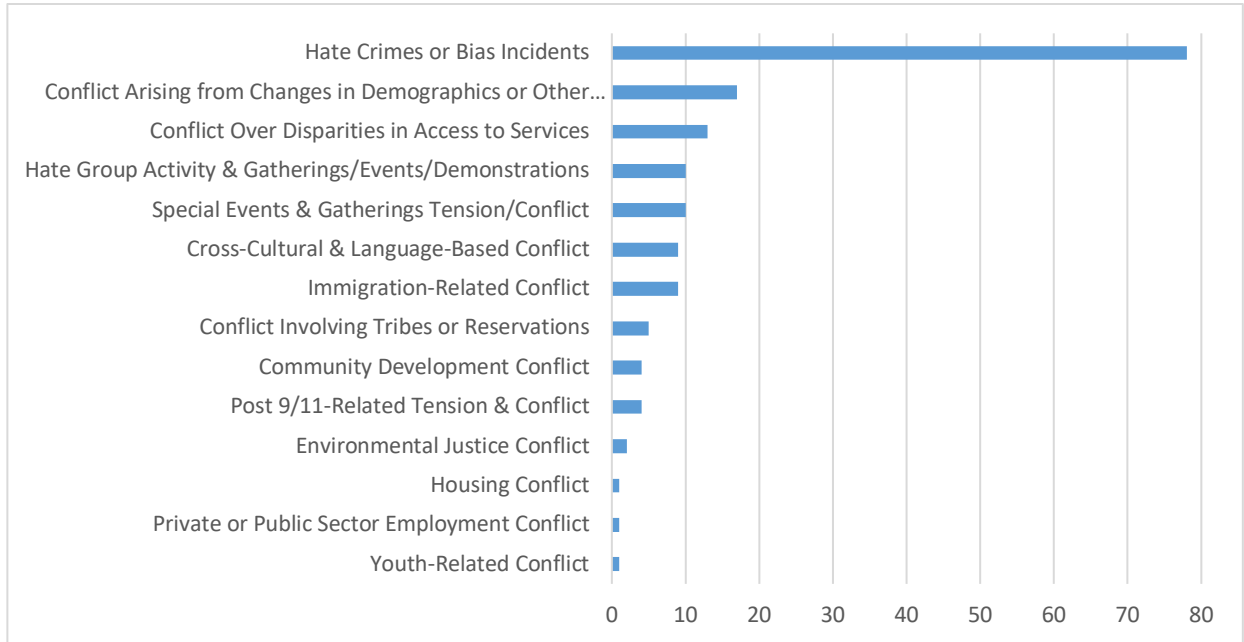
**Chart 17: CRS General Community Relations Cases (2017)**

<sup>796</sup> Ibid., 20.

<sup>797</sup> Ibid., 21.

<sup>798</sup> Ibid.





Source: U.S. Dep't of Justice, Community Relations Services, Annual Report, 2017.

Despite these significant contributions, during a subsequent Commission briefing on federal civil rights enforcement in November 2018, SAALT's Director of National Policy Lakshmi Sridaran expressed concern about the Trump Administration's request to zero out the budget of CRS and combine its functions with the Civil Rights Division,<sup>799</sup> where hate crimes are prosecuted:

[P]rosecutions cannot be the only tool of enforcement to address hate crimes. . . . CRS was an arm of DOJ that supported the very difficult task of building trust between communities and law enforcement, which research and evidence strongly suggests is one of the most effective ways to improve hate crimes reporting. This DOJ has undermined a key tool for addressing and preventing hate crimes.<sup>800</sup>

The Office of Community Oriented Policing Services (COPS) is another component within the DOJ, which provides resources to law enforcement agencies and communities, while also aiding police in analyzing local hate crime problems.<sup>801</sup> The COPS office focuses on how to foster better relationships and establish trust between local law enforcement and community members through implementing community-oriented policing strategies.<sup>802</sup> For instance, in 2013, COPS partnered

<sup>799</sup> See U.S. Dep't of Justice, Community Relations Service, "FY 2019 Budget Request At A Glance," <https://www.justice.gov/jmd/page/file/1033131/download>. However, Congress rejected President Trump's request, and funded CRS with \$15.5 million for FY 2019. See Joint Resolution 31, 116th Congress, Jan. 3, 2019, at 92, <https://www.congress.gov/116/bills/hjres31/BILLS-116hjres31enr.pdf>. The CRS had a \$14.4 million budget for FY 2017. For FY 2018, the CRS requested \$14.4 million, see Community Relations Service, "FY 2018 Budget Request At A Glance," <https://www.justice.gov/jmd/page/file/968246/download>.

<sup>800</sup> U.S. Comm'n on Civil Rights, Briefing on Federal Civil Rights Enforcement, Briefing Transcript, pp. 343-44.

<sup>801</sup> U.S. Dep't of Justice, Community Oriented Policing Services, <https://cops.usdoj.gov/aboutcops>. The COPS office was established by the 1994 Violent Crime Control and Law Enforcement Act, Pub. L. 103-322.

<sup>802</sup> According to the office, they define community policing as "a commitment to building trust and mutual respect between police and communities." *Ibid.*; see also, U.S. Dep't of Justice, Community Oriented Policing Services, "Hate Crime Resources," <https://cops.usdoj.gov/hatecrimeresources>.

with the Not in Our Town movement (NIOT)<sup>803</sup> on “a multi-year initiative to increase awareness of hate crimes, improve hate crime reporting, and promote safe, inclusive communities nationwide.”<sup>804</sup> Efforts between the NIOT movement and COPS included working to bring community members and law enforcement together to help the Sikh community after the mass shooting in Oak Creek, Wisconsin.<sup>805</sup> While federal charges could not be brought against the alleged perpetrator since he committed suicide after his attack on the Sikh temple, the community, local law enforcement officials, and the mayor worked with the COPS office as a part of NIOT to create a documentary to bring national attention to the incident as well as highlight the community’s resilience and efforts to rebuild after such an attack.<sup>806</sup>

The COPS office points to its collaboration with the NIOT movement as a successful model on how law enforcement and communities can work together to address hate crimes. In their *Building Stronger, Safer Communities* report, COPS stresses that “if a police chief doesn’t take a visible and active role, then there is an assumption that everything is alright. And these hate groups have learned through experience that if a community doesn’t respond, then the community accepts. Silence is acceptance to them.”<sup>807</sup>

### DOJ Hate Crimes Website

In 2018, DOJ launched a website focused specifically on hate crimes that houses all of the information from the various Justice Department components that work to prevent, investigate, and prosecute hate crimes.<sup>808</sup> On its website, DOJ stresses that addressing and preventing hate crimes requires that communities and law enforcement work together.<sup>809</sup> Through practices of community policing that focus on creating and fostering partnerships between communities and law enforcement, local law enforcement will be better able to be more aware of potential hate or bias-related problems before they result in a serious crime.<sup>810</sup> The Justice Department contends that the best method for law enforcement to address hate and bias-motivated crimes utilizes the SARA model, which stands for “scanning for the problems, analyzing the facts, responding to reduce the problems, and assessing the outcome of the response.”<sup>811</sup>

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<sup>803</sup> Initially a PBS film about how citizens in Billings, Montana responded to attacks by White supremacists, Not in Our Town has grown into movement to stop hate, address bullying, and build safe communities through a film, social media, and organizing tools. See Not in Our Town, About Us, <https://www.niot.org/about-us>.

<sup>804</sup> U.S. Dep’t of Justice, Community Oriented Policing Services, “Hate Crime Reporting – Working to Close the Gap,” [https://cops.usdoj.gov/html/dispatch/05-2013/hate\\_crime\\_reporting.asp](https://cops.usdoj.gov/html/dispatch/05-2013/hate_crime_reporting.asp).

<sup>805</sup> Not In Our Town in conjunction with U.S. Department of Justice COPS Office, “Waking in Oak Creek,” <https://www.niot.org/cops/wakinginoakcreek>.

<sup>806</sup> Ibid.

<sup>807</sup> Kelly Whalen, Nazmia Alqadi, and Libby McNerny, “Building Stronger, Safer Communities,” Community Oriented Policing Services, U.S. Dep’t of Justice, 2013, at 3, <https://ric-zai-inc.com/Publications/cops-p270-pub.pdf>.

<sup>808</sup> See U.S. Dep’t of Justice, “Hate Crimes,” <https://www.justice.gov/hatecrimes>.

<sup>809</sup> U.S. Dep’t of Justice, “Preventing Hate Crimes in Your Community,” <https://www.justice.gov/hatecrimes/preventing-hate-crimes-your-community> (last accessed April 26, 2019).

<sup>810</sup> Ibid.

<sup>811</sup> Ibid.

Hate crime experts agree that in order to prevent hate crimes, proper documenting and reporting is essential.<sup>812</sup> As discussed previously, the underreporting of hate crimes is a central concern that can inhibit prevention efforts.<sup>813</sup> For instance, in March 2018, then-Attorney General Jeff Sessions announced that the Collaborative Reform Technical Assistance Center—a \$10 million technical assistance program in partnership with the International Association of Chiefs of Police and eight law enforcement leadership and labor organizations—would be expanded to include the prosecution and prevention of hate crimes. Further, the program is intended to allow law enforcement to access information regarding hate crimes, and receive education and training resources on hate crime investigation and prevention.<sup>814</sup>

In a speech to law enforcement in October 2018, Deputy Attorney General Rod Rosenstein stated that “simply because hate crimes are not reported does not mean they are not happening” and there needs to be more work in understanding why survivors do not report and what barriers keep local and state law enforcement from reporting their numbers to the FBI.<sup>815</sup> Rosenstein announced that the National Institute of Justice issued an \$840,000 grant to the University of New Hampshire to conduct a national survey of hate crime incidents and victimization and will survey 3,000 law enforcement agencies on reporting practices, and a follow-up survey is planned to interview 250 prosecutors regarding cases that ended in arrests.<sup>816</sup> This study will run through 2021 and will include information regarding the rates of reporting, gather profiles of hate crime offenders, and identify the challenges in defining, investigating, and documenting hate crimes.<sup>817</sup>

### Federal Prosecution Efforts

The Criminal Section in the Civil Rights Division (CRT) of the DOJ is responsible for working with law enforcement in the investigation and prosecution of hate crimes. As a component in the Commission’s investigation of the federal role in investigating and prosecuting hate crimes, staff sent interrogatories and document requests to DOJ to inquire about the steps the agency takes in addressing them. During the time period the Commission studied (2009 – 2018), according to DOJ’s response to the Commission’s interrogatories and further information provided upon Commission staff inquiry, DOJ prosecuted federal hate crimes charges in federal court in 63 cases, some of which involved multiple defendants.<sup>818</sup> These cases are documented in Tables 5-8 below,

<sup>812</sup> See e.g., U.S. Dep’t of Justice, “Hate Crimes,” <https://www.justice.gov/hatecrimes>; NAACP, “Monitoring and Preventing Hate Crimes,” Sept. 8, 2017, <https://www.naacp.org/latest/monitoring-preventing-hate-crimes/>; Southern Poverty Law Center, “Ten Ways to Fight Hate: A Community Response Guide,” Aug. 14, 2017, <https://www.splcenter.org/20170814/ten-ways-fight-hate-community-response-guide>.

<sup>813</sup> See discussion and *supra* notes 472-83; 489-501.

<sup>814</sup> U.S. Dep’t of Justice, “Deputy Attorney General Rod J. Rosenstein Delivers Remarks at a Law Enforcement Roundtable Regarding Improving Identification and Reporting of Hate Crimes,” Oct. 29, 2018, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-law-enforcement-roundtable>.

<sup>815</sup> *Ibid.*

<sup>816</sup> *Ibid.*

<sup>817</sup> U.S. Dep’t of Justice, “Deputy Attorney General Rosenstein Announces Funds and Technical Assistance Resources to Help Law Enforcement Investigate and Prosecute Hate Crimes at Law Enforcement Roundtable,” Oct. 29, 2018, <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.

<sup>818</sup> U.S. Dep’t of Justice, Civil Rights Division, Interrogatory Responses to U.S. Commission on Civil Rights, Sept. 7, 2018.

which also provide information about the bases of the charges (race, gender, religion, etc.) and the results of the litigation.<sup>819</sup> The text below also includes analysis of trends in federal prosecution efforts.<sup>820</sup>

The great majority of these cases involve charges brought under the HCPA of 2009 (18 U.S.C. § 249), which criminalizes willfully causing bodily injury, or attempting to do so through the use of fire, a firearm, dangerous weapons, or an explosive or incendiary device: (1) because of the actual or perceived race, color, religion, national origin of any person or (2) because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate commerce or occurred within the special maritime or territorial jurisdiction of the United States.<sup>821</sup> However, the HCPA also provides that there may be no federal prosecution:

except under the certification in writing of the Attorney General, or a designee, that –

- (A) the State does not have jurisdiction;
- (B) the State has requested that the Federal Government assume jurisdiction;
- (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
- (D) a prosecution by the United States is in the public interest and necessary to secure justice.<sup>822</sup>

DOJ also uses other federal criminal civil rights statutes, such as 18 U.S.C. §§ 245 and 247, in its prosecution of hate crimes.<sup>823</sup> Section 245 prohibits intimidation or interference with civil rights in places that receive federal funding or in interstate commerce, based on race, religion, or national origin.<sup>824</sup> Section 247 prohibits intentional damage to religious property and obstruction of the free exercise of religious beliefs.<sup>825</sup> However, since 2009, the main statute utilized is the HCPA.<sup>826</sup> Two other federal hate crimes statutes are enforced by DOJ: 18 U.S.C. § 241 prohibits conspiracy against civil rights; and 42 U.S.C. § 3631 prohibits biased intimidation or interference with housing.<sup>827</sup> In the 62 cases described in the charts below, most are prosecuted under HCPA: 40 involved violations of 18 U.S.C. § 249 (HCPA), 14 involved violations of 18 U.S.C. § 247 (damage to religious property), 7 involved violations of 42 U.S.C. § 3631 (biased interference in housing rights), 5 involved violations of 18 U.S.C. § 241 (conspiracy to violate rights), and 3 involved violations of 18 U.S.C. § 245 (interference with civil rights in federally-funded activities or public accommodations).

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<sup>819</sup> See *infra* Tables 5: USCCR Staff Summary of DOJ Reported Hate Crime Cases Motivated by Race, Ethnicity, and/or National Origin Animus; Table 6: USCCR Staff Summary of DOJ Reported Hate Crime Cases Motivated by Gender Identity and Sexual Orientation; Table 7: USCCR Staff Summary of DOJ Reported Hate Crime Cases Motivated by Religious Animus; Table 8: USCCR Staff Summary of DOJ Reported Hate Crime Cases Motivated by Disability Animus.

<sup>820</sup> See, e.g., Chart 18 and *infra* notes 781-784.

<sup>821</sup> 18 U.S.C. § 249(a).

<sup>822</sup> 18 U.S.C. § 249(b).

<sup>823</sup> See *infra* notes 781-84.

<sup>824</sup> 18 U.S.C. § 245.

<sup>825</sup> 18 U.S.C. § 247.

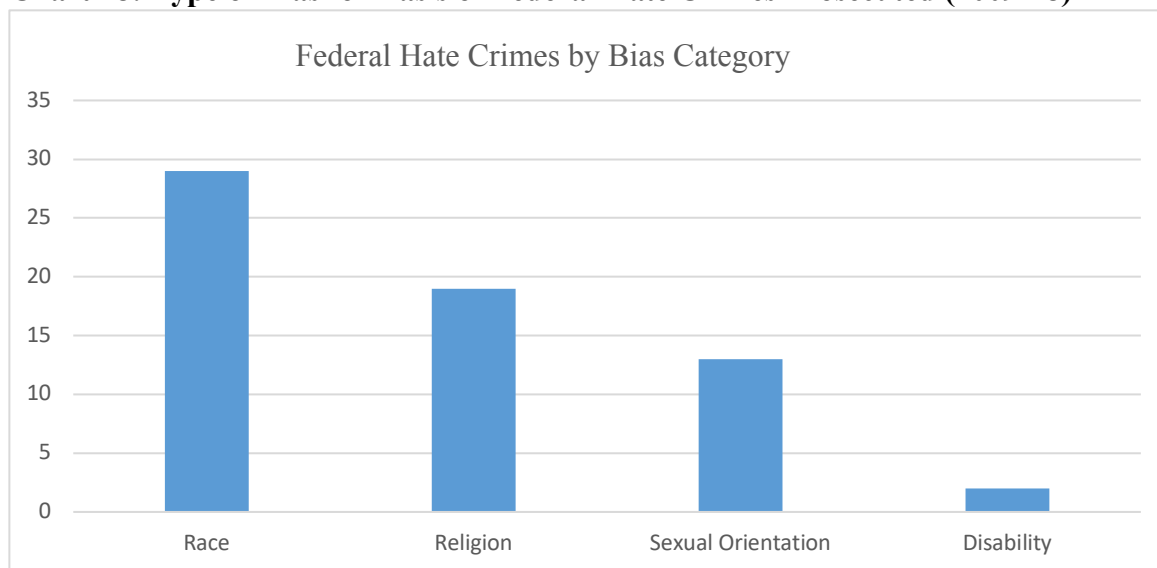
<sup>826</sup> See *infra* Tables 5-8.

<sup>827</sup> 18 U.S.C. § 241; 42 U.S.C. § 3631.

The data show that during the time period studied [hereinafter “2009-2018”], 28 (45.2 percent) of the DOJ’s prosecuted hate crimes cases were committed because of race or national origin, 13 (20.9 percent) were because of gender or sexual orientation, 19 (30.6 percent) were because of religion, and 2 (3.2 percent) were because of disability.<sup>828</sup> Also, of the 62 cases, in five cases: *United States v. Fields*, *United States v. Garza*, *United States v. Thompson*, *United States v. Lengend*, and *United States v. Allen* offenders were charged with a hate crime motivated by multiple biases (and most were charges based on race and religion). For example, the *Garza* case was prosecuted as a hate crime motivated by bias against race as well as a hate crime based on sexual orientation;<sup>829</sup> however, DOJ entered into a plea agreement with the *Garza* defendants on the sexual orientation charges and dismissed the race charges.<sup>830</sup> Also, the tables below only count each case once. Lastly, of the 62 hate crime complaints DOJ filed from 2009-2018, to date, 58 (93.5 percent) have resulted in convictions.<sup>831</sup>

The chart below shows the breakdown along bias categories of the federally prosecuted cases for the studied time years (2009-2018) (see chart 18).

**Chart 18: Type of Bias for Basis of Federal Hate Crimes Prosecuted (2009-18)**



Source: U.S. Dep’t of Justice, Interrogatory Responses to U.S. Commission on Civil Rights; data compiled and chart created by Commission staff

The facts of these cases are summarized below. The Commission has analyzed the patterns and evidence of bias through a summary that includes explanations of explicit evidence of intentional discrimination that may be disturbing to read.

### ***Hate Crimes Based on Race and/or National Origin***

<sup>828</sup> See *infra* Tables 5-8.

<sup>829</sup> *United States v. Garza, et al.* 2:15-CR-691 (S.D. Tex. 2015).

<sup>830</sup> See *infra* Tables 5-8.

<sup>831</sup> See *infra* Tables 5-8.

The highest number of federal hate crimes cases reported and prosecuted by DOJ's Civil Rights Division have been brought on the basis of bias against race or national origin. Out of the 62 hate crimes reportedly prosecuted by the federal government from 2009 to 2018, 28 (45.2 percent) have been brought on the basis of race or national origin. In some of the cases prosecuted, defendants have argued that an indictment is invalid because HCPA exceeds Congress's authority to pass legislation. To date, federal courts have upheld the constitutionality of 18 U.S.C. § 249(a)(1) by recognizing Congress's authority to pass legislation under the Thirteenth Amendment to prohibit willfully causing bodily injury to "any person because of the actual or perceived race, color, religion or national origin of any person[.]"<sup>832</sup> The Thirteenth Amendment provides that Congress has authority to enforce by appropriate legislation, the promise that neither slavery nor involuntary servitude shall exist in the United States;<sup>833</sup> in several hate crimes cases, federal courts have interpreted this as authority to "eradicate badges and incidents of slavery"<sup>834</sup> through HCPA.<sup>835</sup> As the cases summarized in the table below illustrate, this authority has been used to successfully prosecute attackers of Black, Latinx and Navajo individuals when they exhibit hatred of the individual's race or national origin during, before, or after the attack.<sup>836</sup>

The data charted below also shows that evidence of intentional discrimination was readily found in these cases through statements of the defendants. As the research illustrates, in the race-based cases the DOJ prosecuted, intent was shown through racist symbols, speech, and actions of defendants in the commission of the crimes. Clearly, bias motivation is a statutory element of 18 U.S.C. § 249, and the government has to prove it in order to get an indictment.<sup>837</sup> Among these cases, those that DOJ litigated to date were the most egregious and the evidence was clear.<sup>838</sup> The Commission provides descriptions of the key facts in these cases, particularly those that show the element of bias, to illustrate its unfortunate typicality.

<sup>832</sup> See Shepard-Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249; See also, e.g., *United States v. Metcalf*, No. 15-CR-1032-LRR, 2016 WL 827763, at \*5 (N.D. Iowa, March 2, 2016) (quoting Cong. Globe, 39th Cong., 1st Sess., 322) (alterations omitted); *United States v. Cannon*, 750 F.3d. 492, 499, 502 (5th Cir. 2014).

<sup>833</sup> U.S. Const. Amend. XIII.

<sup>834</sup> See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>835</sup> Senator Trumbull stated in support of the Thirteenth Amendment: "I have no doubt that under [the Thirteenth Amendment] we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end...[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *United States v. Cannon*, 750 F.3d. 492, 499, 502 (5th Cir. 2014); *United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012); *United States v. Metcalf*, No. 15-CR-1032-LRR, 2016 WL 827763, at \*5 (N.D. Iowa, March 2, 2016) (quoting Cong. Globe, 39th Cong., 1st Sess., 322) (alterations omitted); see also *United States v. Beebe*, 807 F. Supp. 2d 1045 (D. N.M. 2011); *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014); *United States v. Henery*, 60 F. Supp. 3d 1126 (D. Idaho 2014).

<sup>836</sup> See e.g., *United States v. Beebe*, 807 F. Supp. 2d 1045 (D.N.M. 2011); *United States v. Maybee*, 3:11-CR-30006, 2013 WL 3930562, at \*1 (W.D. Ark. 2011); *United States v. McClary* 4:12-CR-503 (D. S.C. 2012).

<sup>837</sup> 18 U.S.C. § 249.

<sup>838</sup> See *infra* notes 966-68 (discussing known fact patterns in which it would be harder to prove intent).

**Table 5: USCCR STAFF SUMMARY OF DOJ REPORTED HATE CRIME CASES MOTIVATED BY RACE, ETHNICITY, AND/OR NATIONAL ORIGIN ANIMUS (2009-2018):<sup>839</sup>**

<b>Defendant &amp; State &amp; Year</b>	<b>Key Facts</b>	<b>Evidence of Intent</b>	<b>Outcome</b>
<i>Beebe</i> , NM, 2011. <sup>840</sup>	Ds kidnapped a Navajo man with a cognitive disability, assaulted him, and branded him with a swastika.	Ds branded Navajo man with a swastika.	Convicted
<i>Popejoy</i> , AR, 2011. <sup>841</sup>	D and two others harassed five Latino men at a gas station. They proceeded to follow them, running them off the road causing the vehicle to crash and the passengers to be ejected from the vehicle.	D used racial slurs, told the five men to “go back to Mexico” and stated that he hoped the five men die after running them off the road.	Convicted – plea agreement. Convicted - following a jury trial. <sup>842</sup> D appealed and the Court of Appeals dismissed his motion <sup>843</sup>
<i>Butler</i> , MS, 2012. <sup>844</sup>	Ds attacked a black individual and yelled “white power.”	Ds conspired to attack black victims	Convicted – plea agreement
<i>McClary</i> , SC, 2012. <sup>845</sup>	D violently assaulted a black teenager by repeatedly striking him with a broken coffee mug.	D used racial epithets during the attack.	Convicted – plea agreement
<i>Gunar</i> , NJ, 2012. <sup>846</sup>	Ds conspired to attack two Middle Eastern men by brandishing a knife while shouting anti-Arab slurs. One D also pulled one man out of a car and punched him in the face and head.	Ds attended a “meet and greet” for white supremacists and conspired to randomly assault non-white individuals.	Convicted – plea agreement
<i>Hammet</i> , CA, 2013. <sup>847</sup>	Ds attacked a white man and black woman causing injuries and smashed the victims’ car windshield.	One D called the white man a “[racial-slur]-lover” and one D used a racial slur to refer to a Black witness.	Convicted – plea agreement

<sup>839</sup> DOJ Responses to USSCR Interrogatory No. 1, 5, 6 (Sept.7, 2018); Commission Staff Research of cases on Westlaw and PACER.

<sup>840</sup> *United States v. Beebe*, 807 F. Supp. 2d 1045 (D.N.M. 2011).

<sup>841</sup> *United States v. Popejoy*, 3:11-CR-30006 (W.D. Ark. 2011).

<sup>842</sup> One Defendant pleaded guilty to and was convicted of violating 18 U.S.C. § 249. The other Defendant went to trial and was found guilty of violating 18 U.S.C. § 249. See Judgment of Popejoy, *United States v. Popejoy*, 3:11-CR-30006 (W.D. Ark. 2011); Judgment of Maybee, *United States v. Popejoy*, 3:11-CR-30006 (W.D. Ark. 2011).

<sup>843</sup> U.S.C. §A Mandate, *United States v. Maybee*, 3:11-CR-30006, 2013 WL 3930562, at \*1 (W.D. Ark. July 30, 2011).

<sup>844</sup> *United States v. Butler*, 3:12-CR-34 (S.D. Miss. 2012); *United States v. Montgomery & Gaskamp*, 3:12-CR-130 3:12-CR-139 (S.D. Miss. 2012); *United States v. Blalack*, 3:14-CR-87 (S.D. Miss. 2014).

<sup>845</sup> *United States v. McClary*, 4:12-CR-503 (D.S.C. 2012).

<sup>846</sup> *United States v. Gunar*, 3:12-CR-815 (D.N.J. 2012).

<sup>847</sup> *United States v. Hammett*, 2:13-CR-011 (E.D. Cal. 2013).

<i>Larson, WA, 2013.</i> <sup>848</sup>	D grabbed the victim by his beard, struck him in the face, and repeatedly stomped on the victim's stomach, causing acute kidney failure and other injuries.	D referred to victim as a "raghead," "towelhead," and made comments such as "why did you come to my country" during the violent attack.	Convicted – plea agreement
<i>Aguilar, CA, 2013.</i> <sup>849</sup>	Ds attacked a black 17-year-old by striking him in the head with a metal pipe.	Ds gang often refer to themselves as "NK" or "N***** Killers." When they approached the victim, Ds threatened him by referring to themselves as "NKs."	Convicted – plea agreement
<i>Barret, TX, 2014.</i> <sup>850</sup>	D, in a video, punched an elderly black man, laughed and said "knockout" causing the victim to suffer 2 jaw fractures, 4 days' hospitalization.	In the recording, D said "The plan is to see if I were to hit a black person, would this be nationally televised?"	Convicted – plea agreement
<i>Henery, ID, 2014.</i> <sup>851</sup>	D attacked a black man.	D yelled racial slurs during the attack.	Acquitted after trial
<i>Cannon, TX, 2014.</i> <sup>852</sup>	Ds attacked a black man waiting alone at a bus stop by surrounding him and punching him repeatedly.	Ds had bald heads, were covered in tattoos indicative of white-supremacy organizations, and used racial epithets towards the victim and a black responding police officer.	3 of 4 Ds convicted. Court of Appeals affirmed <sup>853</sup>
<i>Dennis, FL, 2015.</i> <sup>854</sup>	D and others attempted to intimidate their neighbors, an interracial couple, by burning a six-foot cross in their front yard.	D had harassed the couple since they moved into his predominantly white-neighborhood by using demeaning language and racial slurs.	Convicted – plea agreement <sup>855</sup>

<sup>848</sup> *United States v. Larson*, 2:13-CR-95 (W.D. Wash. 2013).

<sup>849</sup> *United States v. Aguilar*, 2:13-CR-91 (C.D. Cal. 2013).

<sup>850</sup> *United States v. Barrett*, H-14-43, 2014 WL 3670040, at \*1 (S.D. Tex. July 22, 2014).

<sup>851</sup> *United States v. Henery*, 60 F. Supp. 3d 1126 (D. Idaho 2014).

<sup>852</sup> *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014).

<sup>853</sup> On appeal, Defendants argued that 18 U.S.C. § 249 was not a valid exercise of Congress's power under the Thirteenth Amendment. The United States Court of Appeals rejected this claim. In assessing the history of Thirteenth Amendment jurisprudence, it found that Thirteenth Amendment enforcement power gives Congress the ability to enact legislation that eradicates the "badges" and "incidents" of slavery. Thus, as "racially motivated violence was essential to the enslavement of African-Americans and was widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement" the Appeals Court could not find that "Congress was irrational in determining that racially motivated violence is a badge or incident of slavery." As such, 18 U.S.C. § 249, which outlaws hate crimes (incidences of racially motivated violence), is valid under the Thirteenth Amendment. *United States v. Cannon*, 750 F.3d 492, 499, 502 (5th Cir. 2014).

<sup>854</sup> *United States v. Dennis*, 8:16-CR-365 (M.D. Fla. 2015).

<sup>855</sup> Defendant was convicted of violating 18 U.S.C. § 241—conspiring against protected rights—as well as another felony. Judgment, *United States v. Dennis*, 8:16-CR-365 (M.D. Fla. 2015).



<i>Harpham</i> , WA, 2015. <sup>856</sup>	D placed an explosive device near the planned Martin Luther King Jr. Day Unity March.	D admitted to being a white supremacist and white separatist and pleaded in court that his crime was carried out because of the intended victims' race and national origin.	Convicted – plea agreement
<i>Saucedo</i> , CA, 2015. <sup>857</sup>	Ds attacked the homes of black families with Molotov cocktails.	Ds admitted that they targeted these families because of their race and that their goal was to intimidate the victims into moving out of the neighborhood, which the Ds' gang claimed as territory.	Convicted – plea agreement <sup>858</sup>
<i>Metcalf</i> , IA, 2016. <sup>859</sup>	D stomped on and kicked a black man in the head while at a bar.	D bragged about burning crosses and flashed his swastika tattoo throughout the night.	Convicted – jury trial
<i>Butler</i> , OH, 2016. <sup>860</sup>	Ds beat a black man, until 2 off-duty police officers saw the scene and pulled them away.	Following the incident, one D posted on Facebook that the attack was “in the name of the White Race.”	Convicted – plea agreement
<i>Martinez</i> , KS, 2016. <sup>861</sup>	Ds attacked victims while they were sitting on a bench outside of an African market.	Ds yelled racial & anti-Somali slurs.	Convicted – plea agreement <sup>862</sup>
<i>Kyle</i> , PA, 2016. <sup>863</sup>	D assaulted a 53-year-old black man outside a concert.	D admitted that he was motivated by the victim's race.	Convicted – plea agreement
<i>Vangastel</i> , OR, 2016. <sup>864</sup>	D entered the property of his Vietnamese neighbors without permission, appeared as if he were going to attack a member of the	D made derogatory and racial comments like “You smell like salmon-fish,” “I’ll beat you because you are Asian,” “You are not even white,” and “You	Convicted – plea agreement <sup>865</sup>

<sup>856</sup> *United States v. Harpham*, 2:11-CR-42, 2015 U.S. Dist. LEXIS 101326 (E.D. Wash. Aug. 3, 2015).

<sup>857</sup> *United States v. Saucedo, et al.*, 2:16-CR-0442 (C.D. Ca. 2016).

<sup>858</sup> Defendants were convicted of, among other felonies, violating 18 U.S.C. § 241—conspiring against protected rights, and 42 U.S.C. § 3631—interference with housing rights. Judgment, *United States v. Saucedo, et al.*, 2:16-CR-0442 (C.D. Ca. 2016).

<sup>859</sup> *United States v. Metcalf*, 15-CR-1032, 2016 WL 827763, at \*1 (N.D. Iowa March, 2016).

<sup>860</sup> *United States v. Butler*, 3:16-CR-249 (N.D. Ohio 2016).

<sup>861</sup> *United States v. Martinez*, 6:16-CR-10062, 2016 U.S. Dist. LEXIS 110353 (D. Kan. 2016).

<sup>862</sup> One Defendant pleaded guilty to violating 18 U.S.C. § 249 (HCPA). One Defendant pleaded guilty to an obstruction (perjury) offense. See Judgment of Sotelo, *United States v. Martinez*, 6:16-CR-10062, 2016 U.S. Dist. LEXIS 110353 (D. Kan. 2016); Judgment of Martinez, *United States v. Martinez*, 6:16-CR-10062, 2016 U.S. Dist. LEXIS 110353 (D. Kan. 2016).

<sup>863</sup> *United States v. Kyle*, 2:16-CR-255 (W.D. Pa. 2016).

<sup>864</sup> *United States v. Vangastel*, 6:16-CR-219 (D. Or. 2016).

<sup>865</sup> Defendant was convicted of violating 42 U.S.C. § 3631(a)—interference with housing rights. Judgment, *United States v. Vangastel*, 6:16-CR-00219 (D. Or. 2016).

	family, and made threatening comments.	[expletive] Vietnamese – you don’t deserve to live here.”	
<i>Gust</i> , ND, 2016. <sup>866</sup>	D set fire to a local Somali restaurant in ND with a Molotov Cocktail.	D admitted he committed the arson to intimidate the restaurant’s Somali patrons and employees.	Convicted – plea agreement <sup>867</sup>
<i>Whittington</i> , CA, 2016. <sup>868</sup>	D used a shotgun to fire at a Latino man who was standing outside of his home with his wife and child. Soon after, D also shot at a local convenience store operated by an individual of Middle Eastern descent.	While D was firing at the Latino man, he yelled racial slurs with profanity. He also shouted at the victim to move out of Oildale, California.	Convicted – following a jury trial. <sup>869</sup> Court of Appeals affirmed
<i>Burgess</i> , PA, 2017. <sup>870</sup>	D punched the victim, causing a fractured jaw, a head injury, and a lost tooth, because he thought the victim was Arab. <sup>871</sup>	Sealed case – no evidence of intent available.	Convicted – plea agreement
<i>Purinton</i> , KS, 2017. <sup>872</sup>	D shot three men, including two Indian men, resulting in the death of one.	Sealed case – no evidence of intent available.	Convicted – plea agreement
<i>Nucera</i> , NJ, 2017. <sup>873</sup>	After two black teenagers were arrested for staying in a hotel without paying, D allegedly slammed the teenager’s head into a metal doorjamb.	Police recorded D allegedly making racist remarks.	Ongoing case <sup>874</sup>
<i>Roof</i> , SC, 2017. <sup>875</sup>	D murdered nine black individuals in a church after they had attended Bible study.	A few hours before the shooting, D published his manifesto discussing his racist beliefs online.	Convicted – following a jury

<sup>866</sup> *United States v. Gust*, 3:16-CR-8 (D.N.D. 2016).

<sup>867</sup> Defendant was convicted of violating 18 U.S.C. § 241—conspiring against protected rights—as well as another felony. Judgment, *United States v. Gust*, 3:16-CR-00008 (D.N.D. 2016).

<sup>868</sup> *United States v. Whittington*, 1:15-CR-265 (E.D. Cal. 2016).

<sup>869</sup> Defendant was convicted of, among other felonies, violating 42 U.S.C. § 3631(a)—interference with housing rights. Judgment, *United States v. Whittington*, 1:15-CR-00265 (E.D. Cal. 2016).

<sup>870</sup> *United States v. Burgess*, 2:17-CR-70 (W.D. Pa. 2017).

<sup>871</sup> See Torsten Ove, “Bethel Park Man Gets Probation, Community Service in Federal Hate Crime Assault,” *Pittsburgh Post-Gazette*, April 6, 2018, <https://www.post-gazette.com/local/south/2018/04/06/Bethel-Park-Jeffrey-Burgess-probation-community-service-federal-hate-crime-assault/stories/201804060128>.

<sup>872</sup> *United States v. Purinton*, 2:17-CR-20028 (D. Kan. 2017).

<sup>873</sup> *United States v. Nucera*, 1:17-CR-532 (D. N.J. 2017).

<sup>874</sup> Defendant, a police officer, was charged with violating 18 U.S.C. § 249, but also with violating 18 U.S.C. § 242, for the deprivation of rights under the color of law. Indictment, *United States v. Nucera*, 1:17-CR-532 (D. N.J. 2017) at 7.

<sup>875</sup> *United States v. Roof*, 252 F. Supp. 3d 469 (D. S.C. 2017).

			trial. <sup>876</sup> Case pending appeal
<i>Porter</i> , UT, 2017. <sup>877</sup>	D assaulted his black neighbor with a stun device.	D had told his apartment complex staff that he did not want to live around black people & told a neighbor they should be “exterminated.” Immediately preceding the incident, he yelled a racial slur at victim’s young child. He again used a racial slur at the victim & his child & told them to “get out of here.”	Convicted – jury trial. <sup>878</sup> Case pending appeal.
<i>Halfin</i> , TX, 2018. <sup>879</sup>	D threatened force against and intimidated the upstairs neighbors in his apartment complex, who were a black family.	D hung a baby doll from a noose outside of the entrance of the family’s apartment (the family had a young daughter). D had intimidated the same family on previous occasions.	Convicted – plea agreement. <sup>880</sup> D appealed, but the Appeals Court dismissed his appeal pursuant to appellant’s motion.
<i>Fields</i> , VA, 2018. <sup>881</sup>	D, following a “Unite the Right” rally, drove rapidly into a diverse crowd of counter-protesters striking numerous individuals, killing Heather Heyer.	D, a neo-Nazi, was a protester at “Unite the Right” rally and drove into a crowd of counter-protesters.	Convicted (Race and Religion) <sup>882</sup>

<sup>876</sup> Defendant was convicted of violating 18 U.S.C. § 249, but also of violating 18 U.S.C. § 247—obstruction of the free exercise of religion. Judgment, *United States v. Roof*, 252 F. Supp. 3d 469 (D. S.C. 2017).

<sup>877</sup> *United States v. Porter*, 2:17-CR-527 (D. Utah 2017).

<sup>878</sup> Defendant was convicted of violating 42 U.S.C. § 3631(a)—interference with housing rights. Judgment, *United States v. Porter*, 2:17-CR-00527 (D. Utah 2018).

<sup>879</sup> *United States v. Halfin*, 4:18-CR-142 (N.D. Tex. 2018).

<sup>880</sup> Defendant was convicted of violating 42 U.S.C. § 3631—interference with housing rights. Judgment, *United States v. Halfin*, 4:18-CR-142 (N.D. Tex. 2018).

<sup>881</sup> *United States v. Fields*, 3:18-CR-11 (W.D. Va. 2018).

<sup>882</sup> Defendant was indicted in June 2018 on 30 counts, including charges of violating 18 U.S.C. § 249 and 18 U.S.C. § 245. When he pleaded guilty in March 2019, he pleaded to the 29 charges of violating 18 U.S.C. § 249, with the crime committed because of the actual or perceived race, color, religion, and national origin of his intended victims. His plea agreement admitted guilt for the HCPA violations (18 U.S.C. § 249) and stipulated a dismissal of Count 30, the violation of 18 U.S.C. § 245—bias-motivated interference with a federally protected activity resulting in death. See Indictment, *United States v. Fields*, 3:18-CR-11 (W.D. Va. 2018) at 6-7; Plea Agreement, *United States v. Fields*, 3:18-CR-11 (W.D. Va. 2018) at 2. This dropped count could have resulted in a death penalty sentence, according to the *New York Times*. Mitch Smith, “James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville,” *New York Times*, June 28, 2019, <https://www.nytimes.com/2019/06/28/us/james-fields-sentencing.html>. Defendant was sentenced to life in federal prison in June 2019. Sentencing, *United States v. Fields*, 3:18-CR-11 (W.D. Va. 2018).

### *Hate Crimes Based on Gender and/or Sexual Orientation*

After hate crimes based on race or national origin, the next highest category of hate crimes federally prosecuted under 18 U.S.C. § 249 has been on the basis of sexual orientation motivated crimes. Out of the 62 hate crimes cases reportedly prosecuted by the federal government from 2009 to 2018, 13 (20.9 percent) were assaults based on sexual orientation.<sup>883</sup> HCPA extends protections to LGBT victims of a hate crime (intentional infliction of bodily injury because of actual or perceived gender, sexual orientation, or gender identity), when there are certain types of impacts on interstate commerce.<sup>884</sup> The statute contains a detailed description of the ways the commerce clause element may be fulfilled, including that: the crime was committed across a state line or national border; or the defendant used an instrumentality of interstate or foreign commerce; or the defendant employed a firearm, dangerous weapon, explosive or incendiary device or other weapons that has traveled in interstate or foreign commerce; or the crime “interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct” or otherwise affects interstate or foreign commerce.<sup>885</sup>

DOJ prosecuted these complex statutory elements in *United States v. Hill*, a case from Virginia. Defendant Hill was an Amazon employee who had violently assaulted a co-worker and among other indicators of bias against his gay co-worker; after the incident he told Amazon and the police who arrived on the scene that he had assaulted his co-worker because of the co-worker’s sexual orientation.<sup>886</sup> Hill then brought and won a facial challenge to the constitutionality of 18 U.S.C. § 249 before trial. DOJ appealed, and the court of appeals reversed the district court and remanded the case for a jury trial during which evidence of whether Hill’s conduct “sufficiently affects interstate commerce as to satisfy the constitutional limitations placed on Congress’ Commerce

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<sup>883</sup> See *infra* Table 6.

<sup>884</sup> 18 U.S.C. § 249(a)(2).

<sup>885</sup> 18 U.S.C. § 249(a)(2)(B):

(B) Circumstances described.—For purposes of subparagraph (A)[bodily injury caused “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person”], the circumstances described in this subparagraph are that—

- (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—
  - (I) across a State line or national border; or
  - (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
- (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);
- (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
- (iv) the conduct described in subparagraph (A)—
  - (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
  - (II) otherwise affects interstate or foreign commerce.

<sup>886</sup> *United States v. Hill*, 182 F. Supp. 3d 546 (E.D. Va. 2016).

Clause power.”<sup>887</sup> DOJ then changed its argument from an interstate commerce argument, dropping that claim, and instead “relied exclusively on the theory that Defendant’s assault of Tibbs ‘interfere[d] with commercial or other economic activity in which the victim [was] engaged at the time of the conduct.’”<sup>888</sup> The jury convicted Hill after trial,<sup>889</sup> but the trial court overturned the conviction, and the federal government appealed again. Most recently, on June 24, 2019, the Fourth Circuit held that “we conclude that as applied to Defendant’s conduct, the Hate Crimes Act easily falls under Congress’s broad authority to regulate interstate commerce, we reverse and remand to the district court to reinstate the jury’s guilty verdict.”<sup>890</sup> The Fourth Circuit considered that:

Video shows that shortly after the beginning of Tibbs’s shift on May 22, 2015, as Tibbs carried items to load into a box, Defendant approached Tibbs from behind and— without provocation or warning—repeatedly punched him in the face. As a result of the assault and battery, Tibbs suffered significant bruising, cuts to his face, and a bloody nose. After the incident, Tibbs went to Amazon’s in-house medical clinic and then to the nearest hospital for treatment. Tibbs did not return to work on the production line for the remaining several hours of his ten-hour shift. Amazon shut down the area of the incident for approximately 30–45 minutes to clean blood off the floor, but Amazon did not miss any “critical pull times,” or packaging deadlines, as a result of the incident because other areas of the facility absorbed the work.<sup>891</sup>

The court of appeals reasoned that although the Supreme Court has made clear that Congress’ interstate commerce authority must be limited to avoid creating a federal police power, as police powers generally pertain to the states, “Congress paid close attention to the scope of its authority when it enacted the Hate Crimes Act.”<sup>892</sup> The Fourth Circuit considered that in enacting the HCPA, “Congress averted to several Supreme Court decisions setting forth the outer limits of Congress’ authority under the Commerce Clause,”<sup>893</sup> and enacted the statutory elements required to prove a nexus to interstate commerce “to avoid constitutional concerns” set forth by the Court. Moreover, it was “because Tibbs was assaulted while preparing packages for interstate sale and shipment” that the Commonwealth of Virginia’s attorney referred the crime for federal prosecution.<sup>894</sup> In several cases the Supreme Court has held that “when Congress may regulate an economic or commercial activity, it also may regulate violent conduct that interferes with or affects that activity.”<sup>895</sup> Therefore, the Fourth Circuit held that: “Hence, if individuals are engaged in ongoing economic or commercial activity subject to congressional regulation—as Tibbs was at the time of the assault—then Congress also may prohibit violent crime that interferes with or affects such

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<sup>887</sup> *United States v. Hill*, 700 F. App’x 235, 237 (4th Cir. 2017).

<sup>888</sup> *United States v. Hill*, 700 F. App’x 235, 237 (4th Cir. 2017), *citing* 8 U.S.C. § 249(a)(2)(B)(iv)(I).

<sup>889</sup> *United States v. Hill*, 182 F. Supp. 3d 546, 555–56 (E.D. Va. 2016).

<sup>890</sup> *United States v. Hill*, No. 18-4660, 3 (4th Cir. June 24, 2019),

<http://www.ca4.uscourts.gov/opinions/184660.P.pdf>.

<sup>891</sup> *Id.* at 4.

<sup>892</sup> *Id.* at 9.

<sup>893</sup> *Id.* at 10.

<sup>894</sup> *Id.* at 11.

<sup>895</sup> *Id.* at 18.

individuals' ongoing economic or commercial activity, including the type of bias-motivated assaults proscribed by the Hate Crimes Act.”<sup>896</sup>

As the chart below shows, in contrast to the *Hill* litigation, most DOJ hate crimes cases that involved a LGBT victim were resolved through a plea agreement.<sup>897</sup> This indicates that the defendant pled guilty and admitted to intentionally assaulting the victim based on their sexual orientation.<sup>898</sup>

**Table 6: USCCR STAFF SUMMARY OF DOJ REPORTED HATE CRIME CASES MOTIVATED BY GENDER IDENTITY AND SEXUAL ORIENTATION ANIMUS (2009-2018)<sup>899</sup>**

Defendant & State & Year	Key Facts	Evidence of Intent	Outcome
<i>Avery</i> , MI, 2012. <sup>900</sup>	D punched a gay man in the face, fracturing his eye socket.	D used anti-gay slurs toward the victim during the attack.	Convicted – plea agreement
<i>Hall</i> , TX, 2012. <sup>901</sup>	D assaulted his fellow inmate, whom he perceived to be gay, with a dangerous weapon.	D yelled homophobic slurs during the attack.	Convicted – plea agreement
<i>Jenkins</i> , KY, 2012. <sup>902</sup>	Ds kidnapped and brutally beat an LGBT person.	The beating occurred while Ds yelled homophobic slurs.	Convicted – jury trial. <sup>903</sup> Court of Appeals upheld. <sup>904</sup>
<i>Cain</i> , GA, 2013. <sup>905</sup>	Ds repeatedly kicked and punched a gay man.	Ds carried out the attack while yelling anti-gay epithets.	Convicted – plea agreement
<i>Mason</i> , OR, 2014. <sup>906</sup>	D punched and used a metal tool to attack a gay man and his boyfriend.	D yelled homophobic slurs and said “you are un-American because your poodle is pink.”	Hung jury – Court declared mistrial

<sup>896</sup> *Id.* at 18.

<sup>897</sup> See Table 6, *infra* (documenting these cases).

<sup>898</sup> This is in part because federal judges are prohibited from participating in plea agreements, and they must be voluntary, so they are merely agreements between the parties. See, e.g., Federal Sentencing Law & Practice, Court’s Role in Plea Negotiations, § 6B1.1 (4) (2016 ed.), discussing Federal Rules of Criminal Procedure Rule 11(c)(1) (“An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”), and citing cases.

<sup>899</sup> The cases covered in this table were in the response to the interrogatories sent by the Commission on July 18, 2018 to the Department of Justice Civil Rights Division.

<sup>900</sup> *United States v. Avery*, 5:12-CR-20529 (E.D. Mich. 2012).

<sup>901</sup> *United States v. Hall*, 3:12-CR-349 (N.D. Tex. 2012).

<sup>902</sup> *United States v. Jenkins*, 6:12-CR-15, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

<sup>903</sup> Defendants were charged with violating 18 U.S.C. § 249 and the federal kidnapping statute. A jury found them guilty of kidnapping but acquitted them on the hate crimes charges. See Indictment, *United States v. Jenkins*, 6:12-CR-15, 909 F. Supp. 2d 758 (E.D. Ky. 2012); Judgment *United States v. Jenkins*, 6:12-CR-15, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

<sup>904</sup> United States Court of Appeals Judgment, *United States v. Jenkins*, 6:12-CR-15, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

<sup>905</sup> *United States v. Cain*, 1:13-CR-85 (N.D. Ga. 2013).

<sup>906</sup> *United States v. Mason*, 3:13-CR-0029, 993 F. Supp. 2d 1308 (D. Or. 2014).

<i>Johnson</i> , TX, 2014. <sup>907</sup>	D kidnapped a young gay man, after luring him to his home and violently assaulting him.	In recorded jail calls and conversations, D used derogatory gay slurs. D also had the victim saved in his phone as a derogatory slur.	Convicted – plea agreement <sup>908</sup>
<i>Burns</i> , WA, 2015. <sup>909</sup>	D chased down and attempted to stab three gay men.	D yelled homophobic slurs and continued to use slurs in the presence of responding police.	Convicted – plea agreement
<i>Garza</i> , TX, 2015. <sup>910</sup>	Ds punched, kicked, and used various weapons such as a sock full of batteries and a belt to whip a gay black man.	Ds called victim a slave while whipping him and called him a “fa--ot ni--er.”	Convicted – plea agreement (on sexual orientation charge only; race claim dismissed). <sup>911</sup>
<i>Vallum</i> , MS, 2016. <sup>912</sup>	D, after ending a consensual sexual relationship with a transgender woman, killed her by using a stun gun, repeatedly stabbing, and bludgeoning her with a hammer until she died.	D feared that his fellow gang-members would learn of his relationship with his transgender partner.	Convicted – plea agreement
<i>Shelton</i> , TX, 2017. <sup>913</sup>	Ds used a dating platform for gay men, Grindr, to arrange to meet in the home of an LGBT individual and proceeded to physically restrain and assault the individual.	Ds made derogatory statements during the incident.	Convicted – plea agreement
<i>Schneider</i> , ID, 2017. <sup>914</sup>	Ds violently assaulted an LGBT person by kicking him between 20 and 30 times with steel-toed boots, causing his death.	Ds used homophobic slurs during the attack.	Convicted – plea agreement

<sup>907</sup> *United States v. Johnson*, 4:14-CR-108 (N.D. Tex. 2014).

<sup>908</sup> Defendant was originally charged with violating 18 U.S.C. § 249 and the federal kidnapping statute. However, his plea agreement stipulated a guilty plea to the kidnapping charges contingent on the United States dropping the hate crimes charges. Defendant was only convicted on the kidnapping charges. *See* Indictment, *United States v. Johnson*, 4:14-CR-108 (N.D. Tex. 2014); Plea Agreement, *United States v. Johnson*, 4:14-CR-108 (N.D. Tex. 2014); Judgment, *United States v. Johnson*, 4:14-CR-108 (N.D. Tex. 2014).

<sup>909</sup> *United States v. Burns*, 2:15-CR-263 (W.D. Wash. 2015).

<sup>910</sup> *United States v. Garza*, 2:15-CR-691 (S.D. Tex. 2015).

<sup>911</sup> Each Defendant was initially charged with two counts of violating U.S.C. § 249 because of the race of the victim and two counts of violating U.S.C. § 249 because of the sexual orientation of the victim. However, both Defendants submitted a motion to dismiss the counts of violating U.S.C. § 249 because of the race of the victim, which the district court granted. *See* Indictment, *United States v. Garza*, 2:15-CR-691 (S.D. Tex. 2015) at 3, 4; Order to Dismiss Counts Two and Four of the Indictment, *United States v. Garza*, 2:15-CR-691 (S.D. Tex. 2015).

<sup>912</sup> *United States v. Vallum*, 1:16-CR-114 (S.D. Miss. 2016).

<sup>913</sup> *United States v. Shelton*, 4:17-CR-39 (E.D. Tex. 2017).

<sup>914</sup> *United States v. Schneider*, 1:17-CR-3 (D. Idaho 2017).

<i>Hill, VA, 2018.</i> <sup>915</sup>	D punched a gay man in his face several times while he was working in a production line.	D stated after the attack that he hit the victim because of his sexual orientation.	Convicted – case pending appeal
<i>Taylor, WV, 2018.</i> <sup>916</sup>	D allegedly used a glass bottle to hit the victim multiple times on her head because of her sexual orientation.	Sealed case – no evidence of intent available.	Acquitted by jury – DOJ did not appeal

### ***Hate Crimes Based on Religion***

Of the 62 federal hate crimes cases prosecuted from 2009-2018, 19 (30.6 percent) were motivated by animus based on religion. In addition to these, another major case is underway. For his alleged mass shooting at the Tree of Life Synagogue in Pittsburgh, in January 2019, Robert Bowers was indicted on 44 counts,<sup>917</sup> and an additional 19 counts are set forth in a superseding indictment, 13 of which are under HCPA.<sup>918</sup>

The First Amendment has been used by the defendants in an attempt to fight charges of religious discrimination under HCPA. Precedents set among these cases show that federal courts have upheld the principle that, “[t]he First Amendment has never been construed to protect acts of violence against another individual, regardless of the motivation or belief of the perpetrator.”<sup>919</sup>

**Table 7: USCCR STAFF SUMMARY OF DOJ REPORTED HATE CRIME CASES MOTIVATED BY RELIGIOUS ANIMUS (2009-2018)<sup>920</sup>**

<b>Defendant &amp; State &amp; Year</b>	<b>Key Facts</b>	<b>Evidence of Intent</b>	<b>Outcome</b>
<i>Thompson, MN, 2011.</i> <sup>921</sup>	D attacked the victim, who was an elderly Somali Muslim man.	D yelled that the victim should “go back to Africa” and admitted that he attacked the Somali man solely because of his religion.	Convicted – plea agreement (Religion/National Origin)
<i>Lengend, NY, 2012.</i> <sup>922</sup>	D allegedly threw a flaming bottle filled with gasoline into a convenience store, threw another at a house that caught fire, and later went to	D, during a post-arrest statement, expressed a strong dislike for Arabs, Muslims, and people of Middle Eastern decent.	Convicted – plea agreement (Race/Color/Religi)

<sup>915</sup> *United States v. Hill*, No. 18-4660, 3 (4<sup>th</sup> Cir. June 24, 2019),

[https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/us-v-hill\\_va\\_20190613\\_opinion.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/us-v-hill_va_20190613_opinion.pdf).

<sup>916</sup> *United States v. Taylor*, 2:18-CR-135 (S.D. W.V. 2018).

<sup>917</sup> *United States v. Robert Bowers*, No. 18-292, Case: 2:18-cr-00292-DWA, Filed 10/31/2018,

<https://www.justice.gov/usao-wdpa/press-release/file/1106841/download>.

<sup>918</sup> See U.S. Dep’t of Justice, “Additional Charges Filed in Tree of Life Synagogue Shooting,” Jan. 29, 2019,

<https://www.justice.gov/opa/pr/additional-charges-filed-tree-life-synagogue-shooting>.

<sup>919</sup> See, e.g., *United States v. Mullet*, 868 F. Supp. 2d 618, 623 (N.D. Ohio 2012) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)).

<sup>920</sup> The cases covered in this table were in the response to the interrogatories sent by the Commission on July 18, 2018 to the Department of Justice Civil Rights Division, and were supplemented by cases later sent to the Commission on June 17, 2019.

<sup>921</sup> *United States v. Thompson*, 0:11-CR-223 (D. Minn. 2011).

<sup>922</sup> *United States v. Lengend*, 1:12-CR-188 (E.D.N.Y. 2012).



	a mosque and a Hindu temple where he threw glass bottles with gasoline.		on/National Origin) <sup>923</sup>
<i>Mullet</i> , OH, 2012 <sup>924</sup> ; <i>Miller</i> , OH, 2014. <sup>925</sup>	Ds in the Amish community forcibly shaved beards and cut hair of other community members, to humiliate those who do not comply with religious community leaders.	No direct speech during the commission of the assault; however, there was biased speech during the planning.	Convicted – jury trial. Overturned. <sup>926</sup>
<i>Doggart</i> , TN, 2015. <sup>927</sup>	D planned armed attack on a community in New York with a large Muslim population, including plans to burn down a mosque, school, and cafeteria.	Evidence presented during trial established that D targeted the mosque because it was a building of the Islamic faith.	Convicted – jury trial. <sup>928</sup> Overturned. <sup>929</sup>
<i>Hakey</i> , CT, 2015. <sup>930</sup>	D fired shots from a high-powered rifle into a Mosque in Meriden, CT.	Prior to the attack, his Facebook status read: “What is gonna be the breaking point to go “weapons free” against Islam?” and he messaged a friend: “I hate ISLAM!”	Convicted – plea agreement <sup>931</sup>

<sup>923</sup> Defendant was charged with, among other felonies, violating 18 U.S.C. § 249 and 18 U.S.C. § 247. However, he only pleaded guilty to violating 18 U.S.C. § 249 and the other charges were dismissed. Judgment, *United States v. Legend*, 1:12-CR-188 (E.D. N.Y. 2012).

<sup>924</sup> *United States v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012)

<sup>925</sup> *United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014).

<sup>926</sup> Sixteen defendants were charged with violating 18 U.S.C. § 249 and obstructing justice. Defendants were convicted of hate crimes and obstruction offenses after a jury trial. The United States Court of Appeals overturned the 18 U.S.C. § 249 convictions because of an error in the jury instructions (religious bias had to be “the determinative factor”). However, Defendants remain convicted of the obstruction of justice charges. *United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014).

<sup>927</sup> *United States v. Doggart*, 1:15-CR-39 (E.D. Tenn. 2015).

<sup>928</sup> Defendant was convicted of violating 18 U.S.C. § 247—attempted damage to religious property. Judgment, *United States v. Doggart*, 1:15-CR-39 (E.D. Tenn. 2015).

<sup>929</sup> The Court of Appeals stated that “. . .the district court wrongly rejected the plea agreement,” and so it “reverse[d] its decision to reject the agreement, leav[ing] in place for now the later convictions, and remand[ed] for it to reconsider the agreement under the correct law.” Memorandum and Order, *United States v. Doggart*, 1:15-cr-00039 (E.D. Tenn. 2017).

<sup>930</sup> *United States v. Hakey*, 3:15-CR-232 (D. Conn. 2015).

<sup>931</sup> Defendant was convicted of violating 18 U.S.C. § 247—damage to religious property. Judgment, *United States v. Hakey*, 3:15-CR-00232 (D. Conn. 2016).

<i>Fisher</i> , MN, 2016. <sup>932</sup>	D wrote and sent a letter filled with threatening language to an Islamic Center in Minneapolis.	The letter threatened to “blow up your building with all you immigrants in it,” and included hateful language against Muslims. He later admitted that his motivations for writing the letter was to intimidate the Center’s Muslim patrons.	Convicted – plea agreement <sup>933</sup>
<i>Schnitzler</i> , FL, 2016. <sup>934</sup>	D threatened to harm the patrons of two local mosques and destroy mosque property in Pinellas County, FL.	D also admitted that his behavior was a reaction to the 2015 terrorist attacks in Paris.	Convicted – plea agreement <sup>935</sup>
<i>Payne</i> , NM, 2016. <sup>936</sup>	D demanded a Muslim woman take off her hijab, and when she didn’t, he pulled it off himself.	As D was removing his victim’s hijab, he demanded, “Take it off! This is America!” D later admitted that he knew hijabs were associated with Islam.	Convicted – plea agreement <sup>937</sup>
<i>Medina</i> , FL, 2016. <sup>938</sup>	D planned and attempted to attack a synagogue in Aventura, FL. D also attempted to use a weapon of mass destruction.	In conversations with an FBI Confidential Human Source, D referenced his hatred for Jewish people as a motivation for his attack on the synagogue. <sup>939</sup>	Convicted – plea agreement <sup>940</sup>
<i>Allen</i> , KA, 2016. <sup>941</sup>	Ds planned to bomb an apartment complex and use a weapon of mass destruction, to hurt immigrants living there.	The apartment complex housed a number of Muslim Somali immigrants and also contained a mosque.	Convicted – jury trial (Race, National Origin, Religion) <sup>942</sup>

<sup>932</sup> *United States v. Fisher*, 0:16-CR-300 (D. Minn. 2016).

<sup>933</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. *United States v. Fisher*, 0:16-CR-00300 (D. Minn. 2016).

<sup>934</sup> *United States v. Schnitzler*, 8:16-CR-27 (M.D. Fla. 2016).

<sup>935</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. Judgment, *United States v. Martin Schnitzler*, 8:16-CR-00027 (M.D. Fla. 2016).

<sup>936</sup> *United States v. Payne*, 1:16-CR-02074 (D.N.M. 2016).

<sup>937</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. *United States v. Payne*, 1:16-CR-02074-SCY (D.N.M. 2016).

<sup>938</sup> *United States v. Medina*, 1:16-CR-20349 (S.D. Fla. 2016).

<sup>939</sup> Criminal Complaint, *United States v. Medina*, 1:16-CR-20349 (S.D. Fla. 2017) at 4-5.

<sup>940</sup> Defendant was convicted of violating 18 U.S.C. § 247—attempting to damage religious property. Judgment, *United States v. Medina*, 1:16-CR-20349 (S.D. Fla. 2017).

<sup>941</sup> *United States v. Allen*, 6:16-CR-10141 (D. Kan. 2016).

<sup>942</sup> Defendants were also convicted of, among other felonies, violating 18 U.S.C. § 241—conspiring against protected rights. Judgment, *United States v. Allen*, 6:16-CR-10141 (D. Kan. 2016).

<i>Stout</i> , MO, 2017. <sup>943</sup>	D successfully committed arson at a local mosque.	D admitted he set fire to the mosque due to its religious character.	Convicted – plea agreement. <sup>944</sup>
<i>Wallace</i> , FL, 2017. <sup>945</sup>	D threatened to attack a mosque in Miami Gardens, FL, by shooting its members.	D left a voicemail on the phone line at the Islamic Center that was filled with profanity and disparaged Islam, the Koran, and the prophet Mohammed.	Convicted – plea agreement <sup>946</sup>
<i>Perez</i> , TX, 2017. <sup>947</sup>	D set fire to the Victoria Islamic Center in Victoria, TX.	Witness testified that D had previously used discriminatory language to describe Muslims and an FBI agent testified that prejudice and hate-filled messages were found in D’s social media account.	Convicted – following a jury trial. <sup>948</sup> Case is pending appeal.
<i>Jones</i> , FL, 2017. <sup>949</sup>	D threatened two Muslim grocery stores with violence if the storeowners did not close up their shops.	While making his threats, D stated that he and others would “blow up all Muslims and get this land back. D also stated that he (D) was from “the good temple” and that “we decided whatever happened in Orlando is not gonna (sic) happen again. We don’t need no halal business in the area either you or the other guys back there.”	Convicted – plea agreement <sup>950</sup>

<sup>943</sup> *United States v. Stout*, 669 Fed.Appx.589 (8th Cir. 2017). D appealed, arguing that the district court’s restitution order and prison term sentencing was substantively unreasonable. The Court of Appeals affirmed the District Court’s order.

<sup>944</sup> Defendant was convicted of violating 18 U.S.C. § 247—damage to religious property.

<sup>945</sup> *United States v. Wallace*, 1:17-CR-20354 (S.D. Fl. 2017).

<sup>946</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. Judgment, *United States v. Wallace*, 1:17-CR-20354 (S.D. Fl. 2017).

<sup>947</sup> *United States v. Perez*, 6:17-CR-35 (S.D. Tex. 2017).

<sup>948</sup> Defendant was convicted of, among other felonies, violating 18 U.S.C. § 247—aiding and abetting damage to religious property. Judgment, *United States v. Perez*, 6:17-CR-35 (S.D. Tex. 2017).

<sup>949</sup> *United States v. Jones*, 2:17-CR-2 (M.D. Fla. 2017).

<sup>950</sup> Defendant was convicted of violating 18 U.S.C. § 245—interference with federally protected activities. Judgment, *United States v. Jones*, 2:17-cr-00002 (M.D. Fla. 2017).

<i>Stout</i> , TN, 2018. <sup>951</sup>	D conspired to vandalize religious property—an Islamic Center—in Murfreesboro, TN.	D littered bacon, a food forbidden by Islam, around the entrance of the Center, and sprayed profane references about Allah on the Center’s façade.	Convicted – plea agreement <sup>952</sup>
<i>Hughes</i> , FL, 2018. <sup>953</sup>	D threatened via voice message to attack a mosque in Pembroke Pines, FL, with a dangerous weapon and explosive.	The voice message was filled with denigrating comments about Islam.	Convicted – plea agreement <sup>954</sup>
<i>Howard</i> , FL, 2018. <sup>955</sup>	D harassed, threatened, and intimidated a Muslim family in an attempt to deter them from buying a home in his neighborhood.	When the family was taking a tour of the home, D yelled at the family, “You are not welcome here.” D relayed this story to others in the following days and made derogatory comments about Muslims.	Convicted – plea agreement. <sup>956</sup>
<i>Howard</i> , GA, 2018. <sup>957</sup>	D called the Islamic Society of Augusta and threatened violence against its members.	In multiple phone calls, D said he would “hunt down” Muslims. D admitted to committing this act in an attempt to obstruct the members of the mosque from practicing their religious beliefs freely.	Convicted - plea agreement. <sup>958</sup> Case pending appeal.
<i>Koch</i> , OH, 2018. <sup>959</sup>	D allegedly hit and kicked an individual after learning of the man’s Jewish identity.	Sealed case – no evidence of intent available.	Convicted—bench trial.

<sup>951</sup> *United States v. Stout*, 3:17-CR-168 (M.D. Tenn. 2018).

<sup>952</sup> Defendant was convicted of violating 18 U.S.C. § 247—damage to religious property. *United States v. Stout*, 3:17-CR-00168-1 (M.D. Tenn. 2018).

<sup>953</sup> *United States v. Hughes*, 0:18-CR-60143 (S.D. Fla. 2018).

<sup>954</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. Judgment, *United States v. Hughes*, 0:18-CR-60143 (S.D. Fla. 2018).

<sup>955</sup> *United States v. Howard*, 8:18-CR-51 (M.D. Fla. 2018).

<sup>956</sup> Defendant was convicted of violating 42 U.S.C. § 3631(a)—interference with housing rights. Judgment, *United States v. Howard*, 8:18-CR-00051 (M.D. Fla. 2018).

<sup>957</sup> *United States v. Howard*, 1:18-CR-13 (S.D. Ga. 2018).

<sup>958</sup> Defendant was convicted of violating 18 U.S.C. § 247—obstruction of persons in their free exercise of religious beliefs. Judgment, *United States v. Howard*, 1:18-CR-13 (S.D. Ga. 2018).

<sup>959</sup> *United States v. Koch*, 1:18-CR-34 (S.D. Ohio 2018).

### *Hate Crimes Based on Disability*

Of the 62 federal hate crimes prosecuted from 2009-2018, only 2 (3.2 percent) were brought on the basis of disability. In both of these cases, victims were allegedly abused, held in captivity by their assailants, and treated in inhumane ways due to their disabilities. Further, the defendants in both cases were charged with multiple counts beyond violating the HCPA.

**Table 8: USCCR STAFF SUMMARY OF DOJ REPORTED HATE CRIME CASES MOTIVATED BY DISABILITY ANUMUS (2009-2018)<sup>960</sup>**

<b>Defendant &amp; State &amp; Year</b>	<b>Facts</b>	<b>Evidence of Intent</b>	<b>Outcome</b>
<i>Weston, PA, 2013.</i> <sup>961</sup>	Ds carried out a racketeering enterprise that targeted victims with cognitive disabilities and subjected victims to subhuman conditions.	Ds' scheme was meant to steal disability payments from cognitively disabled individuals.	Convicted – plea agreement. <sup>962</sup>
<i>Knope, LA, 2018.</i> <sup>963</sup>	Ds allegedly conspired to sex trafficking and obtaining the forced labor of the victim, and individual with a disability. One D caused bodily harm to the victim because of her disability.	Written materials and recorded video evidence showed that the four defendants allegedly attempted to obtain forced labor, interfere with D.P.'s Fair Housing Act rights, shot her with a BB gun, and attempted to force her into sex trafficking.	Ongoing case – 3 of the 4 Ds have not yet received a judgment. <sup>964</sup>

### *Other Fact Patterns*

<sup>960</sup> The cases covered in this table were in the response to the interrogatories sent by the Commission on July 18, 2018 to the Department of Justice Civil Rights Division.

<sup>961</sup> *United States v. Weston*, 2:13-CR-25 (E.D. Pa. 2013).

<sup>962</sup> The five Defendants were convicted of a number of federal offenses in addition to violating 18 U.S.C. § 249. *United States v. Weston*, 2:13-CR-25 (E.D. Pa. 2013).

<sup>963</sup> *United States v. Knope*, 2:18-CR-160 (E.D. La. 2018).

<sup>964</sup> The four defendants were charged with a number of felonies. Three have pleaded guilty to these federal offenses. One Defendant pleaded guilty to violating 42 U.S.C. § 3631—interference with housing rights. One Defendant pleaded guilty to violating 18 U.S.C. § 249. These were the only hate crimes law violations charged and pleaded to. However, only the Defendant who violated the Hate Crimes Prevention Act has been convicted. The other two Defendants who pleaded guilty await judgment and sentencing. The last, fourth Defendant was indicted, but no plea agreement has been made and no trial has yet been brought. See *United States v. Knope*, 2:18-CR-160 (E.D. La. 2018).

As illustrated by the tables above, in the majority of these cases, the DOJ Civil Rights Division brought federal charges due to explicit verbal expressions of bias (e.g., slurs, epithets) stated by offenders during the assault; the agency has only brought a small number of cases where hate speech was not stated during or directly after the assault. The government used evidence of the defendants' intent through their posts on social media to prove intent in several of the cases sent in response to the Commission's interrogatories.<sup>965</sup> Federal prosecutors used social media to prove intent in the Charleston church mass shooting case in *United States v. Roof*,<sup>966</sup> in the Charlottesville attack in *United States v. Fields*,<sup>967</sup> and in a case in Ohio where the defendant posted on social media that he had beaten a black man "in the name of the white race," in *United States v. Butler*.<sup>968</sup>

### *Lack of Transparency*

Unlike other sections of the DOJ Civil Rights Division's (CRT) website, the Criminal Section does not provide public links to the major legal filings and decisions in their cases (including hate crime cases) and these cases could only be located through paid legal databases (e.g., Westlaw and PACER).<sup>969</sup> The CRT website only provides press releases on hate crime cases, which do not include links to legal documents. Only a few of the court documents needed to research these cases were free and publicly available on the DOJ website.<sup>970</sup> During the Commission's briefing, Deputy

<sup>965</sup> The government when prosecuting high profile cases, such as the Charleston, South Carolina church shooting and the Charlottesville, Virginia hit and run that killed Heather Heyer, has used social media and the internet as evidence to support the need for a hate crime charge(s). In the first case, the government referred to the defendant's manifesto on his neo-Nazi beliefs which was uploaded online after the attack during Roof's indictment. See Indictment, *United States v. James Alex Fields*, No. 3:18-cr-00011, ¶ 13 (W.D. Va. June 27, 2018) (a case brought by the U.S. Attorney's Office) (proof included a meme posted three months prior to the attack that showed an image similar to the crime wherein a car drove through a protest sending protesters flying in the air with the caption "You have a right to protest but I'm late for work.").

<sup>966</sup> *United States v. Roof*, 252 F. Supp. 3d 469 (D.S.C. 2017).

<sup>967</sup> See Indictment, *United States v. James Alex Fields*, No. 3:18-cr-00011, ¶ 2 (W.D. Va. June 27, 2018) ("Prior to August 12, 2017, Defendant James Alex Fields, Jr. obtained multiple social media accounts, which he used to express his beliefs regarding race, national origin, religion and other topics. On these accounts, Fields expressed and promoted his belief that white people are superior to other races and peoples; expressed support of the social and racial policies of Adolf Hitler and... and espoused violence against African Americans, Jewish people and members of other racial, ethnic and religious groups he perceived to be non-white.") and ¶ 3 ("This [Unite the Right] rally was widely promoted on social media and internet sites associated with white supremacist individuals and groups, and was scheduled to feature a lineup of well-known white supremacist speakers.") (emphasis added).

<sup>968</sup> *U.S. v. Butler*, 3:16-CR-249 (N.D. Ohio 2016) (defendant posted on Facebook after beating a black man with a bat that it was done "in the name of the White Race.").

<sup>969</sup> U.S. Dep't of Justice, Civil Rights Division, <https://www.justice.gov/crt/press-releases>; See also <https://www.justice.gov/crt/search-cases-and-matters>, Criminal ("We are sorry, the page you're looking for can't be found on the Department of Justice website.") (last accessed July 10, 2019).

<sup>970</sup> Some federal cases brought during the time period studied were not included in the list sent to the Commission; this is perhaps because they were brought by U.S. Attorney's Offices rather than the Civil Rights Division, although they also should be made accessible. For instance, the trial of *United States v. Medina* (1:16-cr-20349, S.D. Fla.) was not included in the list provided by the DOJ. On August 16, 2017, James Gonzalo Medina pleaded guilty to a federal hate crime for attempting to attack a Jewish synagogue in Aventura, Florida and attempting to use a weapon of mass destruction. On November 27, 2017, Medina was sentenced to 25 years in prison for the charges. See U.S. Dep't of Justice, "Florida Man Pleads Guilty to Hate Crime and Weapons of Mass Destruction Charges for Attempting to Attack Florida Synagogue," Aug. 16, 2017, <https://www.justice.gov/opa/pr/florida-man-pleads-guilty-hate-crime-and-weapons-mass-destruction-charges-attempting-attack>; see also, U.S. Dep't of Justice, "Florida Man Sentenced to 25 Years in Prison for Hate Crime for Conspiring to Attack Florida Synagogue," U.S. Attorney's

Assistant Attorney General Moosy stated that the DOJ publishes “everything public we can say about a hate crime prosecution, we put in a press release at the time of the indictment, conviction, or sentencing... [and] we put pretty much every significant action in a hate crime case, or any civil rights case, we make publicly available on our website.”<sup>971</sup> However, these press releases do not include links to the legal documents, and Moosy also stated that many civil rights groups have asked for DOJ to provide more information regarding its hate crimes litigation.<sup>972</sup> For instance, the Muslim Public Affairs Council submitted a comment to the Commission following the briefing calling for the creation of a central federal repository for resources related to hate crimes and bias motivated incidents.<sup>973</sup> The group argues that currently, “public access to this information is scattershot and labyrinthine to navigate... [thus] creating a centralized online resource... is one of the easiest and most impactful actions the federal government can take to support all Americans in need.”<sup>974</sup> Similarly, at the Commission’s briefing, Lena Masri, National Litigation Director and Acting Civil Rights Director at CAIR, testified that the federal government should create a publicly available central database that contains reporting records on hate crimes, including court records and DOJ litigation documents.<sup>975</sup>

Former Deputy Assistant Attorney General Roy Austin testified that “you can’t understate the importance of public awareness over hate crimes. The condemnation, the shame that goes with that. And how that impacts whether or not someone is going to commit one in the future.”<sup>976</sup> Full information about criminal prosecution of hate crimes may have the ability to send a message of deterrence to potential perpetrators, and may also send a message that law enforcement care to the targeted communities.<sup>977</sup> Many have argued that DOJ’s authority may be used to not only protect the public from an individual offender but may also send a symbolic message that hate crimes are not acceptable.<sup>978</sup> On the positive side, among other resources, DOJ’s website includes a Hate

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Office, Southern District of Florida, Nov. 28, 2017, <https://www.justice.gov/usao-sdfl/pr/florida-man-sentenced-25-years-prison-hate-crime-conspiring-attack-florida-synagogue>.

This case was led by the U.S. Attorney’s Office for the Southern District of Florida, but like the CRT website, its website also does not provide links to legal documents regarding hate crimes and relies on users having access to PACER (which is a paid service) to access the details of cases. See U.S. Dep’t of Justice, U.S. Attorney’s Office, Southern District of Florida, <https://www.justice.gov/usao-sdfl/pr>.

<sup>971</sup> Robert Moosy, Deputy Assistant Attorney General, Criminal Section, U.S. Dep’t of Justice, *Briefing Transcript* p. 62.

<sup>972</sup> *Ibid.*, 62-63.

<sup>973</sup> Muslim Public Affairs Council, Public Statement to U.S. Commission on Civil Rights, June 25, 2018, at 2, <https://www.mpac.org/assets/docs/2018/MPAC-Comments-to-the-US-Commission-on-Civil-Rights.pdf>.

<sup>974</sup> *Ibid.*

<sup>975</sup> Lena Masri, testimony, *Briefing Transcript* p. 220; Hate Crimes Coalition, “Post-Charlottesville Hate Crimes Summit Coalition Recommendations to the Department of Justice,” The Leadership Conference on Civil & Human Rights, Sept. 15, 2017, <http://civilrightsdocs.info/pdf/policy/letters/2017/final%20post-Charlottesville%20DoJ%20hate%20crime%20summit%20coalition%20recommendations.docx.pdf>.

<sup>976</sup> Roy Austin, partner at Harris, Wiltshire & Grannis, LLP and former Deputy Assistant Attorney General of the Civil Rights Division, U.S. Dep’t of Justice, *Briefing Transcript*, p. 281.

<sup>977</sup> See Roy Austin partner at Harris, Wiltshire, & Grannis, LLP and former Deputy Assistant Attorney General of the Civil Rights Division at the U.S. Department of Justice, *Briefing Transcript*, p. 280.

<sup>978</sup> President Barack Obama, “Remarks by the President at Reception Commemorating the Enactment of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act,” Oct. 28, 2009, <https://www.tolerance.org/classroom-resources/texts/remarks-by-the-president-at-reception-commemorating-the-enactment-of-the>; Valerie Jenness and Ryken Grattet, *Making Hate A Crime: From Social Movement to Law*

Crimes section with information about how to report a hate crime, hate crimes prevention at the community level, and a “Learn About Hate Crimes” section, explaining what a hate crime is, and clearly stating that:

Hate crimes have a broader effect than most other kinds of violent crime. A hate crime victimizes not only the immediate target but also impacts every member of the group that direct victim represents. Hate crimes affect families, communities, and sometimes the entire nation.<sup>979</sup>

However, complete public information about the hate crimes cases prosecuted by DOJ is still a missing element.<sup>980</sup> Mary McCord, senior litigator and visiting professor of law at Georgetown Law’s Institute for Constitutional Advocacy and Protection, testified to the Virginia State Advisory Committee to the Commission that when prosecutors are able to charge an alleged perpetrator with a federal hate crime, it sends “that bigger, broader message. And labels are important. It’s not just [] semantics, it sends a message of how important our government feels that these crimes are.”<sup>981</sup>

### *Statutory Limitations*

As discussed, HCPA only permits federal prosecution if a state has declined to prosecute, or refers the alleged hate crime to the federal government, or if federal prosecution is clearly in the public interest and needed to serve justice.<sup>982</sup> At the Commission’s briefing, DOJ’s Robert Moosy, testified that before any prosecution under the HCPA, the Attorney General has to certify that seeking a prosecution is in the public’s best interest.<sup>983</sup> Following this certification, there is an “internal briefing process by the prosecutors to the Assistant Attorney General. . . where factors are laid out, the deliberative process is explained, the strengths and weaknesses of the internal analysis of the case, and the analysis of the factors as they relate to the evidence.”<sup>984</sup>

Furthermore, under the HCPA, only the perpetrator and any co-conspirators can be prosecuted.<sup>985</sup> While prosecuting perpetrators of hate crimes is an important step for the federal government to demonstrate its commitment to protecting targeted communities, unlike other civil rights issues, the focus tends to remain on the perpetrator themselves and not address possible broader remedies that may help prevent hate crimes (e.g., anti-bias education, anti-hate training, restitution to individuals and communities).

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*Enforcement*, 2002, (New York: Russell Sage Foundation) at 3; U.S. Dep’t of Justice, “Deputy Attorney General Rosenstein Announces Funds and Technical Assistance Resources to Help Law Enforcement Investigate and Prosecute Hate Crimes at Law Enforcement Roundtable,” Oct. 29, 2018, <https://www.justice.gov/opa/pr/deputy-attorney-general-rosenstein-announces-funds-and-technical-assistance-resources-help>.

<sup>979</sup> Dep’t of Justice, Hate Crimes, Learn About Hate Crimes, <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last accessed July 2, 2019).

<sup>980</sup> Dep’t of Justice, Hate Crimes, <https://www.justice.gov/hatecrimes>, *passim*. (last accessed July 2, 2019).

<sup>981</sup> Mary McCord, senior litigator and visiting professor of law at Georgetown Law’s Institute for Constitutional Advocacy and Protection, Virginia State Advisory Committee, *Briefing Transcript*, p. 27.

<sup>982</sup> See *supra* note 263, citing U.S. Const. amend V.

<sup>983</sup> Robert Moosy, Deputy Assistant Attorney General, Criminal Section, U.S. Dep’t of Justice, *Briefing Transcript*, pp. 77-78.

<sup>984</sup> *Ibid*.

<sup>985</sup> 18 U.S.C. § 249.



In some cases, however, judges have started to integrate rehabilitative measures as a part of the sentencing process.<sup>986</sup> For example, in Oregon, Judge Lindsey Partridge sentenced Andrew Ramsey, who attacked a Sikh shop owner, to three years of probation and 180 days in jail, but also ordered Ramsey to attend the annual Sikh parade and report to the court what he learned about the Sikh community and their culture.<sup>987</sup> The judge stated that: “‘Bigotry is the result of ignorance. All of us are able to learn and benefit from cultures in our community.’”<sup>988</sup>

## Department of Education and DOJ Jurisdiction Related to Education

Biased-based bullying and harassment in K-12 schools and on university campuses are significant civil rights concerns, and these types of hate incidents fall under the jurisdiction of the Department of Education; however, if a hate crime were to occur in these settings, these crimes would fall under the jurisdiction of local law enforcement and/or the DOJ. Both hate crimes and hate incidents are discussed herein.

As discussed above, the Southern Poverty Law Center reported that following the November 2016 election, a number of reported hate incidents occurred in K-12 schools and on college and university campuses (183 and 140, respectively) (see chart 17).<sup>989</sup> The highest percent of post-2016 election hate crimes were in K-12 schools, and the majority involved racial discrimination.<sup>990</sup>

According to the FBI, in 2017, 10.5 percent of the overall reported hate crimes occurred at schools or colleges, which was a 25 percent increase from 2016, which makes it the second consecutive year to have roughly a quarter increase.<sup>991</sup> Breaking these statistics down into the specific locations, the FBI recounted that there were a total of 340 hate crimes reported at primary or secondary schools, which is a 37 percent increase from 2016.<sup>992</sup> There were 214 reported hate crimes at colleges or universities, which is about a 2 percent increase from 2016; and there were at additional 199 incidents reported in the combined school/college category, which is a 36 percent increase from 2016.<sup>993</sup>

### Chart 19: Reported Hate Crimes in Schools by Bias Category, 2017

<sup>986</sup> See e.g., Andrew Selsky, “Judge tells attacker to study Sikhs as part of sentence,” *Associated Press*, May 24, 2019, <https://www.apnews.com/f52e19d7e81e44f68d87105da35f8cf0>; Michael Kunzleman, “Settlement Requires ‘Anti-Hate Training’ for Internet Troll,” *U.S. News*, Dec. 18, 2018, <https://www.usnews.com/news/best-states/montana/articles/2018-12-18/settlement-requires-anti-hate-training-for-internet-troll>.

<sup>987</sup> Andrew Selsky, “Judge tells attacker to study Sikhs as part of sentence,” *Associated Press*, May 24, 2019, <https://www.apnews.com/f52e19d7e81e44f68d87105da35f8cf0>.

<sup>988</sup> *Ibid.*

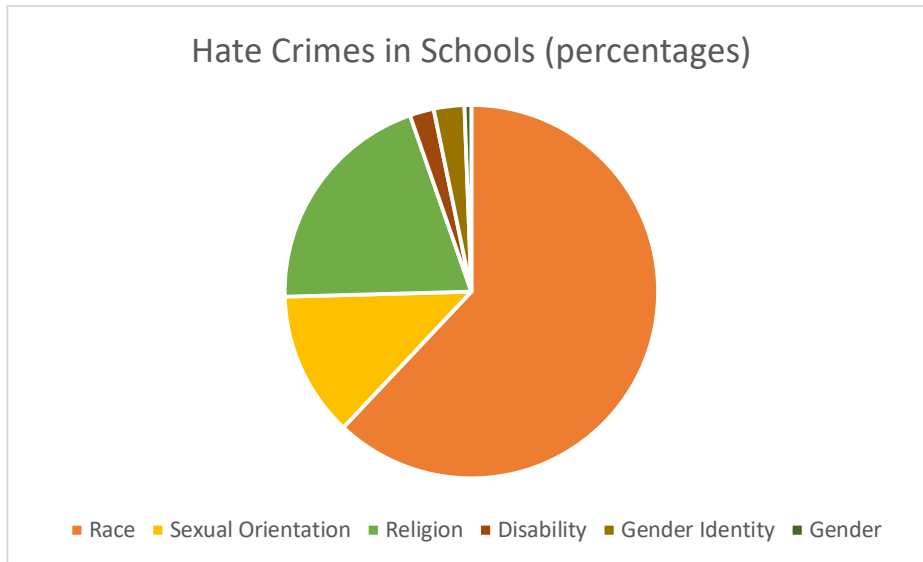
<sup>989</sup> Southern Poverty Law Center, “Ten Days After: Harassment and Intimidation in the Aftermath of the Election,” Nov. 29, 2016, <https://www.splcenter.org/2016/11/29/ten-days-after-harassment-and-intimidation-aftermath-election>.

<sup>990</sup> *Ibid.*

<sup>991</sup> See FBI, UCR, Hate Crime Statistics, 2017; FBI, UCR, Hate Crime Statistics, 2016.

<sup>992</sup> See *Ibid.*

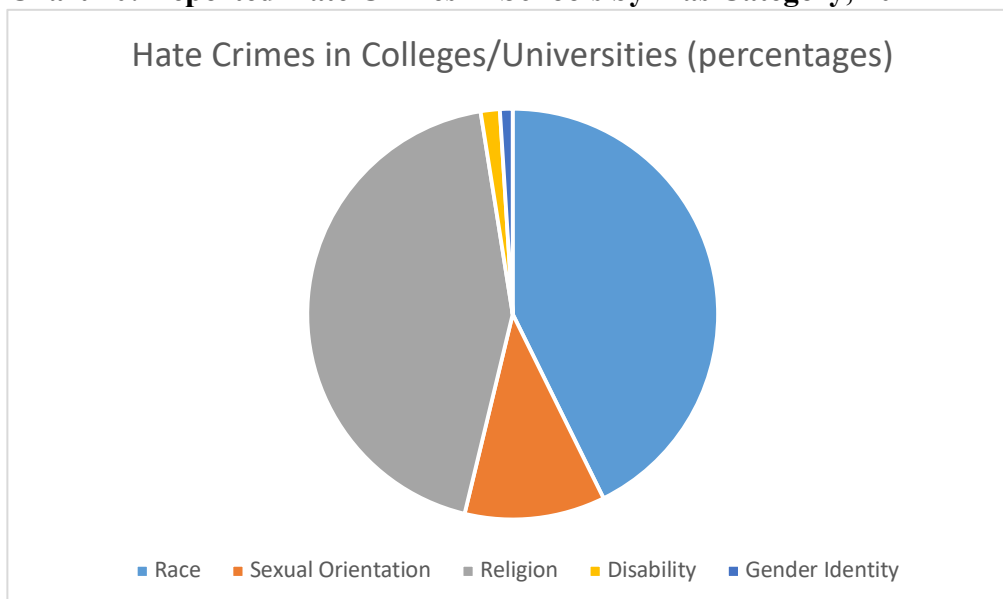
<sup>993</sup> Note: The FBI uses the location designation “school/college” for the local and state agencies that have not updated their reporting systems to include the new location designations of “School—college/university” and “School—elementary/secondary.” See FBI, UCR, Hate Crime Statistics, 2017, <https://ucr.fbi.gov/hate-crime/2017/tables/table-10.xls>; FBI, UCR, Hate Crime Statistics, 2016.



### Higher Education Campuses

Of the incidents that occurred at colleges or universities, religious bias was the most commonly reported (87), followed by race (85), then sexual orientation (22), disability (3), and gender identity (2) (see chart 19).<sup>994</sup>

**Chart 20: Reported Hate Crimes in Schools by Bias Category, 2017**



<sup>994</sup> Ibid.

Based on their jurisdiction under civil rights statutes, the Department of Education has released several guidances and resources on the prevention of harassment and bullying in elementary and secondary schools in addition to postsecondary institutions. For instance, in 2012, ED released a toolkit that was designed to help educators and school administrators reduce incidents of bullying through leading workshops and strategies on how to build a more supportive classroom environment.<sup>995</sup> ED's Office of Safe and Healthy Students in the Office of Elementary and Secondary Education has also developed tools and resources to help address bullying and harassment, such as funding the National Center on Safe Supportive Learning Environments Technical Assistance Center (Center).<sup>996</sup> The Center provides program support to grantees and has also developed training materials, webinars, products, and data sources for schools and members of the public.

The Department's Office for Civil Rights enforces federal civil rights laws that provide it with jurisdiction to investigate incidents of bullying that rise to the level of harassment on the basis of race, national origin, sex, or disability status, making the incidents potential civil rights violations.<sup>997</sup> However, ED also states that even if bullying or harassment does not constitute a civil rights violation, schools should still be diligent in addressing the behavior, in order to protect students from the physical, psychological, and emotional harm that it can cause.<sup>998</sup> Olabisi Okubadejo, former ED OCR staff attorney, testified at the Commission's briefing that there is a critical need to provide students with mental health services in the wake of bias-motivated incidents or hate crimes, specifically to "students on both sides of the issue, the person who's the target of harassment or discrimination and then also the person who's perpetrating."<sup>999</sup>

In January 2019, House Bill 761 was introduced by Representative Anthony Brown in Congress. It would "strengthen prevention and response measures for hate crimes on college campuses by establishing robust accountability measures, providing needs-based grants, and amending the Clery Act."<sup>1000</sup> This bill would amend the Higher Education Act of 1965 and the Clery Act to specifically include hate crime prevention and response programs, and ensure that students and faculty are aware of related safety concerns on and around campuses.<sup>1001</sup> The proposed bill would require colleges and universities to adopt and implement several policies such as, developing a "standards of conduct" that clearly

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<sup>995</sup> See e.g., U.S. Dep't of Education, "U.S. Department of Education Provides Guidance to Help Classroom Teachers Combat Bullying," Sept. 28, 2012, <https://www.ed.gov/news/press-releases/us-department-education-provides-guidance-help-classroom-teachers-combat-bullying>.

<sup>996</sup> See U.S. Dep't of Education, Interrog. Resps. to U.S. Comm'n on Civil Rights, at 2. Note: According to the response, the information provided by the NCSSLE Center does not "necessarily represent the policy or views of the U.S. Department of Education nor do they imply endorsement by the U.S. Department of Education." Ibid.

<sup>997</sup> See, e.g., U.S. Dep't of Education, "Dear Colleague," Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. See also *supra* notes 323-331 (discussing the jurisdiction of the Department of Education over certain types of "hate incidents").

<sup>998</sup> U.S. Dep't of Education, Office for Civil Rights "Dear Colleague," Oct. 26, 2010.

<sup>999</sup> Olabisi Okubadejo, Of Counsel at Ballard Spahr and former Supervisory General Attorney at OCR, *Briefing Transcript*, pp. 290-91.

<sup>1000</sup> CAMPUS HATE Crimes Act, H.R. 761, 116th Congress (2019), <https://www.congress.gov/116/bills/hr761/BILLS-116hr761ih.pdf>.

<sup>1001</sup> *Id.* at 4.

prohibit[s], at a minimum, the acts or threats of violence, property damage, harassment, intimidation, or other crimes that specifically target an individual based on their race, religion, ethnicity, handicap, sexual orientation, gender, or gender identification by students and employees on the institution's property or as a part of any of the institution's activities . . . a description of any counseling, medical treatment, or rehabilitation programs that are available to students or employees that are victims of hate crimes or other hate-based incidences . . . a description of applicable services for students to be able to switch dorms, classes, or make other arrangements should they feel unsafe in those spaces due to a hate crime which affects such space; and a distinct statement that the institution will impose sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct.<sup>1002</sup>

### Primary and Secondary Schools (K-12)

According to the National Center for Education Statistics (NCES), in the 2017 school year (most recent data available), approximately 6 percent of students ages 12-18 reported being the target of hate-related words,<sup>1003</sup> (which is a decrease from 12 percent in 2001). And 23 percent of students reported seeing hate-related graffiti at school during the school year, compared to 27 percent in 2015.<sup>1004</sup>

Data collected by the NCES shows that overall, students who reported being called hate-related words decreased between 2001 and 2015.<sup>1005</sup> In 2017, data disaggregated by race showed that more black students reported being called a hate-related word at school compared to white and Latinx students (7.4 percent, 6.1 percent, and 6.3 percent, respectively), while approximately 5 percent of Asian students reported being called a hate-related word.<sup>1006</sup> Students who identify as of two or more races reported the highest percentage of being called a hate-related word at school (11.4 percent) (see chart 20 below).<sup>1007</sup> Also in 2017, more public-school students reported being called hate-related words than private school students (7 percent compared to 4 percent, respectively).<sup>1008</sup> Students reported that race was the most frequently reported “specific characteristic” (e.g., race, gender, sexual orientation, religion) that these hate-related words referred to.<sup>1009</sup>

### Chart 21: Students Aged 12-18 Reporting Hate-Related Words (2017)

<sup>1002</sup> *Id.* at 5-7.

<sup>1003</sup> “Hate-related” refers to derogatory words used by other students in reference to a student’s personal identity characteristics. See Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, “Indicator 9: Students’ Reports of Being Called Hate-Related Words and Seeing Hate-Related Graffiti,” National Center for Education Statistics, April 2019, [https://nces.ed.gov/programs/crimeindicators/ind\\_09.asp](https://nces.ed.gov/programs/crimeindicators/ind_09.asp).

<sup>1004</sup> *Ibid.*

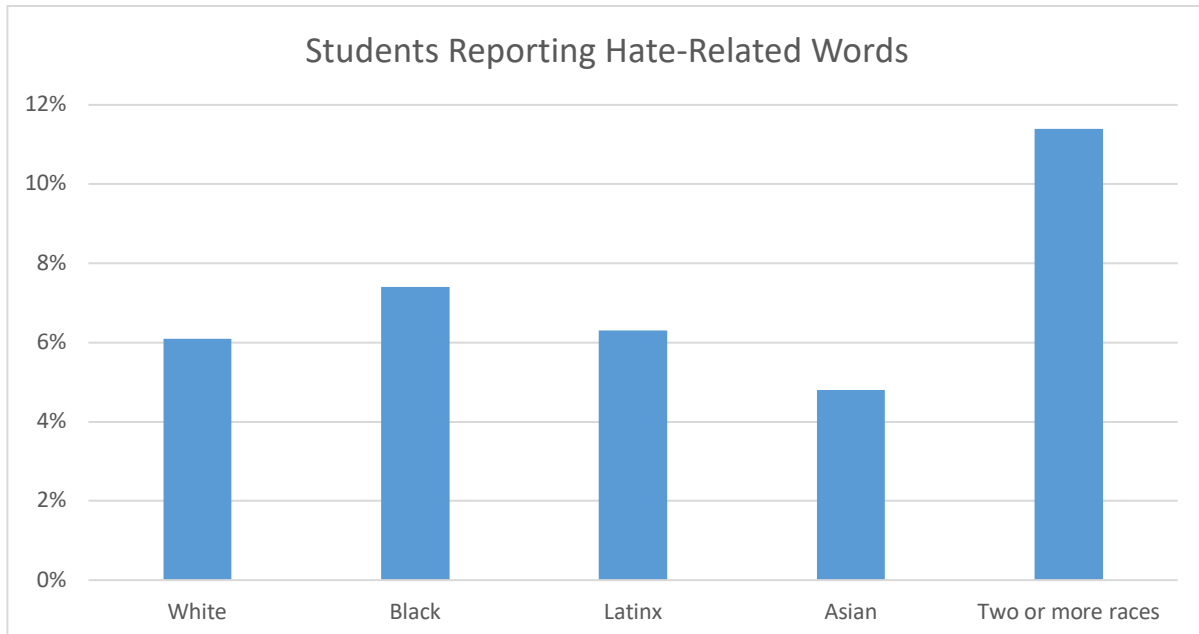
<sup>1005</sup> Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, “Indicator 10: Students’ Reports of Being Called Hate-Related Words and Seeing Hate-Related Graffiti,” National Center for Education Statistics, May 2017, <https://nces.ed.gov/pubs2017/2017064.pdf>.

<sup>1006</sup> *Ibid.*

<sup>1007</sup> National Center for Education Statistics *supra* note 1003.

<sup>1008</sup> *Ibid.*

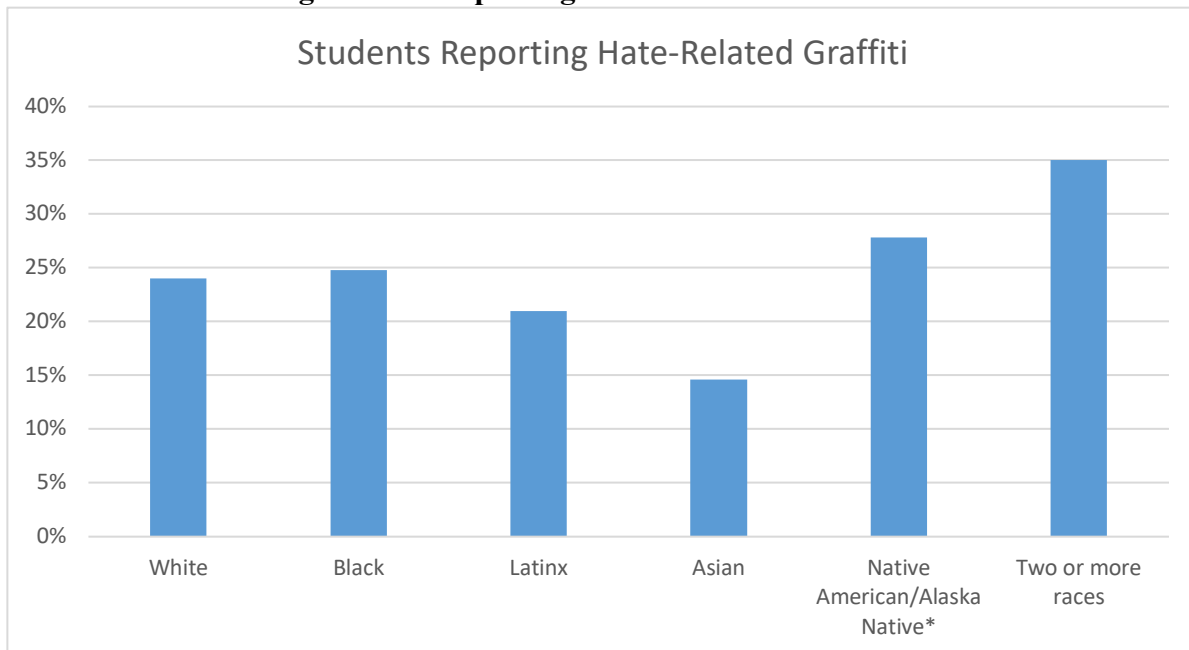
<sup>1009</sup> *Ibid.*



Source: Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, “Indicators of School Crime and Safety: 2018,” National Center for Education Statistics, April 2019, at 74, <https://nces.ed.gov/pubs2019/2019047.pdf>. Note: Percentages were not reported for Pacific Islander or Native American/Alaska Native students due to either small sample sizes or the relative standard deviation is 50 percent or greater.

In 2017, the NCES also found that students of all races reported seeing hate-related graffiti at school.

**Chart 22: Students Aged 12-18 Reporting Hate-Related Graffiti**



\*Interpret data with caution as the relative standard deviation for this group is between 30 and 50 percent.

Source: Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, “Indicators of School Crime and Safety: 2018,” National Center for Education Statistics, April 2019, at 74, <https://nces.ed.gov/pubs2019/2019047.pdf>.

There were measurable differences in the types of schools where these incidents were reported. A higher percentage of public-school students compared to private-school students reported seeing hate-related graffiti at school between 2001 and 2015.<sup>1010</sup> For example, 25 percent of public-school students reported seeing hate-related graffiti at school compared to 6 percent of private school students in 2017.<sup>1011</sup>

Despite declining rates of bullying over the past several years, federal data show that bias-based bullying is still a prevalent issue for many students.<sup>1012</sup> In the 2017 school year (most current year available on bullying), the NCES found approximately 20 percent of students ages 12-18 reported experiencing bullying at school.<sup>1013</sup> Of students ages 12-18, about 13 percent reported being verbally harassed (e.g., made fun of, called names, insulted) and 5 percent reported they were physically harassed (e.g., pushed, shoved, tripped, or spit on) and 4 percent were threatened with bodily harm.<sup>1014</sup> Of the students who reported being bullied at school, more female students than male students reported being bullied (24 percent versus 17 percent), however more male students than female students reported being threatened with physical harm (5 percent versus 3 percent). Overall, of students ages 12–18, higher percentages of students of two or more races, black students, and white students (23 percent each) than of Hispanic students (16 percent) and Asian students (7 percent) reported being bullied at school during the school year in 2017. In addition, higher percentages of American Indian/Alaska Native students (27 percent) and Hispanic students than of Asian students reported being bullied at school.<sup>1015</sup> And while small sample sizes and high standard errors caused the researchers to depress some students' responses, the specific type of bullying (e.g., verbal or physical harassment) followed similar patterns to the overall differences for total bullying. For instance, a higher percentage of black students and white students reported being verbally harassed than Latinx and Asian students.<sup>1016</sup>

Furthermore, according to a report by the Sikh Coalition and the Asian American Legal Defense and Education Fund (AALDEF), in 2013, 50 percent of Asian American youth surveyed in New York City have experienced bias-based bullying and harassment in school.<sup>1017</sup> That is, half of these

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<sup>1010</sup> Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, "Indicators of School Crime and Safety: 2018," National Center for Education Statistics, April 2019, at 63, <https://nces.ed.gov/pubs2019/2019047.pdf>.

<sup>1011</sup> *Ibid.*

<sup>1012</sup> *See* Debora Osgood, partner at Hogan, Marren, Babbo & Rose, Ltd. and former National Enforcement Director, Office for Civil Rights, U.S. Dep't of Education, written statement at 2; *see also*, U.S. Dep't of Education, Office for Civil Rights, "School and Climate and Safety: Civil Rights Data Collection," May 2019, at 5, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>1013</sup> Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, "Indicators of School Crime and Safety: 2018," National Center for Education Statistics, April 2019, at 74, <https://nces.ed.gov/pubs2019/2019047.pdf>.

<sup>1014</sup> *Ibid.*, 67.

<sup>1015</sup> *Ibid.* It is important to note that these statistics represent the percentages of students who reported being bullied that were surveyed by the NCES, and are not calculated according to their respective enrollment population. These data are based on the School Crime Supplement survey. *See* Lauren Musu, Anlan Zhang, Ke Wang, Jizhi Zhang, & Barbara Oudekerk, "Indicators of School Crime and Safety: 2018," National Center for Education Statistics, April 2019, [https://nces.ed.gov/programs/crimeindicators/technotes\\_sources.asp#scs](https://nces.ed.gov/programs/crimeindicators/technotes_sources.asp#scs).

<sup>1016</sup> *Ibid.*, 67.

<sup>1017</sup> The Sikh Coalition, "Fact Sheet on Violence and Discrimination Against Sikhs and Other Minority Communities in New York City," <https://www.sikhcoalition.org/documents/pdf/factsheet-violence-discrimination-against-sikhs-and-minorities.pdf>.

students have been victims of bias incidents in their school.<sup>1018</sup> Moreover, a 2009 survey found that 60 percent of Sikh students in New York City who wore their religion's turbans had experienced verbal or physical assaults in school.<sup>1019</sup>

In its report released December 2018 on continuing federal funding shortfalls for Native American programs, the Commission documented extremely high levels of bullying of Native American students, reporting that:

Being bullied is a huge problem among the Native American student population. A 2013 survey study in Minnesota reported that more than half of Native American students had experienced some form of bullying, with 29.3 percent experiencing verbal threats, 47.5 percent experiencing physical violence, and 23.5 percent experiencing both. Additionally, in several other states with high Native American student populations, these students were the most likely or second most likely to be bullied of any other demographic. Research has found that bullying is potentially linked to several detrimental issues for Native American students, such as not feeling safe in school, a decline in academic performance, dropping out of school, and increased rates of suicide.<sup>1020</sup>

Other data show similar macro-level trends. According to UCLA's Institute for Democracy, Education, and Access, high schools across the nation have been negatively impacted by the recent political climate.<sup>1021</sup> Researchers found that in a nationally representative sample of over 500 high school principals, 89 percent reported that "incivility and contentiousness in the broader political environment has considerably affected their school community."<sup>1022</sup> Further, the overwhelming majority of the principals reported problem such as contentious classrooms, hostile exchanges outside of the classroom, and demeaning or hateful remarks regarding political views. More than eight in ten principals also reported that their students have made derogatory remarks targeting other racial or ethnic groups; and more than six in ten report students making derogatory remarks about immigrants.<sup>1023</sup>

In an online survey representing more than 10,000 K-12 public school teachers, counselors, and school administrators, the Southern Poverty Law Center found that 90 percent of the respondents reported an overall decline in the school environment after the 2016 elections, and 80 percent described having higher levels of anxiety for their students and their students' families.<sup>1024</sup> Further, eight out of ten educators reported feeling fearful for marginalized students including immigrant, Muslim, black, and LGBT students. Four out of ten reported hearing derogatory and offensive language directed at students of color; and two out of ten reported hearing derogatory comments

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<sup>1018</sup> Ibid.

<sup>1019</sup> Ibid.

<sup>1020</sup> U.S. Comm'n on Civil Rights, *Broken Promises: Continuing Shortfalls in Federal Funding for Native Americans*, 119-120 (Dec. 2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.

<sup>1021</sup> John Rogers, Michael Ishimoto, Alexander Kwako, Anthony Berryman, Claudia Diera, *School and Society in the Age of Trump*, UCLA's Institute for Democracy, Education, and Access, 2019, <https://idea.gseis.ucla.edu/publications/school-and-society-in-age-of-trump/>.

<sup>1022</sup> Ibid., iv.

<sup>1023</sup> Ibid., v.

<sup>1024</sup> Mark Potok, "The Trump Effect," Southern Poverty Law Center Feb. 15, 2017, <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

about white students, but stated that few of these comments were directed at those students.<sup>1025</sup> Further, Francisco Vara-Orta, data specialist and staff writer for Education Week, analyzed 472 verified accounts submitted to the “Documenting Hate” project,<sup>1026</sup> and found that most bias-motivated incidents that occurred in schools between 2015 and 2017 were either racially based and targeted black and Latinx students, or religiously based and targeted Jewish and Muslim students.<sup>1027</sup> According to the ADL, there were 269 reported incidents of anti-Semitism in schools from January to September 2017, which represents a 107 percent increase from the previous year.<sup>1028</sup>

Vara-Orta found that most incidents verified by the Documenting Hate project involved hate speech, both written and spoken. The most common words and phrases were: “‘the n-word,’ various versions of ‘build the wall’ and ‘go back to (insert foreign country here, usually Mexico).’”<sup>1029</sup> Students reported that the most common hate symbol seen at schools were swastikas; and the largest number of reports to the project on a single day was the day after the November election.<sup>1030</sup> However, Vara-Orta cautions against using these data to make causal arguments between the rise of hate-related incidents and political rhetoric. Director of Education Research at Child Trends Deborah Temkin argues that “there is usually never just one cause of bullying, so if we scapegoat it on the president, we are overlooking the broader climate issues that were there before and will likely continue if not directly addressed.”<sup>1031</sup>

CAIR and the Institute of Social Policy and Understanding found that Muslim students in elementary and secondary schools often experience high rates of bullying due to their religious identity.<sup>1032</sup> In 2013, OCR at the Education Department reviewed a complaint about the Fremont Unified School District in California that Sikh or Middle Eastern students were subjected to harassment based on their perceived religion and ethnic characteristics.<sup>1033</sup> For instance, during lessons related to Sikhism, Islam, and the Middle East in both junior and high school, students reported that their peers made racist and Islamophobic statements such as: “you started 911” and calling the students “terrorist.”<sup>1034</sup> Students also reported being called “bomber,” “Osama Bin Laden,” and other Muslim slurs, and female students who wore hijabs were disparaged for wearing them by their peers.<sup>1035</sup> Further, some non-Muslim students reported also being harassed for being

<sup>1025</sup> Ibid.

<sup>1026</sup> Documenting Hate is a project organized by ProPublica that brings together a coalition of national news organizations and advocacy organizations to report on the nature and scope of hate crimes and bias incidents in the United States. See ProPublica, “Documenting Hate,” <https://projects.propublica.org/graphics/hatecrimes>. There is a severe lack of reliable national data on hate crimes. Further, federal agencies do not collect reports lower-levels of hate-incidents, such as bullying.

<sup>1027</sup> Francisco Vara-Orta, “Hate in Schools,” *Education Digest*, vol. 84, no. 3, 2018, at 5.

<sup>1028</sup> Anti-Defamation League, “ADL Data Shows Anti-Semitic Incidents Continue Surge in 2017 Compared to 2016,” Nov. 2, 2017, <https://www.adl.org/news/press-releases/adl-data-shows-anti-semitic-incidents-continue-surge-in-2017-compared-to-2016>.

<sup>1029</sup> Francisco Vara-Orta, “Hate in Schools,” *Education Digest*, vol. 84, no. 3, 2018, at 5.

<sup>1030</sup> Ibid.

<sup>1031</sup> Ibid., 5.

<sup>1032</sup> Mary Stegmeir, “Muslims on Campus,” *Journal of College Admission*, 2017, no. 237, at 37.

<sup>1033</sup> U.S. Dep’t of Education, Office for Civil Rights, Investigation of Fremont Unified School District, Docket Number 09-13-5001, April 6, 2017, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09135001-a.pdf>.

<sup>1034</sup> Ibid., 16.

<sup>1035</sup> Ibid., 16.



perceived as Muslim by their peers. Before ED OCR completed the investigation, the district requested a resolution agreement and stated the actions it would take to improve school climate.<sup>1036</sup> In the agreement, the school agreed to issue and distribute a statement saying the district did not tolerate acts of harassment, schedule training for staff regarding cultural responsiveness and training for students regarding harassment and respect, create a forum in which they committed to facilitate conversations about cultural sensitivity and awareness, create a group of district employees, representatives, parents, and students to make recommendations regarding preventative harassment measures, conduct a school climate survey and monitor the effectiveness of harassment prevention measures, and report their compliance and effectiveness to the OCR.<sup>1037</sup>

Aviva Vogelstein, Director of Legal Initiatives at the Brandeis Center, testified at the Commission’s briefing about how critically important it is for ED OCR to be investigating these cases. She stated that a new report released by the Department shows that there were 10,848 incidents of harassment or bullying that were based on religious bias during the 2015-16 school year (8 percent of the total incidents).<sup>1038</sup> She emphasized that, “It’s unconscionable that this category of hate averaging approximately 30 incidents per school day, 150 per school week and 602 incidents per school month has, up until now, been largely unaddressed.”<sup>1039</sup>

Incidents of bullying and harassment were even more common for LGBT youth. In GLSEN’s 2017 National School Climate report,<sup>1040</sup> researchers found that a majority (60 percent) of LGBTQ students reported feeling unsafe while at school during the 2017 academic year. A vast majority (87.3 percent) of LGBTQ students surveyed reported they had experienced harassment or assault based on their identity (i.e., sexual orientation, gender identity or expression, religion, actual or perceived race or ethnicity, or actual or perceived disability). 70.1 percent experienced verbal harassment (e.g., called names, threatened) at school based on their sexual orientation, 59.1% based on gender expression, and 53.2 percent based on gender. Further, LGBTQ students also reported being physically harassed (e.g., pushed, shoved) or assaulted (e.g., punched, kicked, injured with a weapon) in the past year based on their sexual orientation (28.9 percent, 12.4 percent, respectively), gender expression (24.4 percent, 11.2 percent, respectively), and gender (22.8 percent, 10.0 percent, respectively) (see chart 23 below).<sup>1041</sup>

### Chart 23: Bullying and Harassment of LGBTQ Students

<sup>1036</sup> Ibid.

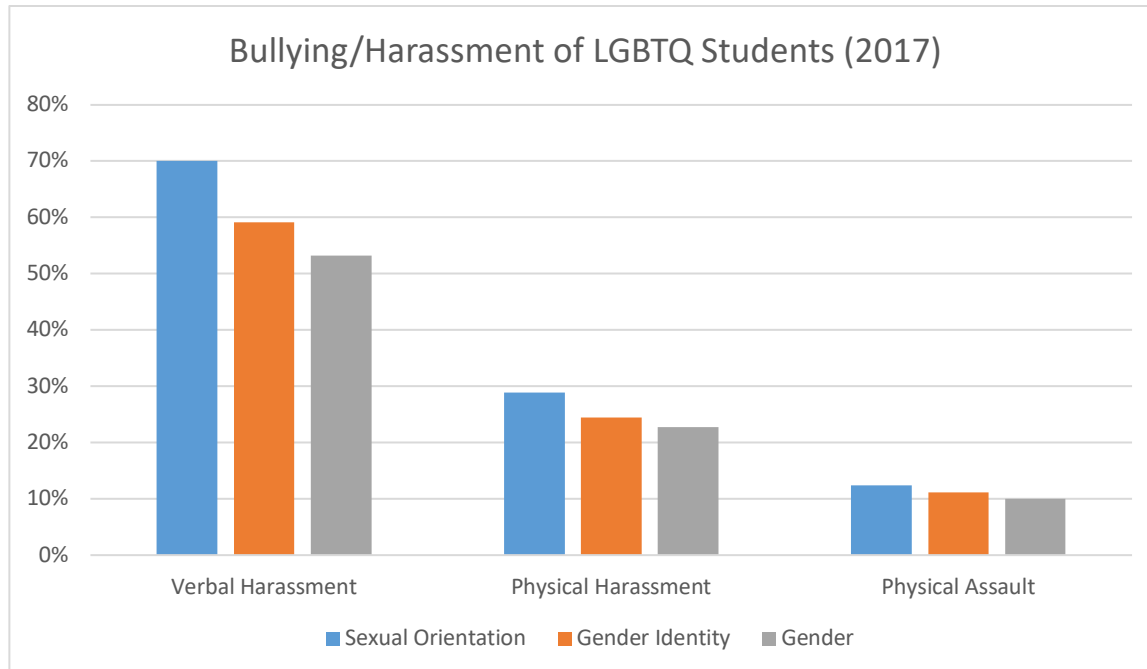
<sup>1037</sup> Ibid., 21.

<sup>1038</sup> Aviva Vogelstein, Director of Legal Initiatives at the Brandeis Center, *Briefing Transcript*, p. 194; see also U.S. Dep’t of Education, Office for Civil Rights, “2015-16 Civil Rights Data Collection, School Climate and Safety,” April 2018, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>1039</sup> Aviva Vogelstein, Director of Legal Initiatives at the Brandeis Center, *Briefing Transcript*, 194.

<sup>1040</sup> The final survey consisted of 23,001 youth ages 13-21 who identified as LGBTQ.

<sup>1041</sup> Joseph G. Kosciw, Emily A. Greytak, Adrian D. Zongrone, Caitlin M. Clark, Nhan L. Truong, “The 2017 National School Climate Survey,” GLSEN, 2018, at 23-25, [https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NCS%29%20-%20Full%20Report\\_0.pdf](https://www.glsen.org/sites/default/files/GLSEN%202017%20National%20School%20Climate%20Survey%20%28NCS%29%20-%20Full%20Report_0.pdf).



Source: GLSEN, 2017 National School Climate Survey

Over a quarter of LGBTQ students reported they were also bullied or harassed due to other aspects of their identities—26.9 percent based on actual or perceived religion, 25.6 percent on race or ethnicity, and 25.5 percent on disability.<sup>1042</sup> Overall, the majority of LGBTQ students (55.3 percent) did not report the incident(s) to school staff or administrators because they did not believe it would help or would make the situation worse if they reported it.<sup>1043</sup> Of those who did report, 60.4 percent stated that school staff did nothing in response or told the student to ignore it; and two in ten students were told to change their behavior (e.g., told not to act “so gay” or dress in a particular way).<sup>1044</sup> One student said, “[w]hile my school does have policies against hate speech and harassment, the administration usually takes no action against students reported for such things.”<sup>1045</sup>

Moreover, the Commission’s 2011 report on bullying found that “bullying and harassment, including bullying and harassment based on sex, race, national origin, disability, sexual orientation, or religion, are harmful to American youth.”<sup>1046</sup> While bullying does not necessarily or universally reach the level of a hate crime, these incidents are significant for educators, researchers, and parents to pay attention to and to actively work with students to prevent. Elizabeth Englander, Executive Director at the Massachusetts Aggression Reduction Center at Bridgewater State University, argues that some incidents of bullying have similar characteristics to hate crimes, especially when a student is targeted for a particular identity trait (perceived or actual), such as

<sup>1042</sup> *Ibid.*, 25.

<sup>1043</sup> *Ibid.*, 28.

<sup>1044</sup> *Ibid.*, 27.

<sup>1045</sup> *Ibid.*, 32.

<sup>1046</sup> See U.S. Commission on Civil Rights, *Peer-to-Peer Violence and Bullying: Examining the Federal Response*, Sept. 2011, 88, <https://www.usccr.gov/pubs/docs/2011statutory.pdf>.

race, sexual orientation, religion.<sup>1047</sup> She argues that bullies victimize other students in order to feel safe or “reinforce their own conformity” through the act of hurting someone who is different or seen as more vulnerable, such as a student with a disability or a student of color in a predominately white school.<sup>1048</sup> Since these incidents resemble similar motivations to a hate crime, Englander argues that educators and school officials should treat these bias-related cases of bullying differently.

Englander further asserts that bullying can be a “Junior Hate Crime” and that schools need to end the normalization of aggressive and hurtful behavior. “Children growing up in 2005, half a century after the birth of the civil rights movement in the United States, typically view verbally berating or humiliating nonconforming peers as a ‘fact of life,’ and parents likewise see their children’s use of offensive slurs as normative.”<sup>1049</sup> However, bias-based bullying can impede equal access to education and rise to the level of civil rights law violations protecting those constitutional rights first articulated in *Brown v. Board of Education*.<sup>1050</sup>

A case that ended in a Resolution Agreement between the Tehachapi Unified School District and both the Education and Justice Departments involved severe and pervasive harassment of a student based on gender identity.<sup>1051</sup> ED OCR initially launched an investigation after a parent filed a complaint with ED OCR against the school district following the suicide attempt and eventual death of her child, an eighth-grade student at Jacobsen Middle School, in September 2010.<sup>1052</sup> The investigation examined whether the school had failed to take prompt and effective steps to end the harassment, prevent the harassment from reoccurring, address the effects of the harassment, and eliminate any hostile environment resulting from the harassment.<sup>1053</sup> OCR and DOJ jointly concluded that the district violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Title IX), and Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000c-9. (Title IV).<sup>1054</sup> Specifically, the student was found to have suffered sexual and gender-based

<sup>1047</sup> Elizabeth Englander, “Is Bullying a Junior Hate Crime? Implications for Interventions,” *American Behavioral Scientist*, vol. 51, no. 2, 205-212 at 206.

<sup>1048</sup> *Ibid.*, 206-07.

<sup>1049</sup> Elizabeth Englander, “Is Bullying a Junior Hate Crime? Implications for Interventions,” *American Behavioral Scientist*, vol. 51, no. 2, 205-212 at 207 (citing National Education Association, 2003).

<sup>1050</sup> *See supra* notes 323-331.

<sup>1051</sup> *See* “Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division,” OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38,

<https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf>

<sup>1052</sup> *See* “Compliance Resolution Between Tehachapi Unified School District, the U.S. Dep’t of Education, Office for Civil Rights and U.S. Dep’t of Justice, Civil Rights Division,” OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38, June 29, 2011, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031-a.html>.

<sup>1053</sup> *Id.*, 1; *see also* “Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division,” OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38,

<https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf> at 1.

<sup>1054</sup> OCR notes that in addition to sexual and gender-based harassment, including harassment based on gender nonconformity, the student also was harassed based on his sexual orientation, which could violate California state law prohibitions on discrimination and harassment on the basis of gender, sexual orientation, and other protected statuses. *See* Cal. Educ. Code §§ 200-234.4. While neither federal agencies enforce state laws, the district is required to comply with both federal and state laws. *See* “Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights

harassment by his peers, including harassment based upon his gender nonconformity; and the harassment was

sufficiently severe, pervasive, and persistent to interfere with and limit his ability to participate in and benefit from the services, activities, and opportunities offered by the District;<sup>1055</sup> the District had notice of the harassment; and the District did not adequately investigate or respond appropriately as it is required to do by federal law.<sup>1056</sup>

In the resulting Resolution Agreement with the federal government, the school district promised to make many changes to its policies. These include changing policies and regulations regarding harassment based on gender and sexual orientation, in order to be in compliance with Title IX and to ensure that complaints are thoroughly evaluated and resolved.<sup>1057</sup> The district also committed to provide annual training sessions and professional development sessions to all students and employees regarding harassment with an emphasis on sexual and gender-based harassment. The district also committed to train school employees, within 30 days of the school year beginning, how to identify sex-based harassment, how to foster an inclusive environment, and to understand the policies and regulations regarding harassment that are required by law. The district also promised to create a committee of teachers, students, and parents to discuss sex-based harassment prevention strategies and outreach programs.<sup>1058</sup>

Moreover, there are cases where hateful behavior in school is severe enough or escalates to where it needs to be investigated as a potential hate crime. For instance, in Glenelg, Maryland, four high school students were indicted in 2018 by a grand jury on seven-count indictments, including three hate crime charges. They allegedly vandalized their school with racist and anti-Semitic graffiti and are charged with three counts related to race or religious harassment, two destruction of property-related charges, and two trespassing charges.<sup>1059</sup> Another example includes an investigation in New Hampshire where an eight-year-old biracial boy was allegedly pushed off a picnic table with a rope around his neck by a group of white teenagers.<sup>1060</sup> The boy's neck was wounded and local law enforcement are investigating the case as a potential hate crime; according to news reports, the teenagers also called the boy racial epithets.<sup>1061</sup> These issues are significant, because data show

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Division,” OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38,

<https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/teachapiagreement.pdf>.

<sup>1055</sup> OCR notes that “although the standard for administrative enforcement actions and injunctive relief under Title IX and Title IV requires that the harassment be severe, pervasive, *or* persistent, the United States [DOJ and ED] found that the harassment of the Student satisfied all three standards.” See “Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division,” OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38, <https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/teachapiagreement.pdf> at 1.

<sup>1056</sup> “Resolution Agreement Between the Tehachapi Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division,” OCR Case No. 09-11-1031, DOJ Case Number DJ 169-11E-38,

<https://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/teachapiagreement.pdf> at 1.

<sup>1057</sup> *Ibid.*

<sup>1058</sup> *Ibid.*

<sup>1059</sup> Nocera *supra* note 131.

<sup>1060</sup> Christine Hauser and Katharine Seelye, “New Hampshire Investigates Wounding of 8-Year-Old as Possible Hate Crime,” *New York Times*, Sept. 13, 2017, <https://www.nytimes.com/2017/09/13/us/biracial-boy-lynched-new-hampshire.html?mcubz=0>.

<sup>1061</sup> *Ibid.*

that from 2004-2015, 15.4 percent of offenders in violent hate crimes were 17 or younger, and 16.7 percent were between 18 and 29.<sup>1062</sup>

Tragically, bullying and harassment can end up costing a student's life. Katharine Prescott testified at the Commission's briefing about her son Kyler's struggles with being bullied in school by his peers and unsupported by school staff due to being transgender, resulting in Kyler taking his own life. She explained that "while we could affirm and support our child in the safety of our home, it was not so easy in the public sphere. School, in particular, became a particularly menacing place."<sup>1063</sup> She stated that while some of the intolerance was on the part of the students, the majority of Kyler's problems stemmed from teachers and school administrators.

School records continued to announce his old name and gender, even after he had received a legal name and gender change. Teachers continued to call him she in front of other students, thus exposing his trans status in front of students who otherwise would not have known. Administrators tried to force him to use the girls' bathroom. Imagine being a child and being called out every day at school by the wrong name and having teachers use the wrong pronoun repeatedly. Imagine being humiliated every day because the school willfully refused to do what it was required to do.<sup>1064</sup>

Olabisi Okubadejo, former Supervisory General Attorney at OCR and currently Of Counsel at Ballard Spahr testified how the Trump Administration's decision to rescind the joint ED and DOJ guidance regarding protections for transgender students has negatively affected students and the school environment.<sup>1065</sup> Okubadejo testified that this guidance rescission was "devastating for some and in some cases dangerous. Because I think the message that some heard was that it is now okay again to discriminate and to treat people differently."<sup>1066</sup> Another example of discrimination against a transgender student occurred in Oklahoma where Maddie, a 12-year-old transgender girl was verbally harassed and threatened with violence on social media after using the girl's bathroom, which led school officials to close the school for two days.<sup>1067</sup>

<sup>1062</sup> Note: Comparatively, for both age groups, the percentages of committing non-hate offenses were higher (17.3 and 28.2, respectively). Madeline Masucci and Lynn Langton, "Hate Crime Victimization, 2004-2015," Bureau of Justice Statistics, U.S. Dep't of Justice, June 2017, 7, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>1063</sup> Katharine Prescott, *Briefing Transcript*, p. 116.

<sup>1064</sup> *Ibid.*, 116-17.

<sup>1065</sup> Olabisi Okubadejo, Of Counsel at Ballard Spahr and former Supervisory General Attorney at OCR, *Briefing Transcript*, pp. 298-99; *see also* Jeremy Peters, Jo Becker, & Julie Hirschfeld Davis, "Trump Rescinds Rules on Bathrooms for Transgender Students," *New York Times*, Feb. 22, 2017, <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html?module=inline>.

Note: In OCR's withdrawal of the "Dear Colleague Letter Withdrawing Previous Guidance on Transgender Students" on February 22, 2017, the department stated that this removal "does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." *See* U.S. Dep't of Justice, Civil Rights Division and U.S. Dep't of Education, Office for Civil Rights, "Dear Colleague," Feb. 22, 2017, 2, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>1066</sup> Olabisi Okubadejo, former supervisory general attorney at OCR and currently of counsel at Ballard Spahr, *Briefing Transcript*, p. 299.

<sup>1067</sup> Christina Caron, "Transgender Girl, 12, Is Violently Threatened After Facebook Post by Classmate's Parent," *New York Times*, Aug. 15, 2018, <https://www.nytimes.com/2018/08/15/us/transgender-oklahoma-school-bullying.html#click=https://t.co/3KoQN04kuq>.

Debbie Osgood, partner at Hogan Marren Babbo & Rose and former National Enforcement Director and 25-year career attorney at OCR, testified that even with the rescission of the guidance on transgender students, schools “can do more than is actually required by the laws. That they can protect [students] even if it’s not specifically [] protected under OCR guidance or the like.”<sup>1068</sup>

ED OCR has also issued several guidance documents regarding school’s responsibility to address incidents of bullying and harassment of students.<sup>1069</sup> Debbie Osgood explained in her written statement to the Commission that ED OCR has “investigated and resolved thousands of cases with harassment allegations [and] [t]hese investigations have taken place as part of OCR’s complaint process... under which OCR proactively identifies schools and discrimination issues for investigation.”<sup>1070</sup> As of March 2019, OCR’s website showed that it has 948 pending harassment cases under investigation on the basis of race, national origin, sex, and disability-related harassment.<sup>1071</sup> Osgood stated that during her tenure at ED OCR, the office

obtained numerous agreements with schools, colleges and universities that required the institutions to take specific steps to comply with the regulatory requirements relating to harassment, including the requirements for having identified compliance coordinators, non-discrimination policies, and prompt and equitable grievance procedures, and the obligation to promptly and appropriately respond to allegations of harassment.

As such, she stressed to the Commission the need for ED OCR to continue to “vigorously enforce” the protections against harassment that are guaranteed to students under civil rights law and provide the necessary leadership for school officials and administrators at primary, secondary, and higher education institutions.<sup>1072</sup>

### **Postsecondary Schools (Colleges and Universities)**

According to the FBI, in 2017, there were 214 reported hate incidents on college and university campuses, with anti-race (60 percent), anti-religion (21 percent), and anti-sexual orientation (14

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<sup>1068</sup> Debbie Osgood, partner at Hogan Marren Babbo & Rose and former National Enforcement Director at OCR, *Briefing Transcript*, p. 298.

<sup>1069</sup> See 34 C.F.R. Part 100 (Title VI), Part 104 (Section 504), Part 106 (Title IX), and 28 C.F.R. Part 35 (Title II); U.S. Dep’t of Education, Office for Civil Rights, “Dear Colleague,” Oct. 26, 2010, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (stating legal principles); U.S. Dep’t of Education, Office for Civil Rights, “Q&A on Campus Sexual Misconduct,” Sept. 2017, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>; U.S. Dep’t of Education, Office for Civil Rights, “Dear Colleague,” July 25, 2000, <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>; U.S. Dep’t of Education, Office for Civil Rights, “Racial Incidents and Harassment Against Students,” March 10, 1994, <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

<sup>1070</sup> Debbie Osgood, partner at Hogan Marren Babbo & Rose and former National Enforcement Director at OCR, written statement, 4.

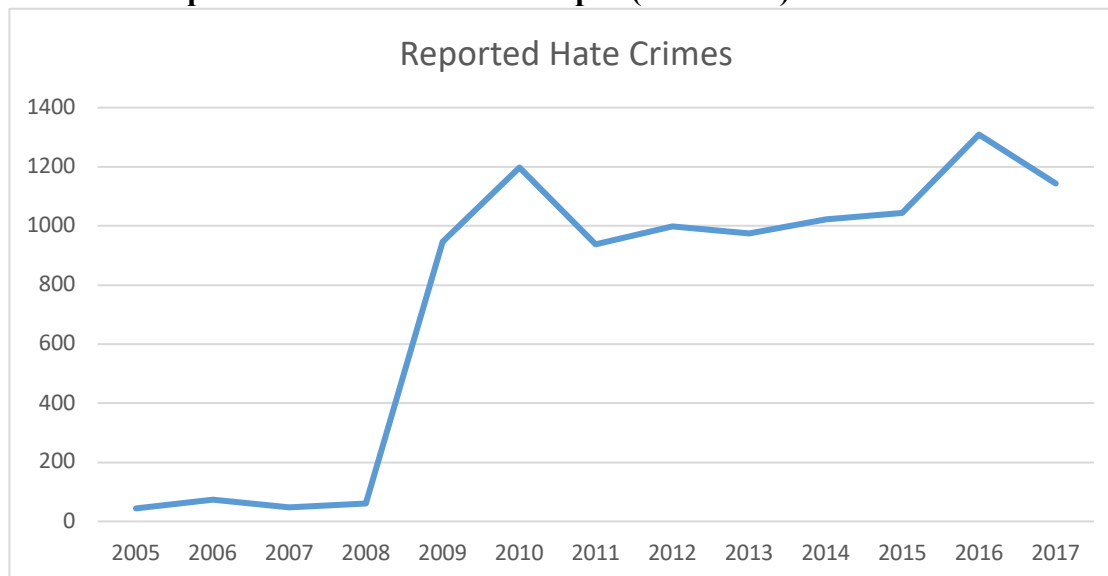
<sup>1071</sup> U.S. Dep’t of Education, Office for Civil Rights, “Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of March 1, 2019 7:30am Search,” <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/age.html>.

<sup>1072</sup> Debbie Osgood, partner at Hogan Marren Babbo & Rose and former National Enforcement Director at OCR, written statement, 5.

percent) bias being the most common motivations for such incidents.<sup>1073</sup> As discussed in Chapter 1, the Clery Act, as amended, requires colleges and universities to report campus crime statistics, including hate crimes and other security information to students, employees, and the broader school community.<sup>1074</sup>

Data from the Department of Education show that there were a total of 1,143 hate crimes reported in 2017 (most current data available), which is based off of 6,339 reporting institutions with 11,210 campuses.<sup>1075</sup> These data represent a 12.68 percent decrease from 2016 (1,309 reported hate crimes), which was the highest number of reported hate crimes since 2005 when the Office of Postsecondary Education began to post their hate crime data (see chart 23 below). These data reflect an average of 1,098 reported hate crimes over the past five years. FBI data show that in 2017, almost 60 percent of reported hate crimes on college and university campuses involved vandalism and destruction of property, and 27.6 were intimidating in nature.<sup>1076</sup>

**Chart 24: Reported Hate Crimes on Campus (2005-2017)**



Source: U.S. Department of Education, Office of Postsecondary Education, Campus Safety and Security survey. Chart created by Commission staff.

As with hate crimes more broadly, reported hate crimes on college campuses also rose in 2017, with FBI data analyzed as follows:

<sup>1073</sup> FBI, UCR Hate Crimes Statistics 2017, “Incidents,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-10.xls>.

<sup>1074</sup> See 20 U.S.C. § 1092(f) (Supp. III 2015); see also Department of Education, *The Handbook for Campus Safety and Security Reporting 2016 Edition* (2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

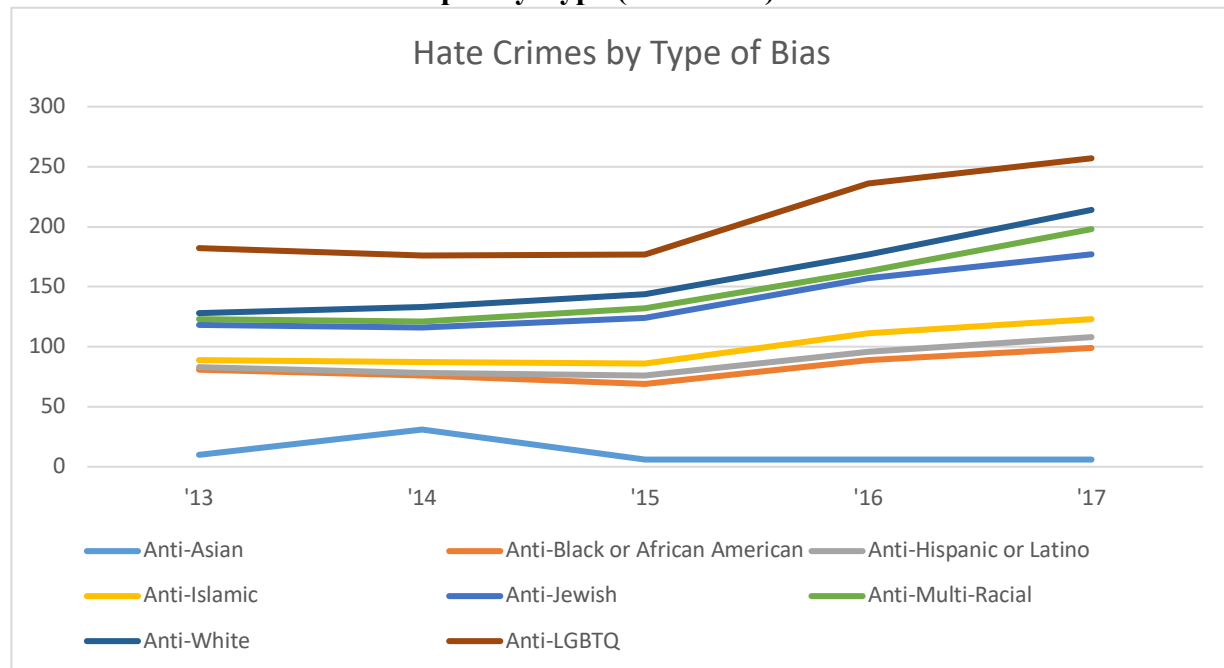
<sup>1075</sup> U.S. Dep’t of Education, Campus Safety and Security, <https://ope.ed.gov/campussafety/Trend/public/#/answer/2/201/main?row=-1&column=-1>.

<sup>1076</sup> Dan Bauman, “Hate Crimes on College Campuses Are Rising, According to New FBI Data,” *The Chronicle of Higher Education*, Nov. 14, 2018, <https://www.chronicle.com/article/Hate-Crimes-on-Campuses-Are/245093>.

Nearly 280 hate crimes were reported in 2017 to the FBI by select campus police departments, up from 257 in 2016 and 194 in 2015... [and] the largest year-to-year increases in hate crimes reported to the FBI, in terms of motivating bias, occurred in crimes against multiracial victims, African-Americans, and Jews.<sup>1077</sup>

In 2017, offenses motivated by racial bias continue to be the most commonly reported. Of the 1,143 hate crimes reported in 2017, anti-black hate crimes were reported the most frequently (93), followed by reports of anti-Jewish hate crimes (54), and anti-LGBT (43) bias were the three most common reported motivations for such incidents (see chart 25).

**Chart 25: Hate Crimes on Campus by Type (2013-2017)**



Source: Dan Bauman, “Hate Crimes on College Campuses Are Rising, According to New FBI Data,” *The Chronicle of Higher Education*, <https://www.chronicle.com/article/Hate-Crimes-on-Campuses-Are/245093> (citing U.S. Department of Education data)

Similar to hate crime trends across the nation, hate crimes at public colleges and universities also spiked in in November 2016.<sup>1078</sup> Dan Bauman, data reporter for *The Chronicle of Higher Education*, found that from 2012 to 2015, there was an average of 20 hate crimes reported at public colleges and universities during the month of November; but in 2016, there were 48 hate crimes at these institutions reported to the FBI in November alone.

One of these incidents included the fatal stabbing of Richard Collins III, a Bowie State University student who was visiting a friend at the University of Maryland, College Park and was set to

<sup>1077</sup> Dan Bauman, “Hate Crimes on College Campuses Are Rising, According to New FBI Data,” *The Chronicle of Higher Education*, Nov. 14, 2018, <https://www.chronicle.com/article/Hate-Crimes-on-Campuses-Are/245093>.

<sup>1078</sup> Dan Bauman, “After 2016 Election, Campus Hate Crimes Seemed to Jump. Here’s What the Data Tell Us,” *The Chronicle of Higher Education*, Feb. 16, 2018, <https://www.chronicle.com/article/After-2016-Election-Campus/242577>.



graduate in May 2017.<sup>1079</sup> His alleged attacker, Sean Urbanski, was charged with the murder of Collins and a Prince George's County grand jury further indicted him with an additional hate crime charge. Police officials stated that the attack was "totally unprovoked" and investigators found "lots of digital evidence" of racial bias on Urbanski's phone, other digital devices, and in his social media activity.<sup>1080</sup> With ample evidence that the victim was killed because of his race, the defendant was indicted for a hate crime as well as for murder, in Prince George's County in May 2017.<sup>1081</sup> As of January 2019, the trial was postponed for a third time since Urbanski was indicted, until July 2019.<sup>1082</sup>

The recent sharp increase in reports of hate and bias-motivated incidents on college campuses may be correlated with a similar spike in white-supremacist propaganda. According to the ADL, there was a 258 percent increase in white-supremacist propaganda from fall 2016 to fall 2017, which affected 216 campuses in the U.S.<sup>1083</sup> During the 2017 fall semester alone, ADL found 147 incidents of white-supremacist fliers, stickers, banners, or posters on campus—up from 41 reported the previous fall semester—which is an over 200 percent increase from the same time last year.<sup>1084</sup> While these incidents happened across the country, the ADL found that the five states that were hardest hit were Texas (61 incidents), California (43 incidents), Pennsylvania (18 incidents), Florida (17 incidents), and Virginia (16 incidents).<sup>1085</sup>

Shaun Harper, executive director of the University of Southern California's Center on Race and Equity, conducted extensive interviews and focus groups with students about their feeling on campus safety and school climate. He found that students said that issues of bigotry and hate have long persisted, but have recently surfaced on campuses. Harper stated that of the almost 50 campuses he visited, there was only one where he did not find a black student who had been called a [black epithet] by "some campus community member, sometimes even a professor."<sup>1086</sup> While Harper states that hate incidents on campus are nothing new, and that "[t]he kinds of things that we're reading online now and seeing in tweets and in Facebook posts are consistently the same

<sup>1079</sup> Dan Bauman, "Hate Crimes on Campus Are Rising, New FBI Data Show," *The Chronicle of Higher Education*, Nov. 14, 2018, <https://www.chronicle.com/article/Hate-Crimes-on-Campuses-Are/245093>.

<sup>1080</sup> Lynh Bui, "U-Md. student to face hate-crime charge in fatal stabbing on campus," *Washington Post*, Oct. 17, 2017, [https://www.washingtonpost.com/local/public-safety/u-md-student-to-face-hate-crime-charge-in-fatal-stabbing-on-campus/2017/10/17/a17bfa1c-b35c-11e7-be94-fabb0f1e9ffb\\_story.html?noredirect=on&utm\\_term=.98cb8985594d](https://www.washingtonpost.com/local/public-safety/u-md-student-to-face-hate-crime-charge-in-fatal-stabbing-on-campus/2017/10/17/a17bfa1c-b35c-11e7-be94-fabb0f1e9ffb_story.html?noredirect=on&utm_term=.98cb8985594d).

<sup>1081</sup> Natalie Schwartz, "Former UMD student indicted on hate crime charge in the death of Richard Collins," *The Diamondback*, Oct. 17, 2017, <http://www.dbknews.com/2017/10/17/hate-crime-charge-sean-urbanski-richard-collins-death-umd/>; see also, *Maryland v. Urbanski*, No. CT170985X (Md. Cir. Ct. 2017).

<sup>1082</sup> Jillian Atelsek, "Sean Urbanski's trial has been postponed for a third time," *The Diamondback*, Jan. 3, 2019, <http://www.dbknews.com/2019/01/03/sean-urbanski-murder-trial-delayed-richard-collins-umd-bowie-state-hate-crime-charge/>; see also, *Maryland v. Urbanski*, No. CT170985X (Md. Cir. Ct. 2017).

<sup>1083</sup> Anti-Defamation League, "ADL Finds Alarming Increase in White Supremacist Propaganda Surges on College Campuses Across U.S.," Feb. 1, 2018, <https://www.adl.org/news/press-releases/adl-finds-alarming-increase-in-white-supremacist-propaganda-on-college-campuses>; see also, Anti-Defamation League, "White Supremacist Propaganda Surges on Campus," Jan. 29, 2018, <https://www.adl.org/resources/reports/white-supremacist-propaganda-surges-on-campus>.

<sup>1084</sup> Anti-Defamation League, "White Supremacist Propaganda Surges on Campus," Jan. 29, 2018, <https://www.adl.org/resources/reports/white-supremacist-propaganda-surges-on-campus>.

<sup>1085</sup> *Ibid.*

<sup>1086</sup> Jeremy Bauer-Wolf, "A September of Racist Incidents," *Inside Higher Ed*, Sept. 22, 2017, <https://www.insidehighered.com/news/2017/09/22/racist-incidents-colleges-abound-academic-year-begins>.

kinds of things I've been hearing for a decade in focus group interviews and our climate studies," Harper maintains that since the November 2016 election, white supremacists are "emboldened."<sup>1087</sup>

### Examples of Bias and Hate Incidents on Campuses Targeting Specific Groups

As discussed previously, colleges and universities are not immune to, and unfortunately are often the locations where bias and hate incidents occur. These incidents target many different groups and create a fearful and hostile school environment. Below are just a few of the recent bias incidents that have occurred on college and university campuses in the United States.

#### *Bias Incidents against black Americans*

In 2018, at Lehigh University in Bethlehem, Pennsylvania, a black student, Juwan Royal, became mysteriously ill several times during the spring semester and was also the victim of his dorm room being vandalized with racist graffiti that same semester.<sup>1088</sup> After Royal's illness got worse and resulted in hospitalization, Royal told police that he was suspicious that his roommate, Yukai Yang, may be responsible for the vandalism to their dorm room. Police investigators opened an investigation and allege that not only was Yang responsible for the racist graffiti, but he was also slowly poisoning Royal.<sup>1089</sup> Yang was subsequently arrested and charged under the state hate crimes law with "ethnic intimidation," and under other statutes prohibiting "institutional vandalism, and criminal mischief," which are all misdemeanors.<sup>1090</sup> Yang was suspended from the university and his student visa was revoked, and at the time of this writing, he remains in police custody and formal charges are still pending until his arraignment in April 2019.<sup>1091</sup>

#### *Alabama South University and American University "Noose Incidents"*

On May 1, 2017, an individual at the American University campus in Washington, D.C., hung three bananas from trees using nooses.<sup>1092</sup> Each banana was specifically placed in a high traffic area: one at a shuttle stop near a dormitory, another near the student center and the cafeteria, and another near the East Quad Building by a lawn that many students frequented. The bananas also contained different messages such as "Harambe Bait" and "AKA."<sup>1093</sup> In response, several student

<sup>1087</sup> Ibid.

<sup>1088</sup> Kyle Swenson, "He suspected his roommate left the racist graffiti. He didn't know about the poison." *Washington Post*, Dec. 21, 2018, [https://www.washingtonpost.com/nation/2018/12/21/he-suspected-his-roommate-left-racist-graffiti-he-didnt-know-about-poison/?noredirect=on&utm\\_term=.2ce5522d43d6](https://www.washingtonpost.com/nation/2018/12/21/he-suspected-his-roommate-left-racist-graffiti-he-didnt-know-about-poison/?noredirect=on&utm_term=.2ce5522d43d6).

<sup>1089</sup> Ibid.

<sup>1090</sup> See *Commonwealth of Pennsylvania v. Yukai Yang*, See Northampton County Court of Common Pleas, Docket Summary, Docket No. CP-48-CR-0001556-2018 (Dec. 3, 2018).

<sup>1091</sup> Swenson *supra* note 1088; see also Sarah Steffens and Megan Klein, "Yukai Yang, former Lehigh student charged with attempted murder, gets increased bail," *The Brown and White*, Feb. 20, 2019, <https://thebrownandwhite.com/2019/02/08/yukai-yang-former-lehigh-student-charged-with-attempted-murder-gets-increased-bail/>.

<sup>1092</sup> Elliott McLaughlin and Tina Burnside, "Bananas, Nooses at American University Spark Protests, Demands," *CNN*, May 17, 2017, <https://www.cnn.com/2017/05/17/us/american-university-bananas-nooses-hate-crime-protests/index.html>.

<sup>1093</sup> "Harambe Bait" was a reference to the lowland gorilla who was shot at the Cincinnati zoo after a boy fell into his enclosure. The event later became the subject of internet jokes, some of which took on racist connotations. See

groups such as the Black Student Alliance, along with the NAACP, gave the administration a list of 13 demands that included expelling the student(s) responsible, increasing the number of professors of color, and implementing training programs for students and staff related to the oppression of marginalized groups.<sup>1094</sup> The offender(s) were never identified, and American University released a memo almost a year later stating that: “the US Attorney’s Office, the FBI, and American University Police have shared their assessment that all credible leads have been exhausted at this time and no suspect has been identified to date. If someone comes forward with additional information, it will be investigated.”<sup>1095</sup>

While the university has not officially taken any further steps to address the incident, Kristen Clarke, President and Executive Director of the Lawyers’ Committee for Civil Rights Under Law, testified at the Commission’s briefing that her organization has filed a lawsuit against Andrew Anglin, the publisher of an alt-right website, *The Daily Stormer*, and several contributors, for facilitating “a massive campaign of racist trolling activity” that also targeted Taylor Dumpson, the newly-elected first black student body president in the incident.<sup>1096</sup> Clarke stated that these actions have disrupted Dumpson’s life, and have “impeded her educational experience, made her fearful for her safety and caused significant physical and emotional trauma [and] the vicious targeting of this student incited unlawful activity by others online.”<sup>1097</sup>

In December 2018, a court settlement agreement required one of the contributors, Evan James McCarty, (among other things) to apologize to Dumpson in a video conference that she could record for advocacy and educational purposes.<sup>1098</sup> The settlement also committed him to attend at least one year of anti-hate training sessions, complete at least four academic courses on race and gender issues, complete at least 200 hours of community service promoting “racial justice and civil rights,” and publicly advocate against hate.<sup>1099</sup> McCarty’s participation in the incident included

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*e.g.*, Chandelis Duster, “‘Crude, Racially Insensitive’: American University Finds Bananas Hanging in Nooses,” *NBC News*, May 1, 2017, <https://www.nbcnews.com/news/nbcblk/crude-racially-insensitive-american-university-finds-bananas-hanging-nooses-n753606>. “AKA” was a direct reference to Alpha Kappa Alpha, a predominantly black sorority, and the incident occurred on the same day that American University initiated their first black female president and a member of AKA, Taylor Dumpson, to the student government. *See* Sheena Jones, “Bananas Tied to Noose are Found around American University Campus,” *CNN*, May 3, 2017, <https://www.cnn.com/2017/05/03/health/american-university-racially-motivated-incident-trnd/index.html>.

<sup>1094</sup> Elliott McLaughlin and Tina Burnside, “Bananas, Nooses at American University Spark Protests, Demands,” *CNN*, May 17, 2017, <https://www.cnn.com/2017/05/17/us/american-university-bananas-nooses-hate-crime-protests/index.html>.

<sup>1095</sup> Sylvia Burwell, “Memorandum: Status of Hate Crime Investigation,” American University, April 27, 2018, <https://www.american.edu/president/announcements/April-27-2018.cfm>.

<sup>1096</sup> *See Dumpson v. Ade*, Case No. 1:18-cv-01011 RMC (D. D.C.), filed Sept. 21, 2018, <https://lawyerscommittee.org/wp-content/uploads/2018/12/2018.09.21-016-First-Amended-Complaint-Taylor.pdf>.

<sup>1097</sup> Kristen Clarke, President and Executive Director of the Lawyers Committee for Civil Rights Under Law, *Briefing Transcript* p. 184.

<sup>1098</sup> Michael Kunzelman, “Settlement Requires ‘Anti-Hate Training’ for Internet Troll,” *U.S. News*, Dec. 18, 2018, <https://www.usnews.com/news/best-states/montana/articles/2018-12-18/settlement-requires-anti-hate-training-for-internet-troll>; *see also* Landmark Settlement Agreement, *Dumpson v. Ade et al.*, Dec. 18, 2018, <https://lawyerscommittee.org/press-release/landmark-settlement-between-hate-incident-perpetrator-and-survivor-announced-in-dumpson-v-ade/>.

<sup>1099</sup> Michael Kunzelman, “Settlement Requires ‘Anti-Hate Training’ for Internet Troll,” *U.S. News*, Dec. 18, 2018, <https://www.usnews.com/news/best-states/montana/articles/2018-12-18/settlement-requires-anti-hate-training-for-internet-troll>.

him tweeting a picture of the hanging bananas with the caption, “READY THE TROOPS” (emphasis in original), and writing, “OOGA BOOGA” (emphasis in original) in another tweet that was directed at Dumpson’s account after the announcement of Dumpson’s victory as the first black female president to the student government.<sup>1100</sup> Dumpson’s lawyers and other advocacy organizations hope that this settlement will become a model to deter others from white supremacy and other hate incidents. In response to the agreement, Kristen Clarke stated that “at the end of the day, our settlement should send a strong message to white supremacists and neo-Nazis all across the country that they will be held accountable for their conduct.”<sup>1101</sup>

A similar incident took place a year later on September 25, 2018 at the University of South Alabama campus. A student hung a bicycle and two nooses in a tree near the cafeteria.<sup>1102</sup> This act has particular significance in Mobile (where the university is located) due to a hate crime in 1981 where the KKK had lynched 19-year-old Michael Donald, which is believed to be the last documented lynching in the United States.<sup>1103</sup> The student responsible for the 2018 incident was Reagan Barr, a 22-year-old student who had written several homophobic and racist comments on his social media; and Barr confessed to hanging the nooses in the tree during class, which was filmed by a fellow student.<sup>1104</sup> Barr was suspended and banned from campus, and as of May 2019, he is still awaiting a formal hearing in front of the university’s administrators.<sup>1105</sup>

### ***Bias Incidents against Muslim Students***

With the increase of anti-Muslim bias incidents nationally, American Muslim students have reported feeling increasingly threatened on college and university campuses. For example, Hannah Shraim, a freshman at Montgomery College in Maryland during the 2015-2016 school year, explained that she felt as though her hijab was a “target for people to look at me differently.”<sup>1106</sup> Another student, at the University of Washington, Nasro Hassan, was allegedly targeted for an attack due to her hijab. On November 15, 2015, Hassan was walking on campus when she was struck in the head with a bottle.<sup>1107</sup> Hassan suffered a concussion and a bruise on the right side of her face.<sup>1108</sup> The Council on American-Islamic Relations (CAIR) argues that the attack was hate

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<sup>1100</sup> Attorneys for Dumpson previously requested that the federal court in D.C. enter default judgments against the other two defendants, Andrew Anglin and Brian Andrew Ade for their failure to respond to the lawsuit. Anglin and Ade are not involved in the current settlement agreement. Dumpson’s lawsuit is also one of three federal lawsuits against Anglin for his racist and anti-Semitic trolling internet campaigns. See Michael Kunzelman, “Settlement Requires ‘Anti-Hate Training’ for Internet Troll,” *U.S. News*, Dec. 18, 2018, <https://www.usnews.com/news/best-states/montana/articles/2018-12-18/settlement-requires-anti-hate-training-for-internet-troll>.

<sup>1101</sup> Ibid.

<sup>1102</sup> Nigel Roberts, “Student Safety In Question After Nooses Were Found on Alabama College Campus,” *News One*, Sept. 27, 2018, <https://newsone.com/3828824/noose-discovered-university-south-alabama-campus/>.

<sup>1103</sup> Ibid.

<sup>1104</sup> Christopher Harress, “University of South Alabama Noose Student Has Racist Past,” *AL.com*, Sept. 28, 2018, [https://www.al.com/news/index.ssf/2018/09/university\\_of\\_south\\_alabama\\_no.html](https://www.al.com/news/index.ssf/2018/09/university_of_south_alabama_no.html).

<sup>1105</sup> Ibid.

<sup>1106</sup> Mary Stegmeir, “Muslims on Campus,” *Journal of College Admission*, no. 237, Fall 2017, at 36, <https://files.eric.ed.gov/fulltext/EJ1158253.pdf>.

<sup>1107</sup> Sara Jean Green, “Muslim Leaders Call on FBI to Investigate Attack on UW Student,” *The Seattle Times*, Dec. 16, 2016, <https://www.seattletimes.com/seattle-news/crime/muslim-leaders-call-on-fbi-to-investigate-attack-on-uw-student/>.

<sup>1108</sup> Ibid.

motivated due to her being Muslim and wearing a hijab.<sup>1109</sup> However, the university did not inform the student body after Hassan reported the incident to campus police, stating there was not enough evidence to claim it was a hate crime.<sup>1110</sup>

According to the American Association of University Professors (AAUP), when a crime is covered by the Clery Act,<sup>1111</sup> campus officials are mandated to investigate the allegation and determine if the crime is “a serious or ongoing threat to the campus community” and evaluate if an alert needs to be issued to inform all students and staff of potential ongoing criminal activity.<sup>1112</sup>

The explicit intent of the Clery Act’s reporting requirement is to aid in the prevention of similar crimes, in part by alerting potential victims to protect themselves. Cases of aggravated assault must be reported, defined in the Clery Act by the nature of the weapon, the severity of the injury, and the assailant’s intent to cause serious harm.<sup>1113</sup>

Based on their assessment of the law, after the incident against Hassan, AAUP sent a letter to the University of Washington’s president, Ana Mari Cauce arguing that an alert should have been sent out after the incident due to

[t]he possibility that the victim was targeted for wearing a hijab would seem to constitute a clear and present risk to other Muslim women on campus of which they should have been apprised. Had there been a timely notification that a victim wearing a hijab was assaulted with a bottle, that would have conveyed the essential message necessary to put potential victims on guard.<sup>1114</sup>

Due to the lack of response from her university regarding the incident, Hassan sought aid with CAIR’s Seattle office. CAIR sent a letter to the FBI requesting an investigation into the case and held a press conference announcing a reward for information regarding the crime.<sup>1115</sup> Further,

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<sup>1109</sup> Ibid.

<sup>1110</sup> Jessica Lee, “UW Bothell investigating possible hate crime against Muslim women.” *The Seattle Times*, December 16, 2016, <https://www.seattletimes.com/seattle-news/education/uw-bothell-investigating-possible-hate-crime-against-muslim-women/>; see also Amy Hagopian and Eva Cherniavsky, “How Our AAUP Chapter Responded to Postelection Violence,” American Association of University Professors, Nov-Dec. 2017, <https://www.aaup.org/article/how-our-aaup-chapter-responded-postelection-violence#.XJoy0VNKiTd>.

<sup>1111</sup> Under the Clery Act, campus officials must alert all students and staff of criminal offenses that fall under these categories: criminal homicide: murder and non-negligent manslaughter, manslaughter by negligence; sexual assault: rape, fondling, incest, statutory rape; robbery; aggravated assault; burglary; motor vehicle theft; arson. 20 U.S.C. 1092(f). For hate crimes specifically, the Clery Act requires alerts be issued for any of the crimes or incidents listed above, in addition to: larceny-theft; simple assault; intimidation; destruction, damage, or vandalism of property. *Id.* See also Clery Center, “Crime Categories Covered,” 2019, <https://clerycenter.org/policy-resources/the-clery-act/>.

<sup>1112</sup> Clery Center, “Timely Warnings and Emergency Notifications,” 2019, <https://clerycenter.org/policy-resources/the-clery-act/>.

<sup>1113</sup> Amy Hagopian and Eva Cherniavsky, “How Our AAUP Chapter Responded to Postelection Violence,” American Association of University Professors, Nov-Dec. 2017, <https://www.aaup.org/article/how-our-aaup-chapter-responded-postelection-violence#.XJoy0VNKiTd>.

<sup>1114</sup> Amy Hagopian and Eva Cherniavsky, “How Our AAUP Chapter Responded to Postelection Violence,” American Association of University Professors, Nov-Dec. 2017, <https://www.aaup.org/article/how-our-aaup-chapter-responded-postelection-violence#.XJoy0VNKiTd>.

<sup>1115</sup> Sara Jean Green, “Muslim Leaders Call on FBI to Investigate Attack on UW Student.” *The Seattle Times*, December 16, 2016, <https://www.seattletimes.com/seattle-news/crime/muslim-leaders-call-on-fbi-to-investigate->

CAIR also filed a complaint with ED, asserting that the university failed to properly issue an alert to the campus community.<sup>1116</sup> CAIR asserts this lack of response from university officials is troubling due to reports of increased hate crimes against Muslim Americans around the nation and a speculated pattern on the UW campus.<sup>1117</sup> Reportedly before this incident, the university was investigating reports that a group of men were specifically targeting Muslim women, demanding that they remove their hijabs.<sup>1118</sup>

The AAUP states that universities “found to be in violation of the Clery Act face warnings, fines, suspension of federal aid, loss of eligibility for financial aid programs, and, possibly, declines in enrollment because of a diminished reputation.”<sup>1119</sup> For instance, the University of Montana was fined \$966,614 for “inaccurate and misleading” reporting of crime statistics from 2012 to 2015. These crimes included a broad range of offenses such as liquor and drug law referrals to forcible sex and rape offenses.<sup>1120</sup>

### ***Bias-Incidents against LGBT Students***

One case that drew national attention to the bullying of gay teenagers was the suicide of Tyler Clementi in 2010. While Clementi did not leave a suicide note, Clementi had previously discovered that his roommate, Dharun Ravi, had secretly filmed Clementi having sex with another male student. On Twitter, Ravi admitted to the incident, tweeting: “Roommate asked for the room till midnight. I went into molly’s room and turned on my webcam. I saw him making out with a dude. Yay.”<sup>1121</sup> While the court did not charge Ravi with Clementi’s death, Ravi was convicted under a state statute of “bias intimidation” where defendants can be convicted if their victims “reasonably believed” that they were harassed or intimidated due to their identity (e.g., race, sexual orientation, religion).<sup>1122</sup> The jury indicted him on 15 counts including invasion of privacy, bias

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[attack-on-uw-student/](#); see also, Amy Hagopian and Eva Cherniavsky, “How Our AAUP Chapter Responded to Postelection Violence,” American Association of University Professors, Nov-Dec. 2017,

<https://www.aaup.org/article/how-our-aaup-chapter-responded-postelection-violence#.XJoy0VNKiTd>. Note: as of the timing of this report, the Commission could not find evidence if the FBI opened an investigation into this case.

<sup>1116</sup> Amy Hagopian and Eva Cherniavsky, “How Our AAUP Chapter Responded to Postelection Violence,” American Association of University Professors, Nov-Dec. 2017, <https://www.aaup.org/article/how-our-aaup-chapter-responded-postelection-violence#.XJoy0VNKiTd>.

<sup>1117</sup> Jessica Lee, “UW Bothell investigating possible hate crime against Muslim women.” *The Seattle Times*, Dec. 16, 2016, <https://www.seattletimes.com/seattle-news/education/uw-bothell-investigating-possible-hate-crime-against-muslim-women/>.

<sup>1118</sup> Ibid.

<sup>1119</sup> Ibid.

<sup>1120</sup> Katie Malafronte, “University of Montana Fined Close to \$1M for Clery Act Violations,” *Campus Safety Magazine*, Oct. 3, 2018, <https://www.campus-safety-magazine.com/clery/university-of-montana-fined-close-to-1m-for-clery-act-violations/>; Letter to University of Montana President Seth Bodnar, U.S. Dep’t of Education, Sept. 25, 2018, [https://studentaid.ed.gov/sa/sites/default/files/UNIVERSITY\\_OF\\_MONTANA\\_FINE\\_ACTION\\_Redacted.pdf](https://studentaid.ed.gov/sa/sites/default/files/UNIVERSITY_OF_MONTANA_FINE_ACTION_Redacted.pdf).

<sup>1121</sup> Nate Schweber and Lisa Foderaro, “Roommate in Tyler Clementi Case Pleads Guilty to Attempted Invasion of Privacy,” *The New York Times*, Oct. 27, 2016, <https://www.nytimes.com/2016/10/28/nyregion/dharun-ravi-tyler-clementi-case-guilty-plea.html>.

<sup>1122</sup> Kate Zernike, “Jury Finds Spying in Rutgers Dorm Was a Hate Crime,” *The New York Times*, Mar. 16, 2012, <https://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html>; Patrick McGeehan, “Conviction Thrown Out for Ex-Rutgers Student in Tyler Clementi Case,” *The New York Times*, Sept. 9, 2016, <https://www.nytimes.com/2016/09/10/nyregion/conviction-thrown-out-for-rutgers-student-in-tyler-clementi-case.html?module=inline>.

intimidation, tampering with evidence, and hindering apprehension or prosecution.<sup>1123</sup> However, in 2015, the New Jersey Supreme Court in another case held that the portion of the bias intimidation statute that relied on the victim's reasonable belief of bias was unconstitutional; this change in law later resulted in the Appellate Division of the Superior Court overturning Ravi's conviction.<sup>1124</sup> Despite overturning Ravi's conviction, the judges issued a strong statement of censure:

[T]he social environment that transformed a private act of sexual intimacy into a grotesque voyeuristic spectacle must be unequivocally condemned in the strongest possible way. The fact that this occurred in a university dormitory, housing first-year college students, only exacerbates our collective sense of disbelief and disorientation.<sup>1125</sup>

In a plea deal with prosecutors, Ravi pled guilty to invasion of privacy (a third-degree felony) and all other charges were dropped.<sup>1126</sup>

### *Free Speech on Campus Issues*

In response to the increase in reported hate crimes over the past several years, over 100 colleges and universities have established "bias response teams" that are typically comprised of a coalition of school administrators, often from the Residential Life and Dean of Students offices.<sup>1127</sup> These teams are established to aid in creating safe and inclusive school environments, respond to reports of bias incidents, hate speech, and/or hate crimes on college campuses, while also balancing free speech protections.<sup>1128</sup> However, Jeffrey Snyder and Amna Khalid, professors at Carleton College, argue that these teams can often stifle important conversations and can "degrade education by encouraging silence instead of dialogue."<sup>1129</sup> In 2018, DOJ filed a Statement of Interest agreeing with a group called Speech First challenging the University of Michigan's disciplinary code protecting students against harassment, bullying and bias-related conduct.<sup>1130</sup> But finding no

<sup>1123</sup> *State of New Jersey v. Ravi*, No. 110400596, 2011 WL 7656976 (N.J. Super. Ct. Law Div. Sept. 9, 2016).

<sup>1124</sup> *Id.*; See also *State v. Pomianek*, 110 A.3d. 841, 843 (N.J. 2015) (holding that part of New Jersey bias-intimidation statute is so vague that it violates the Due Process Clause of the Fourteenth Amendment and is therefore unconstitutional).

<sup>1125</sup> *State of New Jersey v. Ravi*, No. 110400596, 2011 WL 7656976 (N.J. Super. Ct. Law Div. Sept. 9, 2016).

<sup>1126</sup> Nate Schweber and Lisa Foderaro, "Roommate in Tyler Clementi Case Pleads Guilty to Attempted Invasion of Privacy." *The New York Times*, Oct. 27, 2016, <https://www.nytimes.com/2016/10/28/nyregion/dharun-ravi-tyler-clementi-case-guilty-plea.html>.

<sup>1127</sup> See e.g., Ryan Miller, Tonia Guida, Stella Smith, S. Kiersten Ferguson, & Elizabeth Medina, "Free Speech Tensions: Responding to Bias on College and University Campuses," *Journal of Student Affairs Research and Practice*, vol. 55, no.1, 2017, 29; Jeffrey Snyder and Amna Khalid, "The Rise of 'Bias Response Teams' on Campus," *New Republic*, Mar. 30, 2016, <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

<sup>1128</sup> Ryan Miller, Tonia Guida, Stella Smith, S. Kiersten Ferguson, & Elizabeth Medina, "Free Speech Tensions: Responding to Bias on College and University Campuses," *Journal of Student Affairs Research and Practice*, vol. 55, no.1, 2017, 29-30.

<sup>1129</sup> Jeffrey Snyder and Amna Khalid, "The Rise of 'Bias Response Teams' on Campus," *New Republic*, Mar. 30, 2016, <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>. *Ibid.*

<sup>1130</sup> United States' Statement of Interest in Support of Plaintiff's Motion for Preliminary Injunction, *Speech First v. Schlissel*, 333 F.Supp.3d 700 (E.D. Mich., June 11, 2018) (No. 18-11451).

significant harm, the federal district court denied the plaintiff's motion for a preliminary injunction that the DOJ had supported.<sup>1131</sup>

While freedom of speech and the sharing of ideas are essential to the learning environment at colleges and universities, school officials must address issues of bullying and harassment in order to keep students safe on campus. Many people perceive bias incidents to be difficult to address due to the concerns about where a statement that is protected by the First Amendment crosses over into harassment. While schools cannot infringe upon students' First Amendment rights, Debbie Osgood, partner at Hogan, Marren, Babbo, & Rose, and former National Enforcement Director at the OCR at the Education Department, testified at the Commission's briefing that schools have the "obligation and responsibility [] at all levels to address harassment... Schools must continuously affirm that they will not tolerate harassment and take the necessary steps to address harassment effectively."<sup>1132</sup>

On March 2019, President Trump signed Executive Order 13,864 to protect the freedom of speech on college and university campuses. He stated that its purpose was to "defend American students and American values that have been under siege."<sup>1133</sup> The order is meant to direct 12 federal agencies<sup>1134</sup> that make federal grants to colleges and universities ensure that the institutions are complying with the law and policies to promote "free inquiry" and "open debate" on campuses.<sup>1135</sup> Supporters of the order state that "schools are already supposed to be following these rules... and essentially, each agency already conditions grants, and schools are certifying that they're following these conditions. And they will just add free speech as one of those conditions."<sup>1136</sup> However, critics of the executive order worry that it could lead to unwanted federal micromanagement of

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<sup>1131</sup> *Speech First v. Schlissel*, 333 F.Supp.3d 700, 713 (E.D. Mich., Aug. 6, 2018) ("The evidence does not even reflect an instance where the BRT criticized the speech of an individual who is reported to have engaged in biased conduct. But even if the record reflected that the BRT [Bias Response Team] had criticized an individual's speech, there would be no First Amendment violation "in the absence of some actual or threatened imposition of governmental power or sanction." The Court agrees with defense counsel's assertion at the motion hearing that a university should be able to address a student when his or her speech may offend or hurt other students without running afoul of the First Amendment."). The plaintiffs have filed an appeal. Brief of Appellant Speech First, *Speech First v. Schlissel*, On Interlocutory Appeal from the United States District Court for the Eastern District of Michigan, No. 18-1917 (6th Cir., Nov. 13, 2018), <https://speechfirst.org/wp-content/uploads/2018/11/Opening-Brief-filed.pdf>.

<sup>1132</sup> Debbie Osgood, partner at Hogan, Marren, Babbo, & Rose, and former National Enforcement Director at the OCR at the Education Department, Briefing Transcript at 257.

<sup>1133</sup> President Donald Trump, *Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities*, Executive Order 13864, Issued March 21, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/>.

<sup>1134</sup> Agencies listed in the Executive Order: Departments of Defense, Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, and Education; the Environmental Protection Agency, the National Science Foundation; and the National Aeronautics and Space Administration.

<sup>1135</sup> President Donald Trump, *Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities*, Executive Order 13864, Issued March 21, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/>.

<sup>1136</sup> Susan Svrluga, "Trump signs executive order on free speech on college campuses," *Washington Post*, Mar. 21, 2019, [https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/?noredirect=on&utm\\_term=.966c7d96a4ed](https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/?noredirect=on&utm_term=.966c7d96a4ed).



cutting-edge research that is critical to America's global leadership.<sup>1137</sup> Suzanne Nossel, chief executive officer of PEN America, a human rights organization for freedom of expressions, has similarly warned that the executive order must be enforced in an ideologically neutral way so as not to risk "that an order that purports to uphold the First Amendment ends up violating it."<sup>1138</sup>

Some, but not all, bias-related speech and incidents may be prohibited on schools and college campuses, and depending on the facts of the case, may fall under the jurisdiction of the Department of Education. In the *Tinker* case in 1969, the Supreme Court unanimously held that students do not lose their First Amendment rights when they come to public schools, and that students wearing symbolic black armbands to protest the Vietnam War were engaged in a protected form of freedom of expression.<sup>1139</sup> However, the *Tinker* Court was clear that students' and educators' First Amendment rights would not be protected if they "materially and substantively" interfere with or "disrupt... classwork or involve[] substantial disorder or invasion of the rights of others."<sup>1140</sup> In a 1988 case where the high school paper published information about teen pregnancy and divorce among students and their families, the Supreme Court held that speech and expression in schools may be limited in ways that are "appropriate" in the educational environment, in order to protect students' privacy and to promote "fundamental values of public education."<sup>1141</sup> Under this body of law, it may be constitutional to prohibit hate speech and hate incidents in public schools, especially in elementary schools.<sup>1142</sup> Due to the relative maturity of older students, the issue is more complex in the college environment; however, courts have held that bias-related speech may be prohibited when it provokes intimidation or involves threats of violence.<sup>1143</sup>

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<sup>1137</sup> Susan Svrluga, "Trump signs executive order on free speech on college campuses," *Washington Post*, Mar. 21, 2019, <https://www.washingtonpost.com/education/2019/03/21/trump-expected-sign-executive-order-free-speech/>.

<sup>1138</sup> *Ibid.*

<sup>1139</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>1140</sup> *Id.* at 513.

<sup>1141</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>1142</sup> *See supra* notes 323-33 (discussing Equal Protection as well).

<sup>1143</sup> *See supra* notes 323-33.

## CHAPTER 4: Local Level Responses: Strategies to Combat Hate Crimes and Bias-Motivated Incidents

Although the FBI maintains the Hate Crime Statistics Program and website,<sup>1144</sup> hate crime data are obtained and reported by state and local law enforcement. Accurately assessing the prevalence and severity of hate crimes and identifying the best response therefore depends on accurate state and local collection and reporting of hate crime incidents. At the Commission's briefing, Shelby Chestnut, National Organizing and Policy Strategist at the Transgender Law Center, testified that cities can also play an important role in prevention efforts by raising awareness of communities that are being victimized and terrorized by these crimes. They stated that cities can implement public education campaigns, similar to the ones that were done in D.C. and in California.

[A] number of years ago, D.C. ran one that was quite successful and it really was just like putting trans-people sort of in the day to day life like, "hey, I'm trans and I work with you." California has run a very successful campaign thinking that they were going to have a ballot measure called Transform California and it was about educating local business owners on like who transgender people are, what they might look like and that it doesn't really matter that they're transgender just like don't violate their rights. . . and I think part of [prevention efforts] is pushing the media around these narratives and moving away from [] only talk[ing] about trans people when they're dead.<sup>1145</sup>

As stated through testimony provided at the Commission's briefing and the supporting literature shows, preventing hate incidents and hate crimes require buy-in from individuals, organizations, law enforcement, and federal agencies at all levels. As for federal efforts, some of DOJ's prevention efforts can be seen through the work of CRS offices, such as conducting public outreach and education, including collaborating with local law enforcement at the community level to bring awareness to the issue of hate crimes.<sup>1146</sup> But, there are challenges as well as new practices being developed at the local level.

As discussed in the previous chapters, hate crimes are underreported in part due to the lack of mandatory reporting by local law enforcement agencies. Many cities, and even the entire state of Hawaii, does not report hate crime data to the FBI.<sup>1147</sup> Further, as shown by National Crime Victimization Survey (NCVS) surveys, a majority of hate crimes are not reported by victims.<sup>1148</sup> Therefore, the practices that local law enforcement utilize (or do not) play a significant role in

<sup>1144</sup> See Federal Bureau of Investigation Uniform Crime Reporting, Hate Crime Statistics at <https://www.fbi.gov/services/cjis/ucr/hate-crime> (last visited May 15, 2019).

<sup>1145</sup> Shelby Chestnut, National Organizing and Policy Strategist, Transgender Law Center, *Briefing Transcript*, pp. 232-33.

<sup>1146</sup> See e.g., *supra* notes 779-81 (regarding the role of CRS) and notes 783-786 (example of CRS work with community members after a hate incident).

<sup>1147</sup> See FBI, UCR, Hate Crime Statistics; see also, Hailey Middlebrook, "The Fascinating, if Unreliable, History of Hate Crime Tracking in the US," *CNN*, Nov. 14, 2017, <http://www.cnn.com/2017/01/05/health/hate-crimes-tracking-history-fbi/>. See also Appendix C for list of cities over 100,000 that did not report hate crime data to the FBI.

<sup>1148</sup> Madeline Masucci and Lynn Langton, *Hate Crime Victimization, 2004-2015*, Bureau of Justice Statistics, U.S. Dep't of Justice, June 2017, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf> (reporting that about 54% of hate crime victimizations were not reported to the police during 2011-15).

our understanding of hate crime nationally. Although law enforcement officials recognize that accurate and proper reporting is important, many cities still do not have sufficient or effective reporting practices. This chapter will discuss the Commission's investigation of some of the best and worst reporting practices by state and local law enforcement.

As a preliminary matter, it is important to note that reporting hate crimes depends on having hate crimes and incidents clearly defined in state law. For example, following the 2016 election, there was an increase in reported hate incidents in Maryland, targeting churches, and in public schools,<sup>1149</sup> but the law was not clear as to whether serious and threatening incidents were prohibited under Maryland state law. Currently, state legislators are examining whether there are bias incidents that are not protected by the First Amendment that should be included in the state's hate crime law (e.g., potential actions such as cyber-threats or bullying).<sup>1150</sup> Other proposed legislation includes increasing the penalties for those who threaten to commit hate crimes, such as calling a bomb threat to a synagogue. According to investigative reporters for the Baltimore Sun, these proposed bills are due in part to a 47 percent increase in reported anti-Jewish bias incidents in 2017,<sup>1151</sup> which is a part of an overall statewide 35 percent increase of bias incidents or hate crimes reported to police in 2017.<sup>1152</sup> Another proposal consisted of expanding Maryland's hate crime statute to add nooses and swastikas as defacement to property and with the intent to threaten or intimidate an individual or group to the state's hate crime.<sup>1153</sup> As discussed previously in this report, the history of lynchings prompted the need for the nation's first iterations of hate crime laws, but unfortunately, the violent symbol of the noose continues to operate as a threat and therefore needs to be addressed in the modern era.<sup>1154</sup> These practices may be prohibited if there is sufficient evidence that they create the threat of violence. For example, in Washington State, the legislature found that:

[I]n many cases, certain discrete words or symbols are used to threaten the victims. Those discrete words or symbols have historically or traditionally been used to connote hatred or threats towards members of the class of which the victim or a member of the victim's family or household is a member. In particular, the legislature finds that cross burnings historically and traditionally have been used to threaten, terrorize, intimidate, and harass African Americans and their families. Cross burnings often preceded lynchings, murders, burning of homes, and other acts of terror. Further, Nazi swastikas historically and

<sup>1149</sup> See e.g., Catherine Rentz, "Hate in Maryland: From racist taunts to swastikas to a campus stabbing, bias reports up sharply in state," *The Baltimore Sun*, Oct. 18, 2018, <https://www.baltimoresun.com/news/maryland/investigations/bs-md-two-years-of-hate-incidents-20180813-story.html>.

<sup>1150</sup> Catherine Rentz and Luke Broadwater, "Federal and Maryland officials launch reviews of hate crime reporting, laws after Pittsburgh synagogue attack," *The Baltimore Sun*, Oct. 30, 2018, <https://www.baltimoresun.com/news/maryland/politics/bs-md-hate-crime-review-20181030-story.html>.

<sup>1151</sup> *Ibid.*

<sup>1152</sup> *Ibid.*

<sup>1153</sup> Rachel Baye, "State Lawmakers Consider Expanding Hate Crime Law," *WYPR*, Jan. 16, 2019, <http://www.wypr.org/post/state-lawmakers-consider-expanding-hate-crime-law>; see also, S.B. 528, 438th Leg., Reg. Sess. (Md. 2018). <http://mgaleg.maryland.gov/webmga/fmMain.aspx?pid=billpage&stab=03&id=SB0528&tab=subject3&ys=2018RS>.

<sup>1154</sup> See *supra* notes 35-42 (discussing the history of lynching and federal hate crimes laws); and *supra* notes 1093-1096; 1103-06 (nooses on college campuses). See also *supra* note 296 (discussing the Thirteenth Amendment).

traditionally have been used to threaten, terrorize, intimidate, and harass Jewish people and their families. Swastikas symbolize the massive destruction of the Jewish population, commonly known as the holocaust. Therefore, the legislature finds that any person who burns or attempts to burn a cross or displays a swastika on the property of the victim or burns a cross or displays a swastika as part of a series of acts directed towards a particular person, the person's family or household members, or a particular group, knows or reasonably should know that the cross burning or swastika may create a reasonable fear of harm in the mind of the person, the person's family and household members, or the group.<sup>1155</sup>

Intimidation and threats against individuals are not only happening in public and private locations anymore, as online hate and bias-motivated incidents have also become a problem in the modern era. In Maryland, another bill now proposes to close loopholes in laws regulating online harassment by adding prohibitions against harassment due to one's faith or race.<sup>1156</sup> State Senator Robert Zirkin, Chair of the Judicial Committee, who introduced the bill stated that:

You can't criminalize somebody just for being a bigot. Even the worst of the worst of people's thoughts are covered by the First Amendment. That said, when it bridges into threats, intimidation or tormenting, when it's directed at an individual or groups, you can take action.<sup>1157</sup>

According to investigative reporters with the *Baltimore Sun*, 80 percent of the state's 161 law enforcement agencies reported no hate crimes or bias incidents for 2016 or 2017, and some counties have not reported any incidents for the past six years, despite the fact that hate crime incident reporting has been increasing.<sup>1158</sup> Further, FBI data show that in 2016, less than half of the hate crimes in Maryland were reported to the FBI due to late reporting by state law enforcement.<sup>1159</sup> In response, the Maryland State Police conducted a statewide bias and hate training session in April 2018 and planned to conduct four more sessions in 2018 in cooperation with the FBI, the ADL, and the Maryland Commission on Civil Rights.<sup>1160</sup> While (as of the timing of this report) it is not clear if these training sessions have been conducted, Governor Larry Hogan announced that he would include a three million dollar increase to enhance the

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<sup>1155</sup> Wash. Rev. Code § 9A.36.078 (1993), <https://app.leg.wa.gov/rcw/default.aspx?cite=9A.36.078>. Cf. *State v. Talley*, 858 P. 2d 192, 218-22 (en banc) (2015) (explaining that cross-burning may be prohibited because “the statute is aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category” where in contrast, messages that are merely offensive and do not actually damage the victims' property, or “place . . . the victims in reasonable fear for their persons” may not be prohibited by Washington State due to prohibition against content-based regulation of speech).

<sup>1156</sup> Catherine Rentz and Luke Broadwater, “Federal and Maryland officials launch reviews of hate crime reporting, laws after Pittsburgh synagogue attack,” *The Baltimore Sun*, Oct. 30, 2018, <https://www.baltimoresun.com/news/maryland/politics/bs-md-hate-crime-review-20181030-story.html>.

<sup>1157</sup> Ibid.

<sup>1158</sup> Ibid.

<sup>1159</sup> Ibid.

<sup>1160</sup> Ibid.

protections of worshippers and an additional two million dollars to protect children from hate violence in the 2019 state budget.<sup>1161</sup>

### Insufficient Reporting Practices

As discussed previously, collecting accurate and complete data on hate crimes can be difficult. However, it is vitally important to collect and report these numbers in order for communities and law enforcement to understand the severity of the issue, on the local, state, and national level. Further, having accurate data can also aid law enforcement in implementing better prevention strategies and building better relationships with targeted communities. When local law enforcement does not accurately investigate, collect, or report data on hate crimes that are affecting these communities that can send the message to community members that these crimes are not taken seriously.

In 2017, nine cities did not report hate crime data to the FBI and over 80 cities reported zero hate crimes to the FBI. Each of these cities has more than 100,000 residents and many have more than 250,000 residents (see Appendix C).<sup>1162</sup> According to an Associated Press investigation, “more than 2,700 city police and county sheriff’s departments across the country [] have not submitted a single hate crime report” to the FBI during the past six years, which represents “about 17 percent of all city and county law enforcement agencies nationwide.”<sup>1163</sup> Mark Potok, former senior fellow with the Southern Poverty Law Center, asserts that “if these crimes are never really counted, it’s a way of saying they are not important. . . It’s a way of saying your life doesn’t matter.”<sup>1164</sup> And the issue goes even further than just those 2,700 agencies.

The Associated Press also found that thousands of city police agencies and county sheriff’s offices—which are responsible for handling the majority of hate crime investigations—reported inconsistent data, where they would report for some years, but not others, or only report a quarter of the year.<sup>1165</sup> Moreover, there were 16 states in which over a quarter of cities did not appear at all in the UCR database between 2009 and 2014. This number included a majority of law enforcement agencies in Mississippi and Louisiana (64%, 59%, respectively), including the sheriff’s office in Lafourche Parish, Louisiana, despite the fact that in March 2009 nine inmates were charged with racially-based hate crimes following three attacks at the Lafourche Parish Detention Center in Lafourche, Louisiana.<sup>1166</sup> Cities reporting zero hate crimes to the UCR does not necessarily mean that no hate crimes occurred in those years.

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<sup>1161</sup> Samantha Hogan, “Educators and faith leaders confront growth of hate and bias incidents,” *The Frederick News-Post*, Jan. 17, 2019, [https://www.fredericknewspost.com/news/education/funding/educators-and-faith-leaders-confront-growth-of-hate-and-bias/article\\_c64d7552-b401-5de2-9729-84bc5481bba3.html](https://www.fredericknewspost.com/news/education/funding/educators-and-faith-leaders-confront-growth-of-hate-and-bias/article_c64d7552-b401-5de2-9729-84bc5481bba3.html).

<sup>1162</sup> See ADL, FBI 2017 HCSA Did Not Report (DNR) and Zero Reporting, <https://www.adl.org/sites/default/files/documents/Final%20PDF%20FBI%20HCSA%202016%20Cities%20that%20DNR%20or%20Reported%20Zero.pdf>.

<sup>1163</sup> Christina Cassidy, “AP: Patchy reporting undercuts national hate crimes count,” *Associated Press*, June 6, 2016, <https://apnews.com/13412889b85640cfb0adcd3c28ad0093>.

<sup>1164</sup> *Ibid.*

<sup>1165</sup> *Ibid.*

<sup>1166</sup> *Ibid.*

The fact that a city or state reports zero hate crimes also does not mean that local officials are not reporting. In fact, city law enforcement may have accurate reporting practices, but a state could have poor reporting practices. For instance, the Columbus, Ohio Police Department stated that while the department reports all incidents to the state of Ohio, it is unknown what information (if any) is subsequently forwarded to the FBI.<sup>1167</sup>

The lack of reporting to the FBI is even more troubling and suspect when highly populous states do not report or report zero hate crimes from year to year. Notably, both Texas and Florida are the two states that had the greatest number of cities that did not report hate crimes or reported zero hate crimes for multiple years to the FBI.<sup>1168</sup> According to the FBI's 2017 data, participating agencies in Texas reported 0.68 hate crimes per 100,000 residents, and Florida reported 0.71 per 100,000 residents.<sup>1169</sup> These numbers are much lower than the 2.77 per 100,000 that were reported in California, the 2.8 in New York, or the 2.34 reported across the U.S. as a whole.<sup>1170</sup>

Moreover, when comparing states that have similar overall populations such as New York and Florida (both states have about 20 million residents),<sup>1171</sup> disparities in reporting practices become apparent. For example, in 2016, law enforcement agencies in New York reported 598 hate crimes to the FBI, compared to Florida agencies that reported 110.<sup>1172</sup> While it is possible that these numbers are due to a difference in actual hate crimes, it is unlikely given that many cities in Florida such as Fort Lauderdale, Miami, and Tallahassee did not submit any data to the FBI that year. Other agencies in Florida, such as the Miami-Dade County Police Department (MDPD)—the largest force in the Southeast and the eighth-largest in the country—only reported a single hate crime that year. The entire county consists of a population of about 2.7 million people and the department oversees about 1.2 million of them. When investigative reporters inquired why the numbers were so low, MDPD Director Juan Perez stated that it was “likely inaccurate” and “there may have been a lapse” in logging hate crime statistics correctly. While Perez stated that he was going to conduct an audit to ensure compliance, the MDPD only submitted a single hate crime to the FBI's 2017 data collection.<sup>1173</sup>

Nevertheless, it appears that the MDPD may still be incorrectly reporting its hate crime data to the FBI. For instance, in October 2017, the Justice Department convicted Gerald Wallace for

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<sup>1167</sup> See Timothy Mangan, Chief, Litigation Section for Columbus, Ohio Police Department, Response to U.S. Commission on Civil Rights Interrogatory Responses, Oct. 8, 2018, at 3.

<sup>1168</sup> See Anti-Defamation League, FBI 2016 HCSA Did Not Report (DNR) and Reported Zero (0) Hate Crimes, <https://www.adl.org/sites/default/files/documents/Final%20PDF%20FBI%20HCSA%202016%20Cities%20that%20DNR%20or%20Reported%20Zero.pdf>; South Asian Americans Leading Together (SAALT), *Communities On Fire*, 2018, at 17, <http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf>.

<sup>1169</sup> FBI, UCR, 2017 Hate Crime Statistics; see also Peter Aldhous, “The Cities Where the Cops See No Hate,” *BuzzFeed News*, Dec. 13, 2018, <https://www.buzzfeednews.com/article/peteraldhous/hate-crimes-miami-police-irving-syracuse>.

<sup>1170</sup> FBI, UCR, 2017 Hate Crime Statistics; see also Peter Aldhous, “The Cities Where the Cops See No Hate,” *BuzzFeed News*, Dec. 13, 2018, <https://www.buzzfeednews.com/article/peteraldhous/hate-crimes-miami-police-irving-syracuse>.

<sup>1171</sup> See U.S. Census Bureau, <https://www.census.gov/>.

<sup>1172</sup> FBI, Hate Crime Statistics, 2016, “Offenses,” <https://ucr.fbi.gov/hate-crime/2016/tables/table-11>.

<sup>1173</sup> Jerry Iannelli, “One Year Later, MDPD Likely Not Reporting Hate-Crime Data Despite Promises,” *Miami New Times*, Nov. 19, 2018, <https://www.miaminewtimes.com/news/miami-dade-police-likely-not-reporting-hate-crimes-10917694>.

threatening to murder members of a mosque in Miami Gardens, Florida (a town located in Miami Dade County).<sup>1174</sup> According to the DOJ press release:

During the plea hearing, Wallace admitted that on the evening of Feb. 19, he left a voicemail message for the Islamic Center of Greater Miami, located in Miami Gardens, Florida. The defendant admitted leaving a hate-filled and profanity laden message against Islam, the prophet Mohammed, and the Koran, during which he threatened to go to the mosque, and stated, ‘I’m gonna shoot all y’all [sic]. He further admitted that by leaving this threatening message, he obstructed congregants who worship at the Islamic Center from freely exercising their religious beliefs.

Incomplete data can follow from local or state law enforcement not being mandated by federal law to report hate crimes.<sup>1175</sup> As discussed in Chapter 2, other reasons for incomplete data may include law enforcement not being trained in how to report a crime as a possible hate crime or communities being fearful to report crimes. For instance, the NCVS found that during 2011-15, Latinx people experienced a higher rate of violent hate crime victimizations (1.3 per 1,000) than white people (0.7 per 1,000) or black people (1.0 per 1,000);<sup>1176</sup> however, some members of Latinx communities are afraid to report crimes to law enforcement.<sup>1177</sup>

Further, poor reporting may be due to law enforcement inaccurately reporting details about the victim of a hate crime incident, such as misgendering or using the wrong name of a transgender victim, which then incorrectly reports the number of murders committed against this community.<sup>1178</sup>

Another possible cause of poor reporting practices is due to lack of comprehensive training for law enforcement.<sup>1179</sup> Stephen Haas, Director of the Office of Research and Strategic Planning at the

<sup>1174</sup> U.S. Dep’t of Justice, U.S. Attorney’s Office, Southern District of Florida, “Florida Man Pleads Guilty to Hate Crime for Making Telephonic Threat to Shoot Congregants at The Islamic Center of Greater Miami,” Oct. 19, 2017, <https://www.justice.gov/usao-sdfl/pr/florida-man-pleads-guilty-hate-crime-making-telephonic-threat-shoot-congregants-islamic>.

<sup>1175</sup> See, e.g., Ken Schwencke, “Why America Fails at Gathering Hate Crime Statistics,” ProPublica, Dec. 4, 2017, <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics>; Maya Berry, “Charlottesville won’t show up in federal hate crime stats,” *Washington Post*, Sept. 24, 2018, [https://www.washingtonpost.com/outlook/2018/09/24/charlottesville-wont-show-up-federal-hate-crime-stats/?utm\\_term=.517a769e37ce](https://www.washingtonpost.com/outlook/2018/09/24/charlottesville-wont-show-up-federal-hate-crime-stats/?utm_term=.517a769e37ce); FBI, UCR Program, <https://www.fbi.gov/file-repository/ucr/a-word-about-ucr-data.pdf/view>.

<sup>1176</sup> Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Department of Justice, June 2017, at 6, <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>.

<sup>1177</sup> See, e.g., Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising Hate Drives Latinos and Immigrants Into Silence,” Center for Public Integrity, Aug. 22, 2018, <https://publicintegrity.org/federal-politics/rising-hate-drives-latinos-and-immigrants-into-silence/>.

<sup>1178</sup> Human Rights Campaign and Trans People of Color Coalition, *A Time to Act*, 2017, [http://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf](http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf); Emily Waters, Larissa Pham, and Chelsea Convery, “A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017,” National Coalition of Anti-Violence Programs, 2018, <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>1179</sup> A.C. Thompson, Rohan Naik, and Ken Schwencke, “Hate Crime Training for Police is Often Inadequate, Sometimes Nonexistent,” *ProPublica*, Nov. 29, 2017, <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>.

Department of Military Affairs and Public Safety, and colleagues found that police are less likely to participate in hate crime reporting if they have not been properly trained.<sup>1180</sup> Research has shown that determining if a crime has a potential bias is complicated and nuanced, and this classification can be negatively affected if officers are unfamiliar in how to identify and report possible hate crimes.<sup>1181</sup> Some factors that may make hate crime harder to classify are due to:

- Ambiguity – The motivation for the incident may be perceived differently by responding officers, because the indicators used to determine motivation may not be clear.
- Uncertainty – Patrol officers must make judgements about bias motivation at the scene, before a detailed investigation is performed.
- Infrequency – Hate crimes occur infrequently relative to other types of crimes, and officers may not have much experience in applying hate crime procedures.<sup>1182</sup>

Further, research has also shown that some hate crimes may be more readily classified properly if the officer is more experienced or familiar with these types of crimes, suggesting that specialized units may increase the likelihood of accurate classification.<sup>1183</sup> Other studies have found that “only hate crimes that fit popular constructions of ‘normal victims and offenders’ receive investigative outcomes comparable to other similar non-bias offenses.”<sup>1184</sup> This suggests that officers and witnesses to a potential hate crime may perceive some biased crimes as “more serious and worthy of investigative effort than others,” potentially privileging crimes committed due to a racial or ethnic bias due to the history of racial violence in the United States.<sup>1185</sup> During the Commission’s public forum, David Stacy, government affairs director for the Human Rights Campaign (HRC) testified to the need for increased training for law enforcement to correctly identify and report hate crimes. The HRC recommends that this training is conducted as a “two-step process” where the responding officer utilizes a broad definition of a hate crime, and then a trained expert is in charge of reviewing the case to classify it accurately as a hate crime.<sup>1186</sup>

<sup>1180</sup> Stephen Haas, James Nolan, Erica Turley, and Jake Stump, “Assessing the Validity of Hate Crime Reporting: An Analysis of NIBRS Data,” *Criminal Justice Statistical Analysis Center*, July 2011, at 8, [http://djs.wv.gov/ORSP/SAC/Documents/ORSP\\_WV\\_Hate\\_Crime\\_Report.pdf](http://djs.wv.gov/ORSP/SAC/Documents/ORSP_WV_Hate_Crime_Report.pdf).

<sup>1181</sup> Melissa Alderson, Claudia Gross-Shader, “Review of Hate Crime Prevention, Response, and Reporting in Seattle Phase 1 Report,” Seattle Office of City Auditor, Sept. 20, 2017 at 6-7; A.C. Thompson, Rohan Naik, and Ken Schwencke, “Hate Crime Training for Police is Often Inadequate, Sometimes Nonexistent,” *ProPublica*, Nov. 29, 2017, <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>.

<sup>1182</sup> Melissa Alderson, Claudia Gross-Shader, “Review of Hate Crime Prevention, Response, and Reporting in Seattle Phase 1 Report,” Seattle Office of City Auditor, Sept. 20, 2017, at 8, <https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/Hate%20Crime%20Final%20092017v2.pdf>.

<sup>1183</sup> Ronald Davis, and Patrice O’Neill, “The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High,” *The Police Chief* 83, May 2016, <http://www.policechiefmagazine.org/the-hate-crimes/>; Center for Problem-Oriented Policing, “Responses to the Problem of Hate Crimes,” Arizona State University, [https://popcenter.asu.edu/problems/hate\\_crimes/3](https://popcenter.asu.edu/problems/hate_crimes/3).

<sup>1184</sup> Christopher Lyons and Aki Roberts, “The Difference ‘Hate’ Makes in Clearing Crime,” *Journal of Contemporary Criminal Justice*, 2014, vol. 30, no. 3, at 268.

<sup>1185</sup> *Ibid.*, 283-84.

<sup>1186</sup> David Stacy, Government Affairs Director for the Human Rights Campaign, Written Public Statement to U.S. Commission on Civil Rights, at 5.



### Case Studies of Reporting Practices

As discussed in Chapter 2, there are many challenges to gather accurate and complete data on the prevalence of hate crimes. Since state and local law enforcement are tasked with the responsibility to report the number of hate crimes that happen in their jurisdictions to the FBI, their practices are essentially important, and some are creating practices that could help the nation better grapple with the problem. For instance, the New York Police Department established a Hate Crimes Task Force in 2016, which has been applauded for its reporting efforts, along with its efforts to reach out to diverse communities, and build relationships with prosecutors.<sup>1187</sup> In order to address these possible biases, some cities established special law enforcement and prosecutorial units to deal solely with hate crime cases. For instance, the District Attorney's Office in Manhattan, New York created a specific hate crimes unit in 2010 to prosecute alleged hate crimes in the city,<sup>1188</sup> and in 2016, the governor launched a designated police unit to investigate hate crimes in the city.<sup>1189</sup>

Other cities have implemented other strategies to help aid law enforcement in reporting and preventing hate crimes and bias-motivated incidents. For example, city officials in Portland, Oregon have devised a plan to pay community groups to track incidents, in addition to offering resources and supporting victims of hate crimes, and training residents how to resist or disrupt hateful activity.<sup>1190</sup> The grant is targeting community groups that can receive a collective \$350,000 in city grants, "to act as a point of contact for those who have experienced hate crimes, to train individuals or groups how to resist hate crimes, or to gather, analyze, and publicize data about such crimes." The city implemented the grant program after the hate crime attack on passengers aboard the Portland MAX train and hopes to get more communities involved in the fight against bias and hate in the city.

Similarly, in 2017 the International Association of Chiefs of Police (IACP), in consultation with its Community Advisory Committee, passed a resolution entitled: "Increasing Law Enforcement Awareness of and Enhancing the Response to Hate Crimes and Crimes Motivated by Bias."<sup>1191</sup> The IACP stated that this new resolution will be a cornerstone in its policy development and will encourage law enforcement to investigate reported hate crimes and bias incidents seriously, forge meaningful community partnerships, and proactively address hate crimes and bias incidents in hope of preventing these crimes from occurring.<sup>1192</sup> Furthermore, at the Commission's briefing Terrence Cunningham, Deputy Executive Director of the IACP, testified that the IACP has

<sup>1187</sup> Harbani Ahuja, Note, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact of Minority Communities*, 37 *Cardozo L. Rev.* 1867, 1896-99 (2016).

<sup>1188</sup> New York County District Attorney, "Bureaus and Units," 2018, <https://www.manhattanda.org/about-the-office/bureaus-and-units/>.

<sup>1189</sup> New York State, "Governor Cuomo Announces Statewide Hotline to Report Incidents of Bias and Discrimination," Nov. 15, 2016, <https://www.governor.ny.gov/news/governor-cuomo-announces-statewide-hotline-report-incidents-bias-and-discrimination>.

<sup>1190</sup> Jessica Floum, "Portland offers grants to combat city's rising hate crimes," *Oregon Live*, July, 5, 2017, [https://www.oregonlive.com/portland/2017/07/portland\\_offers\\_grants\\_to\\_comb.html](https://www.oregonlive.com/portland/2017/07/portland_offers_grants_to_comb.html); see also City of Portland, "Portland United Against Hate Grant Partners," *Community & Civic Life*, July 1, 2017-June 30, 2019, <https://www.portlandoregon.gov/civic/article/685361>.

<sup>1191</sup> International Association of Chiefs of Police (IACP), "2017 Resolutions," (adopted Dec. 2017) at 40-41, [https://dnn9ciwm8.azurewebsites.net/Portals/0/documents/pdfs/Communications/IACP\\_Resolutions\\_2017\\_Final.pdf](https://dnn9ciwm8.azurewebsites.net/Portals/0/documents/pdfs/Communications/IACP_Resolutions_2017_Final.pdf).

<sup>1192</sup> *Ibid.*, 40.

partnered with agencies like the ADL and the Lawyers' Committee and hosted a series of meetings to hear perspectives from multiple communities, including hate crime survivors, academic experts, national and grassroots advocacy leaders, and law enforcement officials on barriers and best practices to combat hate.<sup>1193</sup>

The Commission also recognizes that many local law enforcement agencies are working diligently with the limited resources they have to try to provide accurate data on and prevent hate crime incidents that occur in their cities, and have implemented a variety of strategies and tools to meet this need. The Commission reached out to five law enforcement agencies in cities of various sizes and that were geographically diverse that were identified as having positive annual reporting practices. These cities were selected based upon two criteria. For the first criterion, Commission staff made a list of the top 50 most populous cities that report hate crimes to the federal government and determined the rate of reporting per the population size of that city. For the second criterion, Commission staff divided the list of cities regionally to make a diverse sample of local jurisdictions. The cities selected were: Seattle, Washington; Phoenix, Arizona; Columbus, Ohio; Charlotte, North Carolina; and Boston, Massachusetts.<sup>1194</sup>

The section below outlines the sampled five agencies' investigative and reporting practices, based on the cities' responses to interrogatories as well as independent staff research.

### Seattle, Washington

In 2017, the city of Seattle had a population of 713,700 and the population of King County, where the city is located, consisted of 2.18 million people.<sup>1195</sup> According to the 2017 American Community Survey, the population of Seattle was 68.6 percent white, 7.1 percent black, 6.5 percent Latinx, 14.5 percent Asian, and 0.6 percent Native American.<sup>1196</sup> The Seattle Police Department (PD) is the largest municipal law enforcement agency in Washington State. The Seattle PD employs 1,444 sworn officers who respond to an average of 609 calls for service daily and who "proactively engage" in 373 incidents on a daily basis.<sup>1197</sup> Washington's hate crime statute is similar to the federal statute that offers protections and has penalty enhancements for all protected classes.<sup>1198</sup> In Washington State, the protected classes are defined as "race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory

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<sup>1193</sup> Terrence Cunningham, Deputy Executive Director of the IACP, *Briefing Transcript* at 33.

<sup>1194</sup> Note, the Commission did not receive responses from the interrogatory or document requests from the Charlotte, North Carolina or Boston, Massachusetts police departments. The information provided for these two cities was gathered thoroughly publicly available information and briefing testimony.

<sup>1195</sup> Seattle Police Department, "Department Fact Sheet," <https://www.seattle.gov/police/about-us/about-the-department/departement-fact-sheet>.

<sup>1196</sup> U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates, Table DP05, Seattle, Washington.

<sup>1197</sup> Seattle Police Department, "Department Fact Sheet," <https://www.seattle.gov/police/about-us/about-the-department/departement-fact-sheet>.

<sup>1198</sup> The federal hate crime act protects against hate crimes on the basis of race, national origin, ethnicity, religion, sexual orientation, gender, disability, and gender identity. *See* 18 U.S.C. § 249 (2009). *Cf.* Wash. Rev. Code § 9A.36.080(1) (2010) ("A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts [including injury, damage to property, threats creating reasonable fear of harm], because of the person's perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap[.]"), <https://apps.leg.wa.gov/RCW/default.aspx?cite=9a.36.080>.

handicap.”<sup>1199</sup> Furthermore, the Seattle Municipal Code prohibits malicious harassment if it is intentionally committed because of “perception of another person’s homelessness, marital status, political ideology, age, or parental status.”<sup>1200</sup>

According to reported numbers to the FBI, hate crimes nearly doubled in Seattle between 2016 and 2017, rising from 118 reported hate incidents in 2016 to 234 in 2017.<sup>1201</sup> As with national numbers, in 2017, the highest reported category of hate crimes were those based on a person’s race, ethnicity, or national origin (120 incidents, 51.3 percent), followed by sexual orientation bias (57 incidents, 24.4 percent), religious bias (45 incidents, 19.2 percent), gender identity bias (11 incidents, 4.7 percent), and 1 reported incident (0.42 percent) for gender bias (see chart 25).<sup>1202</sup> While nationally hate crimes increased by 17 percent, in the state of Washington, hate crimes increased by 27.1 percent from 2016.<sup>1203</sup> Washington reported the second highest number of hate crimes (613) in 2017, with only California reporting a higher number of incidents that year (1,270).<sup>1204</sup>

### Chart 26: Reported Hate Crimes in Seattle (2009-17)

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<sup>1199</sup> *Id.*

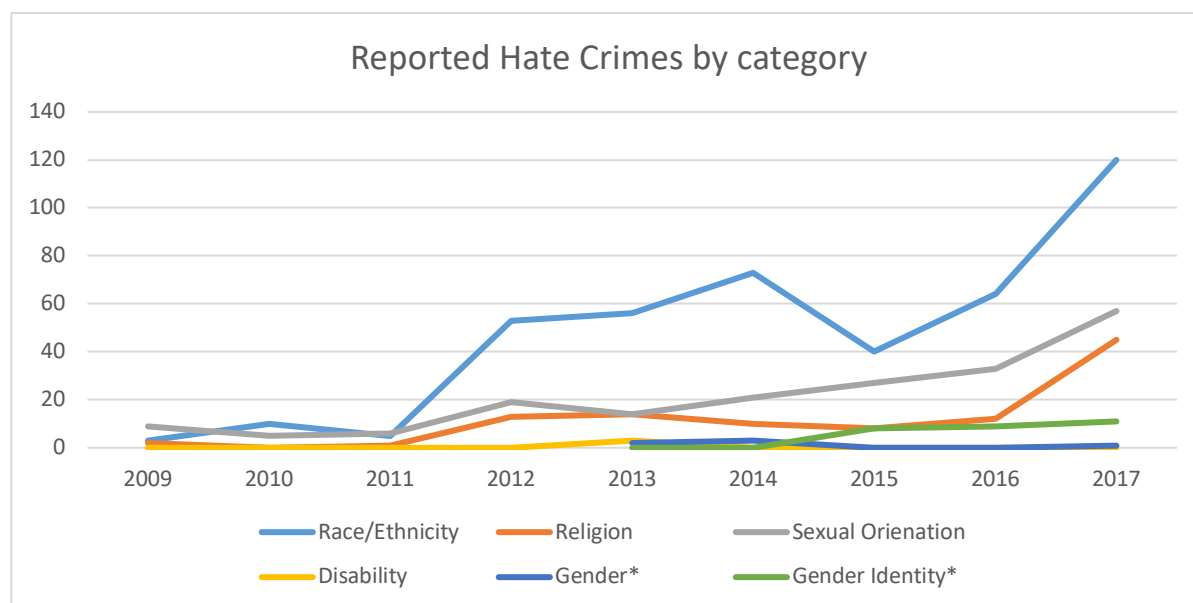
<sup>1200</sup> Seattle, Wash., Mun. Code, § 12A.06.115(A) (1974) (“A person is guilty of malicious harassment if he or she maliciously and intentionally commits one (1) of the following acts [injury to person or property or reasonable threat of harm] because of his or her perception of another person’s homelessness, marital status, political ideology, age, or parental status[.]”), [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT12ACRCO\\_SUBTITLE\\_ICRCO\\_CH12\\_A.06OFAGPE\\_12A.06.115MAHA](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT12ACRCO_SUBTITLE_ICRCO_CH12_A.06OFAGPE_12A.06.115MAHA).

<sup>1201</sup> FBI, UCR Hate Crime Statistics 2017, “Washington: Hate Crime Incidents,” <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/washington.xls>; FBI, UCR Hate Crime Statistics 2016, “Washington: Hate Crime Incidents,” [https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table\\_13\\_washington\\_hate\\_crime\\_incidents\\_per\\_bias\\_motivation\\_and\\_quarter\\_by\\_agency\\_2016.xls](https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table_13_washington_hate_crime_incidents_per_bias_motivation_and_quarter_by_agency_2016.xls).

<sup>1202</sup> FBI, UCR Hate Crime Statistics 2017, “Washington: Hate Crime Incidents,” <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/washington.xls>.

<sup>1203</sup> FBI, UCR Hate Crime Statistics 2017, “Offenses,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-11.xls>; FBI, UCR Hate Crime Statistics 2016, “Offenses,” <https://ucr.fbi.gov/hate-crime/2016/tables/table-11> Calculations by Commission staff.

<sup>1204</sup> *Ibid.*; *See also* FBI, UCR Hate Crime Statistics 2017, “Offenses,” <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-11.xls>.



Source: FBI, UCR; data compiled and chart created by Commission staff

\*2013 was the first year that FBI collected data on gender bias and gender identity bias incidents

### *Investigations*

The Seattle PD has implemented several strategies to aid in their mission of reducing hate crimes and protecting the citizens of the city. According to the department, all Seattle PD officers are trained to investigate reported crimes for all possible elements, including bias; and if a crime is noted to potentially involve bias, the investigation is referred to the Bias Crimes Coordinator/Director (BCCD) for a specialized review.<sup>1205</sup> The BCCD is responsible for a variety of duties, such as maintaining statistical data and producing reports on bias and hate incidents, outreach to multiple communities, and leading the Washington State Criminal Justice Training Commission (CJTC) training classes for Seattle PD recruits.<sup>1206</sup> The Seattle PD has also established an LGBTQ Liaison who is tasked to work closely with LGBTQ communities, monitor LGBTQ-related crime statistics and responses, and coordinate Seattle PD participation with LGBTQ events in the city.<sup>1207</sup> The BCCD and the LGBTQ Liaison also work closely together to address bias incidents and hate crimes against LGBTQ communities.<sup>1208</sup>

At the Commission's briefing, Assistant Chief Marc Garth Green stated that the Seattle PD investigates three types of incidents: malicious harassments, crimes with bias elements, and non-criminal bias incidents.<sup>1209</sup> Christopher Fisher, Chief Strategy Officer for the agency explained that while the FBI mandates bias crime reporting on the basis of essentially the same protected

<sup>1205</sup> Seattle Police Dep't, Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 9, 2018.

<sup>1206</sup> Ibid.

<sup>1207</sup> Seattle Police Department, "SPD Safe Place Partners," <https://www.seattle.gov/spd-safe-place/safe-place-partners>.

<sup>1208</sup> Ibid.

<sup>1209</sup> Marc Garth Green, Assistant Chief, Seattle Police Dep't, *Briefing Transcript*, pp. 26-27; see also discussion, *supra* notes 123 (regarding hate incidents).

classes as under federal law, the Seattle PD further identifies and tracks “non-criminal bias incidents in an effort to support potential victims, identify trends early, and educate offenders.”<sup>1210</sup>

Regarding criminal bias, according to the Seattle PD, “malicious harassments” (sometimes referred to as hate crimes or bias crimes) is the legal term used for these types of crimes, and the department uses a similar definition to the FBI’s hate crime definition but also includes homelessness, marital status, age, parental status, and political ideology, among others in their list of protected categories.<sup>1211</sup>

The second category that the Seattle PD monitors are “crimes with bias elements” which involves any crime that is not necessarily based on bias, but during the incident the suspect uses a derogatory comment directed at the victim’s identity characteristic or group status (e.g., a “traffic accident where [a] victim or suspect get into an argument about who is at-fault, suspect assaults the victim, and heated words are exchanged of a derogatory nature”).<sup>1212</sup>

The third offense category is referred to as a “non-criminal bias incident” which refers to comments directed at a person’s protected status.<sup>1213</sup> Fisher states that while these incidents are not criminal in nature, since hate speech is protected by the First Amendment, the comments can cause fear and concern for the targeted community and victims can feel harassed, intimidated, and offended by such comments, and as such, may warrant police involvement.<sup>1214</sup> The Seattle PD investigates all three categories and encourages residents to report bias incidents, regardless of the level of offense in order for the department to “track incidents, identify potential suspects, and take prompt action to advance cases toward prosecution when appropriate.”<sup>1215</sup>

### *Data Collection & Reporting*

In terms of data collection, the Seattle PD launched the “Bias Crimes Dashboard” (Dashboard) in February 2017.<sup>1216</sup> The electronic reporting system collects incident data and basic demographic information on all three categories of incidents that are reported to the Seattle PD and confirmed by the BCCD.<sup>1217</sup> These data are then used to inform strategic responses for the Seattle PD, and

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<sup>1210</sup> Seattle Police Dep’t, Interrog. Resp. to U.S. Comm’n on Civil Rights, at 2.

<sup>1211</sup> *Ibid.*

<sup>1212</sup> *Ibid.*

<sup>1213</sup> In response to the Commission’s interrogatory requests, Fisher notes that:

The non-criminal bias incidents are not crimes and therefore deviate from standard criminal investigative protocols based on existing laws and police authority to detain, interview, etc. SPD officers are encouraged to identify if possible the subjects involved in these incidents, in case the same individual(s) escalate their behavior to criminal conduct in the future. This would be done through obtaining subject descriptions, locations of occurrence and/or social contacts/voluntary interviews with these individuals. The SPD LGBTQ Liaison may mention certain incidents and/or patterns to federal officials so they can be made aware of potential community concerns.

*Ibid.*, 2.

<sup>1214</sup> *Ibid.*, 2.

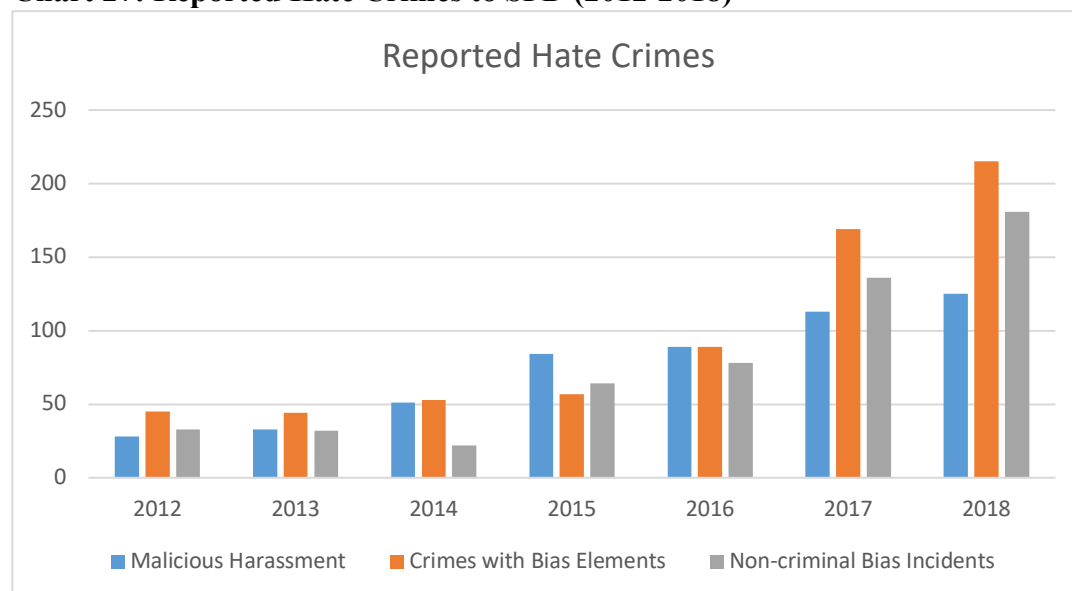
<sup>1215</sup> *Ibid.*

<sup>1216</sup> *Ibid.*

<sup>1217</sup> *Ibid.*

inform the broader community about hate crime trends around the city.<sup>1218</sup> Moreover, the Seattle PD not only encourages community members to report incidents of hate and bias crimes, but offers instructions on how to access the Bias Crimes Dashboard in multiple languages to make it more accessible.<sup>1219</sup> Based on the Bias Crimes Dashboard (which reflects different numbers than the FBI’s UCR program), all three of the categories that the Seattle PD collects have increased over the past three years (see chart 27).

**Chart 27: Reported Hate Crimes to SPD (2012-2018)**



Source: Seattle Police Department; chart created by Commission staff

According to the Dashboard, the total number of offenses reported by the Seattle PD in 2017 was 418 incidents, which includes all three offense categories discussed above (malicious harassment: 113; crimes with bias elements: 169; and non-criminal bias elements: 136).<sup>1220</sup> While the discrepancy between the 418 incidents reported by the Seattle PD and the 284 reported by the FBI is a considerable difference, this discrepancy could be due in part to how local law enforcement report these data.<sup>1221</sup> For example, the non-criminal bias elements would not show up in the FBI database since they are not in fact hate crimes, though the Seattle PD monitors these types of bias incidents. However, even when examining the two criminal categories (malicious harassment and crimes with bias elements), a discrepancy—albeit smaller—remains. Hypothesizing on these differences, we suggest that they could be due to state or federal reporting deadlines or errors in data reporting.<sup>1222</sup> Breaking out the offenses along these two categories, the data show that crimes

<sup>1218</sup> Ibid, 5.

<sup>1219</sup> See Seattle Police Dep’t, “Knowing Your Rights,” Interrog. Docs. to U.S. Comm’n on Civil Rights, Oct. 5, 2018.

<sup>1220</sup> Seattle Police Department, “Bias/Hate Crime Data,” (last updated Feb. 1, 2019), <https://www.seattle.gov/police/information-and-data/bias-crime-unit/bias-crime-dashboard>.

<sup>1221</sup> Ibid; see also FBI, UCR Hate Crime Statistics 2017, “Washington: Hate Crime Incidents,” <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/washington.xls>.

<sup>1222</sup> In an email correspondence with Commission staff, Richard McNally, Section Chief at the FBI stated that individual police departments are “not always responsible for the crime reporting in their State. And I assume that

with racial bias were the highest reported (128 incidents, 45.7 percent), followed by LGBTQ bias (85 incidents, 30.1 percent), religious bias offenses (36 incidents, 12.7 percent), ethnic-bias (12 incidents, 4.2 percent), and gender bias (3 incidents, 1.06 percent).<sup>1223</sup> The Dashboard also offers an additional category for “multi-category” hate crimes offenses or offenses committed along multiple identity categories (e.g., a black lesbian—race, gender, and sexual orientation); in 2017, there were 10 reported incidents (3.4 percent).<sup>1224</sup>

In response to the reported increase of hate crime in 2016 to 2017, the Seattle PD stated that they have been investigating the possible reasons for the reported increases.<sup>1225</sup> Fisher posits that this increase could be in part due to the work of the BCCD and the LGBTQ Liaison who have increased communities’ trust for the agency, thus increasing reporting rates.<sup>1226</sup> Fisher also suggested that the increased national and local media attention, along with community discussions and concerns about the increase in hate crimes may have contributed to driving up the reported numbers.<sup>1227</sup> He also maintains that the increase could be due to broader political issues that caused an actual uptick of these crimes in the city, but states that the agency cannot verify that fact.<sup>1228</sup>

In response to the increase in hate crimes in 2016, the Seattle City Council audited the agency to investigate its reporting practices. A report released by the Seattle Office of City Auditor found that between 2012 and 2016, there were an annual average of 17,000 Seattle PD offense reports that were assigned the bias category of “unknown.”<sup>1229</sup> The report also found that the Seattle PD had a practice of changing these records from “unknown” to “no bias.”<sup>1230</sup> This suggests that the department could have been undercounting the number of hate crimes occurring in the city. However, the department did remove this option in July 2017 to improve hate crime classification and reporting.<sup>1231</sup> Furthermore, four categories—age, parental status, marital status, and political ideology—were not added to the record’s management system after the passage of the Seattle Municipal Code Malicious Harassment Law,<sup>1232</sup> until the system was updated in July 2017.<sup>1233</sup> Further, the audit suggests that officers would benefit from additional hate crime training, stating that officers receive some training during the academy, but not any in-service.<sup>1234</sup> The report also

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states or reporting agencies may be setting their own standards about when something constitutes a hate crime.” May 31, 2019.

<sup>1223</sup> Seattle Police Dep’t, “2017 Bias/Hate Crime Data,” <https://www.seattle.gov/police/information-and-data/bias-crime-unit/bias-crime-dashboard> (last updated Mar. 1, 2019).

<sup>1224</sup> *Ibid.*

<sup>1225</sup> Seattle Police Dep’t, Interrog. Resps. to U.S. Comm’n on Civil Rights, at 2.

<sup>1226</sup> *Ibid.*

<sup>1227</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 10.

<sup>1228</sup> *Ibid.*, 11.

<sup>1229</sup> Melissa Alderson and Claudia Gross-Shader, “Review of Hate Crime Prevention, Response, and Reporting in Seattle Phase 1 Report,” Seattle Office of City Auditor, Sept. 20, 2017 at 6-7, <https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/Hate%20Crime%20Final%20092017v2.pdf>. However, the report also notes that the “unknown” category can be helpful to use if the department follows the FBI model and recommendations. The FBI uses the “unknown” code, only as a temporary placeholder to use for incidents “where some facts are present but are not conclusive” and further recommends that officers must be diligent in updating bias categories as investigations reveal more details.).

<sup>1230</sup> *Ibid.*

<sup>1231</sup> *Ibid.*

<sup>1232</sup> Malicious Harassment, Seattle, Wash., Municipal Code § 12A.06.115 (2010), (1974).

<sup>1233</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 9-10.

<sup>1234</sup> *Ibid.*, 10-11.

suggests that the Seattle PD should create more guidance on how to recognize and respond to hate crimes, and officials should support regional and statewide coordination of hate crime efforts to further aid the city in addressing hate violence.<sup>1235</sup>

In May 2019, the Seattle Office of City Auditor updated its 2017 audit of the SPD's response to hate crimes. The report found that the SPD still did not have sufficient data to evaluate their hate crime response and prevention efforts. Additionally, community organizations report that hate crimes remain a prevalent concern in the city, some populations are more vulnerable than others (e.g., people with disabilities and the homeless), underreporting of these crimes remain an issue, and there is lack of support from city officials.<sup>1236</sup> The report showed that of the 53 organizations that participated in the survey, 35 percent reported that hate crimes are a significant issue, and almost 60 percent stated that they were aware of a hate crime or hate incident occurring in the past six months.<sup>1237</sup>

Further, the survey showed that 20 percent of some hate crimes or hate incidents were reported, and 7 percent stated that none were reported to the SPD. The top six reasons for not reporting included:

1. Cultural issues or fear of revealing immigration status
2. Fear of reprisal by the offender
3. Victim preferred to report to the community organization rather than law enforcement
4. Limited English Proficiency
5. Perception that law enforcement would be inefficient, ineffective
6. Victim handled the matter themselves or informally.<sup>1238</sup>

### *Community Outreach*

The Seattle PD also informed the Commission of the various community outreach projects that the department conducts regularly.<sup>1239</sup> Fisher stated that the department recognizes that many communities may have never interacted with law enforcement or have had negative experiences with police in the past, thus building trusting relationships are essential.<sup>1240</sup> Fisher stated that through these efforts, communities around Seattle have built better relationships with law enforcement and thus, increased reporting and follow-up by the Seattle PD.<sup>1241</sup> He stated: "it is one thing to report crime, but advancing a case toward prosecution requires victim participation."<sup>1242</sup>

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<sup>1235</sup> Alderson & Gross-Shader, *supra* note 1180 at 36.

<sup>1236</sup> Melissa Alderson, Claudia Gross-Shader, & Jane Dunkel, "Review of Hate Crime Prevention, Response, and Reporting in Seattle Phase 2 Report," Seattle Office of City Auditor, May 9, 2019, at 2, [https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/2017-09%20Hate%20Crimes%20Ph2\\_Final.pdf](https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/2017-09%20Hate%20Crimes%20Ph2_Final.pdf).

<sup>1237</sup> *Ibid.*, 36

<sup>1238</sup> *Ibid.*, 39-40.

<sup>1239</sup> Seattle Police Dep't Interrog. Resps. to U.S. Comm'n on Civil Rights.

<sup>1240</sup> Seattle Police Dep't Interrog. Resps. to U.S. Comm'n on Civil Rights, at 4-5.

<sup>1241</sup> *Ibid.*

<sup>1242</sup> *Ibid.*



In an effort to foster these relationships, the Seattle PD has also established an LGBTQ Liaison who is tasked to work closely with LGBTQ communities, monitor LGBTQ-related crime statistics and responses, and coordinate Seattle PD participation with LGBTQ events in the city.<sup>1243</sup> The BCCD and the LGBTQ Liaison also work closely together to address bias incidents and hate crimes against LGBTQ communities. The BCCD has also worked to establish rapport with Muslim and Jewish communities, among other targeted communities in Seattle. For instance, the BCCD speaks at many community organized events such as: religious congregations, schools, refugee and immigrant gatherings, and neighborhood meetings.<sup>1244</sup> The BCCD also leads educational workshops such as one entitled “Hijabs and Harassment” that was sponsored by the Somali Family Safety Task Force, and also workshops on what to expect when calling 911 and some simple self-defense strategies.<sup>1245</sup> Moreover, the Seattle PD has developed a specific program for members of targeted communities called “The SPD SAFE PLACE Initiative” which was initially developed for victims in LGBTQ communities, but has now expanded to all communities affected by hate crimes.<sup>1246</sup> This campaign against bias crimes includes working with local business that place stickers in store windows to signify that they are a “safe place” where someone can seek help or assistance.<sup>1247</sup> Fisher stated that this model is now used around the country and in Canada, and SPD works closely with businesses, schools, and community groups to make victims of hate crimes and student bullying aware that there are supports and resources—including a safe shelter—through the SPD and their community partners.<sup>1248</sup>

The SAFE PLACE Initiative has also been internationally recognized “for its efforts in hate crimes investigations and training, and serves as a model for other law enforcement agencies throughout North America and Europe for its progressive efforts regarding hate crimes.”<sup>1249</sup> According to Fisher, one notable effort by the Seattle PD that moved beyond the Initiative includes the SPD’s “Transgender Video Training for police and community members” which has been successful due to its “humanistic, non-bureaucratic format and assistance from Seattle’s own transgender community.”<sup>1250</sup> He stated that the video has been used as a resource for other law enforcement agencies and community groups around the country.<sup>1251</sup>

However, some Seattle residents are somewhat skeptical on the effects of the campaign. For example, John Wallace, a resident and employee in Capitol Hill (a Seattle neighborhood where the population is predominantly gay), told reporters that rebuilding community trust with officers has been a difficult and slow process.<sup>1252</sup> “There’s a lot of history of bad blood, and whether or not it’s entirely justifiable on both sides is a matter of opinion... I want their help, but we need it in an

<sup>1243</sup> Seattle Police Department, “SPD Safe Place Partners,” <https://www.seattle.gov/spd-safe-place/safe-place-partners>.

<sup>1244</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 5.

<sup>1245</sup> *Ibid.*, 7.

<sup>1246</sup> *Ibid.*

<sup>1247</sup> Seattle Police Department, “Safe Place,” <http://www.seattle.gov/spd-safe-place/>.

<sup>1248</sup> Seattle Police Department, “SPD Safe Place Partners,” <https://www.seattle.gov/spd-safe-place/safe-place-partners>.

<sup>1249</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 6.

<sup>1250</sup> *Ibid.*

<sup>1251</sup> *Ibid.*

<sup>1252</sup> Sami Edge, “Gay cop creates ‘Safe Place’ on Capitol Hill,” *Seattle Times*, July 7, 2015, <https://www.seattletimes.com/seattle-news/crime/gay-cop-creates-safe-place-on-capitol-hill/>.

appropriate way going forward.” Conversely, other residents such as Karyn Schwartz, stated that seeing the Safe Place Logo – a rainbow flag inside a symbol of a police badge – helped her feel more included in the neighborhood. “Seeing some sort of representation of yourself that says ‘you belong here’ – it brings calm to your soul.”<sup>1253</sup>

Fisher further stated that the Seattle PD works closely and shares information about hate crimes in the Seattle area with local universities and K-12 schools.<sup>1254</sup> Most often this partnership centers on addressing LGBTQ bias incidents where schools may reach out to the Seattle PD LGBTQ Liaison (in conjunction with the BCCD) for advice and assistance.<sup>1255</sup> This relationship between Seattle Public Schools and the Seattle PD is part of the SAFE PLACE Initiative has been in place since 2016, where school staff, security and students received further education on how to report hate crimes, updating school policies, and how to work with police regarding these incidents.<sup>1256</sup> The Initiative also offers additional and ongoing education about hate crime awareness to faculty, students, and school security staff. For instance, in 2017, the Seattle PD was actively involved with the University of Washington at the Milo Yiannopoulos speaking event that garnered national attention after Elizabeth and Marc Hokoana assaulted individuals on the campus.<sup>1257</sup>

The Seattle PD also works closely with other agencies such as the King County Prosecutor’s Office, the United States Attorney’s Office, the FBI, and the CRS to help in the investigation and prosecution of hate crimes.<sup>1258</sup> Fisher stated that since 2014, the Seattle PD LGBTQ Liaison has also actively worked with the CRS, U.S. Attorney’s Office, FBI, and the King County Prosecuting Attorney to enhance collaboration between these different agencies to better analyze hate crimes trends, how to raise awareness, and increase education throughout Washington.<sup>1259</sup> In 2016, the Seattle’s BCCD joined an “informal working group” that now regularly conduct hate crime awareness training throughout Seattle and the region to address a variety of community concerns related to bias crimes and forging positive relationship between law enforcement and communities.<sup>1260</sup> This model has now been replicated in other law enforcement agencies such as the FBI office in Kansas City, Missouri.<sup>1261</sup>

Community organizations also reported that the SPD can take several steps to improve community-police relations which can help to ensure that hate crimes and hate incidents in Seattle are properly being reported to authorities. These include suggestions, such as:

- Building confidence with the SPD and have guarantees that victims will be protected;
- Continued community outreach and a stronger PR effort;
- Flyers, informational flyers or posters to post in building common areas;
- Full disclosure by police regarding reports and of resolutions;

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<sup>1253</sup> Ibid.

<sup>1254</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 5.

<sup>1255</sup> Ibid.

<sup>1256</sup> Ibid.

<sup>1257</sup> Ibid., 4; Mike Carter and Steve Miletich, “Couple charged with assault in shooting, melee during UW speech by Milo Yiannopoulos,” *Seattle Times*, April 24, 2017.

<sup>1258</sup> Seattle Police Dep’t Interrog. Resps. to U.S. Comm’n on Civil Rights, at 8.

<sup>1259</sup> Ibid., 9.

<sup>1260</sup> Ibid.

<sup>1261</sup> Ibid., 10.

- Having a strong community-police relationship and police presence more frequently and accessible around public transportation areas;
- Hiring and promoting more police that represent the diverse communities for which the police serve;
- Assigning culturally appropriate officers to the neighborhood they serve;
- Creating a non-criminal civil statute for protection similar to protection from abuse orders. Many survivors do not want to engage with police, prosecutors, or courts and find the process re-victimizing without creating additional safety or providing any resources to cope with trauma.<sup>1262</sup>

Recognizing the work that the city needs to do to help curb the increase of hate crimes happening across the city and the inaccuracy in data collection, in July 2019, the Seattle City Council of Civil Rights, Utilities, Economic Development and Arts Committee stated that they are “exploring ways for community organization to work with Seattle police, prosecutors and other law enforcement agencies to reduce hate crimes.”<sup>1263</sup>

### Columbus, Ohio

The city of Columbus is the 14<sup>th</sup> most populous city in the U.S., with a population of 862,643 and is the largest city in the state of Ohio.<sup>1264</sup> According to the 2017 American Community Survey, the population of Columbus was 60.5 percent white, 28.3 percent black, 6.0 percent Latinx, 5.2 percent Asian, and 0.2 percent Native American.<sup>1265</sup> The Columbus PD has over 1,800 sworn officers and is among the top 25 largest police forces in the United States.<sup>1266</sup> According to the FBI, in 2016, Ohio was third in the country for reports of hate crime incidents (442 reports); following California (931 reports) and New York (595 reports). In terms of hate crime laws, Ohio’s hate crime statute has a penalty enhancement for crimes committed on the basis of race, color, ethnicity, national origin, or religion, but not sexual orientation, gender identity, gender, or disability.<sup>1267</sup>

#### *Investigations*

The Columbus Police Department (PD) stated that the department relies upon the FBI’s definition on whether or not to investigate a crime as a potential hate or bias crime.<sup>1268</sup> And in terms of their investigation practices, Timothy Mangan, Chief of the Litigation Section for the Columbus PD stated that:

<sup>1262</sup> Alderson, Gross-Shader, & Dunkel, *supra* 1235 at 40.

<sup>1263</sup> Lonnie Lusardo, “Hate crimes are on the rise, and the federal government isn’t helping,” *Seattle Times*, July 29, 2019, <https://www.seattletimes.com/opinion/we-cant-combat-rising-hate-crimes-with-woefully-inaccurate-data/>.

<sup>1264</sup> Data USA, “Columbus, OH,” <https://datausa.io/profile/geo/columbus-oh/>; U.S. Census, “The South is Home to 10 of the 15 Fastest-Growing Large Cities,” May 25, 2017, <https://www.census.gov/newsroom/press-releases/2017/cb17-81-population-estimates-subcounty.html>.

<sup>1265</sup> U.S. Census Bureau, 2013-2017 American Community Survey, 5-Year Estimates, Table DP05, Columbus, Ohio.

<sup>1266</sup> The City of Columbus, “Division of Police,” <https://www.columbus.gov/police-highlights/>.

<sup>1267</sup> See OHIO Rev. Code Ann. §§OH § 2927.12 (1987).

<sup>1268</sup> Timothy Mangan, Chief of the Litigation Section for the Columbus Police Department, Interrog. Resps. to the U.S. Comm’n on Civil Rights (Oct. 9, 2018).

If during the course of the investigation of the crime the victim supplies verbal or visual evidence that the crime was based on a hate crime or bias-motivation and the officer/detective is able to verify this information, leading to probable cause, the officer/detective will include this information in the investigation and file or request the appropriate additional/enhanced charge(s).<sup>1269</sup>

Mangan also stated that the department does not have different criteria for investigating hate crimes or bias-motivated incidents compared to other crimes, and investigations are based upon the initial violation of the law and if there is an indication of a hate or bias motivation.<sup>1270</sup> He asserts that currently there are no identified “best practices” regarding the investigation, reporting, and documentation of hate crimes, but the Columbus PD incorporates best practices identified through the Commission on Accreditation for Law Enforcement Agencies (CALEA).<sup>1271</sup> As such, Mangan told the Commission that officers are “advised that when in doubt, report the hate crime and detectives will review the circumstances and make any applicable changes to the report.”<sup>1272</sup>

In terms of challenges that the Columbus PD faces when investigating hate crimes or bias-motivated incidents, Mangan stated that the Columbus PD often has issues due to a victim not wanting to cooperate with the investigation, a lack of witnesses or evidence, and a lack of probable cause.<sup>1273</sup> However, he did state that there were no identified challenges when it came to reporting hate crimes within the investigation and forwarding those statistics to the state of Ohio.<sup>1274</sup>

#### *Data Collection & Reporting*

While the Ohio statute does not require law enforcement to report on hate crimes or collect data on these crimes,<sup>1275</sup> officers have the option to select if a crime had a potential bias motivation in their reports. Officers undergo training (both academy and in-service) to learn how to properly document a hate crime allegation and collect the necessary information for possible prosecution.<sup>1276</sup> If the crime is believed to be a hate crime, then the Columbus PD works with the prosecutor’s office to ensure convictions of these crimes.<sup>1277</sup> Since 2009, the Columbus PD has reported 989 hate crimes, which spiked to its highest number in 2014 (205) (see chart 28). Mangan asserts that after the implementation of HCPA in 2009, the number of hate crimes reported increased based largely on “inaccurate reporting by officers.”<sup>1278</sup> However, he stated that the

<sup>1269</sup> Timothy Mangan, Chief of the Litigation Section for the Columbus Police Department, Interrog. Resps. to the U.S. Comm’n on Civil Rights, at 1.

<sup>1270</sup> *Ibid.*, 1.

<sup>1271</sup> *Ibid.*, 5; *see also* The City of Columbus, Division of Police, “Accreditation,” <https://www.columbus.gov/police-accreditation-highlight/>. (The Commission on Accreditation for Law Enforcement Agencies was created in 1979 “as a means for law enforcement agencies to voluntarily commit to adhering to a body of international ‘best practice’ law enforcement standards.”)

<sup>1272</sup> Columbus Police, Dep’t Interrog. Resps. to the U.S. Comm’n on Civil Rights, *supra* note 1267, at 5.

<sup>1273</sup> *Ibid.*, 6.

<sup>1274</sup> *Ibid.*

<sup>1275</sup> *See* Ohio Rev. Code § 5502.62.

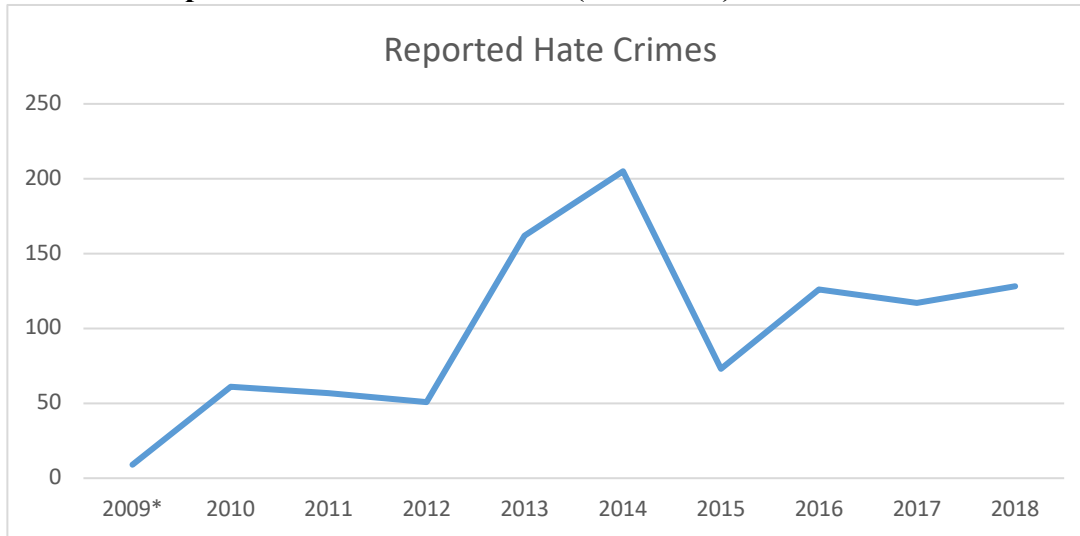
<sup>1276</sup> Columbus Police, Dep’t Interrog. Resps. to the U.S. Comm’n on Civil Rights, *supra* note 1267, at 4.

<sup>1277</sup> *Ibid.*

<sup>1278</sup> *Ibid.*, 5.

Columbus PD identified these errors, corrected the reports and retrained the officers, which then contributed to the later decrease in numbers.<sup>1279</sup>

**Chart 28: Reported Hate Crimes to CPD (2009-2018)**



Source: Columbus Police Department, Interrogatory Responses to Commission; chart created by Commission staff  
\*Reported hate crimes from October 28, 2009-December 31, 2009

According to reported numbers to the FBI, hate crimes had an approximate 50 percent drop in Columbus between 2016 and 2017, dropping from 151 reported hate incidents in 2016 to 75 in 2017.<sup>1280</sup> As with national numbers, in 2017, the highest reported category of hate crimes in Columbus were those based on a person's race, ethnicity, or national origin (50 incidents, 66.6 percent), followed by sexual orientation bias (19 incidents, 25.3 percent), religious bias (3 incidents, 4 percent), and then disability (3 incidents, 4 percent).<sup>1281</sup> As with Columbus, in the state of Ohio overall, hate crimes decreased by 11 percent from 2016.<sup>1282</sup>

Conversely, according to the interrogatory responses to the Commission, Columbus reported 117 hate crimes in 2017, yet the UCR only reflects that Columbus reported 75 incidents were reported to the FBI that year.<sup>1283</sup> Similar to other cities, 2017 was not the only year with discrepancies between the local police department and the FBI. According to data the Columbus PD provided, this agency's reported hate crimes numbers have not matched the FBI's reported numbers any year for the data that was provided to the Commission (i.e., 2009-2017). Mangan stated that the

<sup>1279</sup> Ibid.

<sup>1280</sup> FBI, UCR, Hate Crime Statistics 2017, "Ohio," <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/ohio.xls>; FBI, UCR, Hate Crime Statistics 2016, "Ohio," [https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table\\_13\\_ohio\\_hate\\_crime\\_incidents\\_per\\_bias\\_motivation\\_and\\_quarter\\_by\\_agency\\_2016.xls](https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table_13_ohio_hate_crime_incidents_per_bias_motivation_and_quarter_by_agency_2016.xls).

<sup>1281</sup> FBI, UCR, Hate Crime Statistics 2017, "Ohio," <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/ohio.xls>.

<sup>1282</sup> FBI, UCR, Hate Crime Statistics 2017, "Offenses," <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-11.xls>.

<sup>1283</sup> Columbus Police Dep't, Interrog. Resps. to the U.S. Comm'n on Civil Rights, *supra* note 1267, at 6.

department reports all hate crime investigations to the state of Ohio, but the Columbus PD does not know what information the state then forwards to the FBI.<sup>1284</sup>

Investigative reporters also found discrepancies and errors in the Columbus PD's hate crime incident reports. For instance, since 2010, police officers have reported six incidents that purported heterosexual bias as the motivating factor in the crime; yet, Columbus PD Sgt. Dean Worthington acknowledged that "it's likely that the officers who filed the reports marked the wrong box."<sup>1285</sup> According to UCR data, from 2010 to 2016 there has been 142 reports of anti-heterosexual bias, however, ProPublica investigators found that few, if any, of these crimes were hate crimes targeting heterosexual people. Moreover, the investigators were able to identify that at least 58 of the cases were indeed inaccurately reported by police departments. Many of these cases, including Columbus' records, showed about half were anti-gay or anti-bisexual crimes, and seven cases were not about sexual orientation and were actually bias against the victims being Jewish, black, or women.<sup>1286</sup> In response to these findings, an FBI public affairs specialist told reporters that: "[a]ll state UCR programs and direct contributing agencies are provided with a list of incident reports prior to publication each year for verification purposes. It is the responsibility of the state UCR programs and direct contributing Law Enforcement Agencies to notify the FBI of any data discrepancies."<sup>1287</sup>

### *Community Outreach*

The Columbus PD works with communities in the Columbus area in many ways. For instance, they have Community Liaison Officers and Inclusion Officers who meet with and educate community groups and citizens about hate crimes and bias-motivated incidents.<sup>1288</sup> The Community Liaison Officers are also responsible for attending monthly meetings with Community Block Watch Groups and various Civic Associations in Columbus; while the Inclusion Officers meet with various groups and organization upon request.<sup>1289</sup> At these meetings the officers discuss a variety of topics including: crime trends, suggestions on safety practices, actions that the Columbus PD are taking to solve crimes, and education about the police department.<sup>1290</sup> While the Columbus PD does try and work to build relationships through these officers, the department does not proactively share information about hate crimes to the public, but stated that it does provide the data when responsive to a public records request.<sup>1291</sup>

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<sup>1284</sup> Columbus Police Dep't Interrog. Resps. to the U.S. Comm'n on Civil Rights, *supra* note 1267, at 3.

<sup>1285</sup> Rachel Glickhouse and Rahima Nasa, "Police are Mislabeled Anti-LGBTQ and Other Crimes as Anti-Heterosexual," *ProPublica*, May 15, 2018, <https://www.propublica.org/article/police-are-mislabeled-crimes-as-anti-heterosexual-hate-crimes>.

<sup>1286</sup> *Ibid.*

<sup>1287</sup> *Ibid.* It should be noted that Commission staff also inquired with the FBI about these discrepancies between local police departments and federal UCR data. As of the writing of this report, the Commission has not received a response clarifying these inconsistencies.

<sup>1288</sup> Columbus Police Dep't Interrog. Resps. to the U.S. Comm'n on Civil Rights, *supra* note 1267, at 2.

<sup>1289</sup> *Ibid.*

<sup>1290</sup> *Ibid.*

<sup>1291</sup> *Ibid.*, 4.

As with many cities around the country, the Columbus Police Department is also struggling with building positive community-police relationships.<sup>1292</sup> For instance, Helen Stewart who is a lead organizer with Black Queer & Intersectional Collective told reporters that local communities have lost trust in the police chief. She stated that this lack of trust is largely due to the numerous fatal police shootings that have largely affected communities of color in Columbus.<sup>1293</sup> However, now-former Police Chief Kim Jacobs told an audience of city officials and officers that she prides herself on her efforts to improve community-police relations. “It really does center on some of the training and community engagement that we’ve done... We’ve trained our officers to appreciate the conversations they can have with community members... Training them where they might have biases and training them where people might be afraid of them.”<sup>1294</sup> Community members state that they are glad Jacobs is retiring and hope to forge better relationships with the next police chief.

Some of the efforts the Columbus PD has been implementing are working to strengthen its outreach and enhance its presence in the community. For instance, the department has established a block watch program so community members can aid in reducing crime and a “campus walking crew” program that is partnered with the Ohio State University Police Department and works jointly to improve safety and security in off-campus areas.<sup>1295</sup> Additionally, the Columbus PD has established community liaison officers that are assigned to each of the 20 precincts. The police department states that the “liaison officer can address long-term crime and quality of life issues, as well as attend community meetings (1,623 in 2014) and oversee block watch efforts.”<sup>1296</sup> The department also has established specific “diversity and inclusion liaisons” to help increase outreach to different communities. The liaisons work closely with the black community, LGBT communities, and Latinx communities around Columbus. The role of these liaisons includes:

- creating and maintaining meaningful dialogues and relationships to address a need or concern;
- identifying, analyzing, and addressing problems arising between the Division and the community;
- helping to eliminate barriers and dispel myths that may exist between the police and the community; and
- educating the community about the many outreach and engagement opportunities the Division offers to all citizens so they can learn more about police operations and policies.<sup>1297</sup>

Other community outreach efforts include work by the Franklin County sheriff’s office (the city of Columbus is located in Franklin County) that has established a dedicated Community Outreach and Engagement Unit that is comprised of four residents that focuses on building and maintaining

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<sup>1292</sup> See e.g., Adora Namigadde, “Chief Kim Jacobs’ Tenure Marked by Progress and Criticism,” *WOSU*, Feb. 7, 2019, <https://radio.wosu.org/post/chief-kim-jacobs-tenure-marked-progress-and-criticism#stream/0>.

<sup>1293</sup> Ibid.

<sup>1294</sup> Ibid.

<sup>1295</sup> Columbus Division of Police, “Community Engagement and Outreach Initiatives,” (last updated, March 9, 2016), <https://www.columbus.gov/CEAO/>.

<sup>1296</sup> Ibid.

<sup>1297</sup> Ibid.

relationships around the county.<sup>1298</sup> The department has also developed a specific coordinator for the Latinx community and the Somali community (Franklin County has the second largest Somali population in the country), and these coordinators are intended to bring resources to the communities, enhance relationships and bring awareness to the sheriff's office programs and initiatives.<sup>1299</sup>

After the hate crime attack in Pittsburgh against the Jewish synagogue, the Columbus PD has also been working with community members to enhance security at places of worship. For instance, directly after the Tree of Life attack, the department held a townhall forum with the Jewish community in Columbus to discuss security measures and how its members can remain safe.<sup>1300</sup> Justin Shaw, Director of Community Relations with JewishColumbus, stated that the Jewish community in Columbus has been working closely with the CPD to help educate elected officials and government leaders about specific needs to reinforce security efforts at synagogues.<sup>1301</sup> Shaw stated that:

our partnerships with law enforcement are built upon years of mutual respect and collaboration and are a model for communities across the country. It is because of these strong partnerships that in 2017 we received a combined \$1.2 million in security grants for our community. Earlier this year [2019], JewishColumbus formed a new security committee to further facilitate strong communication between staff, lay leaders, and the entire community.<sup>1302</sup>

This grant money is allocated to pay for off-duty officers to act as security guards at synagogues and Jewish community centers as well as provide funds for two active shooting trainings.<sup>1303</sup> Joel Marcovitch, CEO of JewishColumbus told reporters that it is unfortunate that security is the top priority for the community, however, “[t]his does not make us afraid. We are not afraid. We will continue to live our lives as proud Jews in the community. We will not hide behind these officers.”<sup>1304</sup>

## **Boston, Massachusetts**

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<sup>1298</sup> Franklin County Sheriff's Office, “Community Outreach and Engagement,” <https://sheriff.franklincountyohio.gov/About/Divisions/Support-Services/Community-Response-Bureau-Units/Community-Outreach-and-Engagement>.

<sup>1299</sup> Ibid.

<sup>1300</sup> NBC4 Staff, “Jewish organization holds forum on security in central Ohio synagogues,” *NBC4*, Nov. 15, 2018, <https://www.nbc4i.com/news/local-news/jewish-organization-holds-forum-on-security-in-central-ohio-synagogues/>.

<sup>1301</sup> Justin Shaw, “Security a top priority after Pittsburgh, Poway,” *Columbus Jewish News*, April 29, 2019, [https://www.columbusjewishnews.com/news/local\\_news/security-a-top-priority-after-pittsburgh-poway/article\\_2c3c42e4-6ac0-11e9-83d0-0f23f56802d1.html](https://www.columbusjewishnews.com/news/local_news/security-a-top-priority-after-pittsburgh-poway/article_2c3c42e4-6ac0-11e9-83d0-0f23f56802d1.html).

<sup>1302</sup> Ibid.

<sup>1303</sup> Danae King, “JewishColumbus to fund security at central Ohio Jewish groups,” *The Columbus Dispatch*, May 16, 2019, <https://www.dispatch.com/news/20190516/jewishcolumbus-to-fund-security-at-central-ohio-jewish-groups>.

<sup>1304</sup> Ibid.



Boston is the largest city in Massachusetts with a population of 682,903 as of 2017; and the Boston Police Department (PD) employs 2,205 sworn law enforcement officers.<sup>1305</sup> According to the 2017 American Community Survey, the population of Boston was 52.8 percent white, 25.3 percent black, 19.4 percent Latinx, 9.5 percent Asian, and 0.4 percent Native American.<sup>1306</sup>

In terms of hate crime legislation, as of 2016, Massachusetts' hate crime statute covers race, color, religion, national origin, sexual orientation, gender identity, and disability.<sup>1307</sup> According to the Massachusetts' Attorney General's Office, groups are protected against hate crimes, which include threats, harassment, violence, and other bias-motivated actions.<sup>1308</sup>

According to reported numbers to the FBI, hate crimes increased by about 4.4 percent in Boston between 2016 and 2017, rising from 135 reported hate incidents in 2016 to 141 in 2017.<sup>1309</sup> As with national numbers, the highest reported category of hate crimes were those based on a person's race, ethnicity, or national origin (79 incidents, 56.0 percent), but then followed by sexual orientation bias (33 incidents, 23.4 percent), religious bias (28 incidents, 19.8 percent), and 1 incident (0.46 percent) for gender identity bias.<sup>1310</sup> Overall, reported hate crimes in the state of Massachusetts also increased by about 9.5 percent (see chart 29).<sup>1311</sup>

### Chart 29: Reported Hate Crimes in Boston (2009-2017)

<sup>1305</sup> FBI, Crime in the United States 2017, "Massachusetts, Full-time Law Enforcement Employees," <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-78/table-78-state-cuts/massachusetts.xls>.

<sup>1306</sup> U.S. Census Bureau, 2013-2017 American Community Survey, 5-Year Estimates, Table DP05, Boston, Massachusetts.

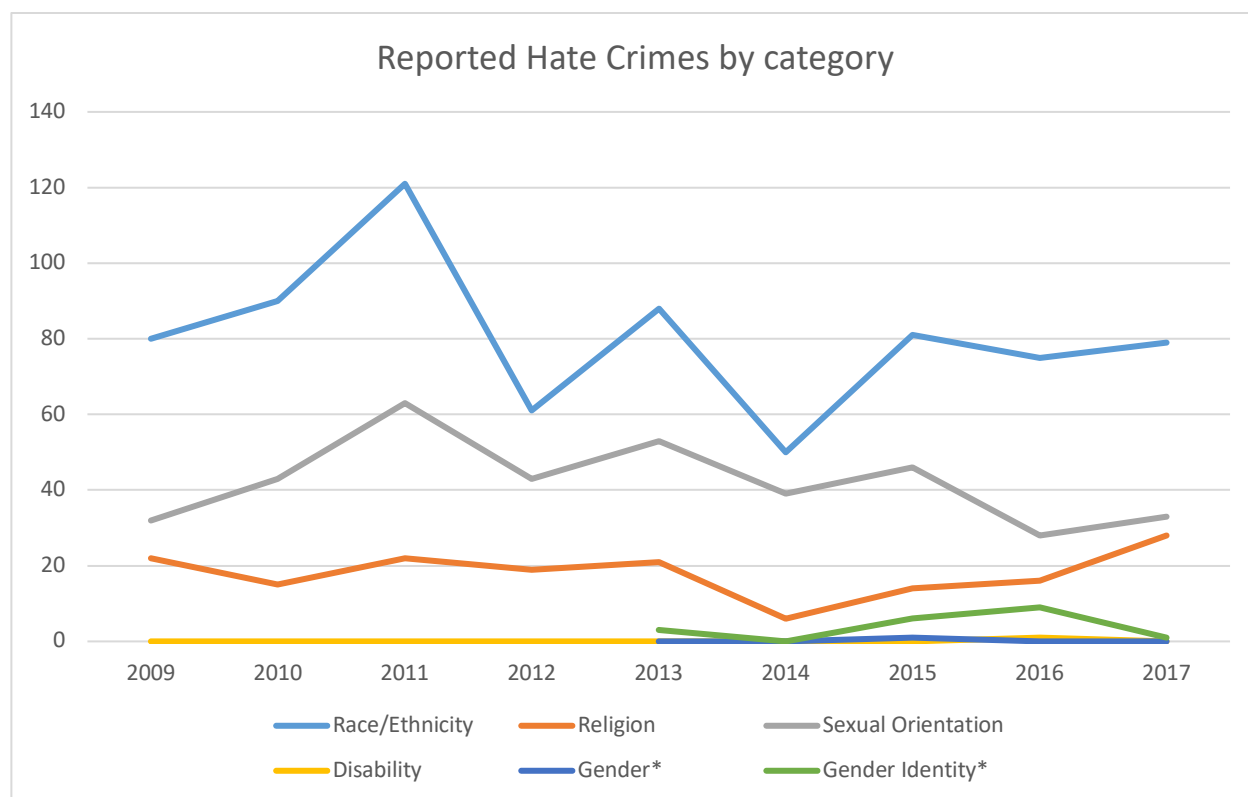
<sup>1307</sup> See MA. Gen. Laws ch. 265 § 39 (1983 current through Act 12 of the 2019 Legislative Session).

<sup>1308</sup> *Id.*; see also Office of Attorney General Maura Healy, Protections against hate crimes, <https://www.mass.gov/service-details/protections-against-hate-crimes> (last accessed May 20, 2019).

<sup>1309</sup> FBI, UCR, Hate Crime Statistics 2017, "Massachusetts," <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/massachusetts.xls>; FBI, UCR, Hate Crime Statistics 2016, "Massachusetts," [https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table\\_13\\_massachusetts\\_hate\\_crime\\_incidents\\_per\\_bias\\_motivation\\_and\\_quarter\\_by\\_agency\\_2016.xls](https://ucr.fbi.gov/hate-crime/2016/tables/table-13/table-13-state-cuts/table_13_massachusetts_hate_crime_incidents_per_bias_motivation_and_quarter_by_agency_2016.xls). Note, the Commission did not receive separate reported hate crime numbers from the Boston PD.

<sup>1310</sup> FBI, UCR, Hate Crime Statistics 2017, "Massachusetts," <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/massachusetts.xls>.

<sup>1311</sup> FBI, UCR, Hate Crime Statistics 2017, "Offenses," <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-11.xls>.



Source: FBI, UCR; data compiled and chart created by Commission staff

\*2013 was the first year that FBI began collecting data on gender bias and gender identity bias crimes

At the Commission's briefing, Sgt. Detective Carmen Curry testified that the city of Boston is experiencing an increase of hate crimes similar to those happening on the national level.<sup>1312</sup> Curry has been working in the Civil Rights Unit for the Boston PD for over 20 years and stated that when she first began, she believed that these types of crimes would be eradicated by now, but state and national trends show quite the contrary.<sup>1313</sup>

In January 2019, Executive Director of the Lawyers' for Civil Rights of Massachusetts Ivan Espinoza-Madrigal pointed to the rise of hate crimes across Massachusetts and in the city of Boston explaining that this increase is due to a system of racism and exclusion.<sup>1314</sup> Espinoza-Madrigal asserts that "[w]e should not be surprised that there has been an explosion in hate crimes in one of the most segregated metropolitan areas in the country, where people of color are excluded from and invisible in public life." Boston Mayor Martin Walsh agrees and noted that Boston has struggled and continues to struggle with addressing racism and bias in the city. He stated that:

Generations of Bostonians have experienced implicit and explicit bias in all aspects of life — from interpersonal relationships to housing policy to educational opportunity. . . We have yet to come to terms fully with [these racist] experiences as a city. . . In light of this

<sup>1312</sup> Carmen Curry, Sgt. Detective for the Boston Police Dep't, *Briefing Transcript*, p. 20.

<sup>1313</sup> *Ibid.*

<sup>1314</sup> Lauren Sampson and Ivan Espinoza-Madrigal, "Hate Crimes Are Multiplying in Massachusetts But We Can't Blame Trump," *WBUR*, Jan. 4, 2019, <https://www.wbur.org/cognoscenti/2019/01/04/hate-crimes-racism-laurel-sampson-ivan-espinoza-madrigal>; *see also*

history, it will take a deeply committed and widely concerted effort to bridge divides that exist in our city in order to ensure that we grow in a way that fosters opportunity for all.<sup>1315</sup>

### *Investigations*

According to testimony received by the Massachusetts Advisory Committee to the Commission, the Massachusetts Attorney General and U.S. Attorney of Massachusetts participated in a joint project to train law enforcement about hate crimes, in the 1990s and 2000s.<sup>1316</sup> Yusufi Vali testified that the team “had a number of community partners in Massachusetts who were really working closely with state and federal law enforcement to educate communities and develop materials.”<sup>1317</sup> While the team is no longer in operation, advocates believed it served as a good resource at the time.<sup>1318</sup>

The Boston PD established a specific hate crimes unit over 40 years ago that has the sole purpose to focus on hate crimes and work with the victims involved in these crimes. Curry testified that while there are not many police departments that have these dedicated units, it is crucial for departments to establish them in order to gain a better understanding about hate crimes that are occurring in their cities.<sup>1319</sup> She testified that:

I think having a unit sends a clear message to the community, to would-be haters or would-be perpetrators that the issues of hate crimes is important. . .we see that, in the climate that we’re living in today, there is an increase in and a boldness of the verbiage that’s being used by our leaders, by the media, by politicians. We see social media, Facebook, Snapchat, Twitter, they all play a role in this increase that we’re seeing today.<sup>1320</sup>

Curry stated that having a dedicated hate crimes unit would also help victims coming forward to report when crimes happen because these officers can work with communities to establish trust, develop relationships, and do the necessary community outreach.<sup>1321</sup> But she also stated that one of the biggest barriers to establishing these units is the lack of resources and if a department has enough officers to dedicate to one of these specialized units.<sup>1322</sup>

Similarly, in a joint report from the IACP and the Lawyers’ Committee on Civil Rights Under Law, the organizations also asserted that local law enforcement departments should establish dedicated hate crime units. “Whether the unit is labelled a hate crimes unit, bias crimes unit, or civil rights unit, the key element is to have a core group of officers skilled in hate crime responses.

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<sup>1315</sup> Mayor Martin Walsh, “Racial Justice,” 2019, <https://www.martywalsh.org/priority/racial-justice/>.

<sup>1316</sup> Yusufi Vali, Director of Strategic Relations and Public Affairs at the Islamic Society of Boston Cultural Center, Massachusetts State Advisory Committee, *Briefing Transcript*, pp. 7.

<sup>1317</sup> *Ibid.*

<sup>1318</sup> *Ibid.*

<sup>1319</sup> *Ibid.*, 21.

<sup>1320</sup> *Ibid.*

<sup>1321</sup> *Ibid.*, 22.

<sup>1322</sup> *Ibid.*, 59.

Seattle, San Francisco, Chicago, and Phoenix are great examples of where these specialized units have been developed.”<sup>1323</sup>

### *Data Collection & Reporting*

According to testimony received by the Massachusetts Advisory Committee to the Commission, the Massachusetts Executive Office of Public Safety and Security (EOPSS) puts out annual reports of hate crime data based on reports it gets from law enforcement agencies across the state.<sup>1324</sup> In 2017, the EOPSS received a total of 427 reports of hate crimes, which increased from 391 in 2016.<sup>1325</sup> These cases were reported by 86 municipal police departments, 12 campus police agencies, one hospital and the Massachusetts Bay Transportation Authority. Further, 256 agencies reported zero hate crimes and 55 agencies did not submit a report to the EOPSS, a decrease from 60 non-reporting agencies 2016.<sup>1326</sup>

Robert Trestan, Director of ADL New England testified to the Massachusetts Advisory Committee that he is skeptical about some of the cities that reported zero hate crimes. For instance, the city of Fall River had a “pretty horrific Jewish cemetery desecration” and a population of almost 90,000 residents, but the city reported zero hate crimes.<sup>1327</sup> Trestan stated that “I’m not questioning Fall River PD and my observations were that they handled the cemetery desecration incredibly well, but that’s a large city in Massachusetts with a big population, a large immigrant population, my guess is that there’s hate crimes that are occurring there that are not getting reported.”<sup>1328</sup>

Curry stated that in order to address and accurately report on hate crimes, training is also a crucial component

because if an officer does not know how to identify a hate crime, then it’s not going to be reported...particularly in Massachusetts, when we look at the numbers of how many Massachusetts law enforcement agencies do not participate in reporting hate crimes, I believe that they don’t report them because they don’t know how to identify what a hate crime is.<sup>1329</sup>

According to Massachusetts state law, the Municipal Police Training Committee is to “provide instruction for police officers in identifying, responding to and reporting all incidents of hate crime” and “include such instruction in all curricula for recruits and in-service trainees and in all police academies.”<sup>1330</sup>

<sup>1323</sup> International Association of Chiefs of Police and Lawyers’ Committee on Civil Rights Under Law, *Action Agenda for Community Organizations and Law Enforcement to Enhance the Response to Hate Crimes*, (April 2019), 20, <https://lawyerscommittee.org/wp-content/uploads/2019/04/IACP.pdf>.

<sup>1324</sup> Yusufi Vali, Director of Strategic Relations and Public Affairs at the Islamic Society of Boston Cultural Center, Massachusetts Advisory Committee, *Briefing Transcript*, p. 6.

<sup>1325</sup> Massachusetts Executive Office of Public Safety & Security, *Hate Crime in Massachusetts 2017*, Dec. 2018, at 2, <https://www.mass.gov/files/documents/2018/12/13/2017%20MA%20Hate%20Crime%20Report.pdf>.

<sup>1326</sup> *Ibid.*

<sup>1327</sup> Robert Trestan, Director of ADL New England, Massachusetts Advisory Committee, *Briefing Transcript*, p. 12.

<sup>1328</sup> *Ibid.*

<sup>1329</sup> Carmen Curry, Sgt. Detective for the Boston Police Department, *Briefing Transcript*, pp. 24-25.

<sup>1330</sup> See Mass. Gen. Law ch. 6, § 116B.

However, Robert Trestan, Director of ADL New England testified to the Commission's Massachusetts Advisory Committee that Massachusetts has several different police academies and asserts that the curricula may not be consistent across the different units. Trestan posits that

police officers, young men and women who are becoming police officers are not always getting the same curriculum and the same information on how do you respond to a hate crime. [Such as] [h]ow [] to interact and communicate with a victim of a hate crime because it's actually very different than another type of crime. . . there are some efforts being made to make these adjustments but I think there is a considerable amount of work to be done.<sup>1331</sup>

Curry also testified that one of the reporting challenges is that hate crimes or bias-motivated incidents that happen on college campuses or universities are not being reported to the local police departments. She stated that these incidents are usually kept internal, which not only makes reporting and data collection difficult for police departments, but also may lead to underreporting the extent of the issue in a city.<sup>1332</sup>

### *Community Outreach*

In Boston, Curry stated that the agency does extensive community outreach. For instance, during religious holidays, the unit meets with different community groups.

[W]e see Ramadan is coming on May 15, we get out and we go and we introduce ourselves and we let them know that we're aware of what's happening in the community, we're aware of the season that we're in now, to let them know we're there, to let them know to be aware, to look around in their surroundings. And that's one of the things that I believe establishes a trust relationship, when they know that the police are going to take these crimes seriously.<sup>1333</sup>

Curry explained that there are many reasons why victims do not come forward to report a crime (e.g., immigration status, distrust of the police, LGBT individuals not being "out"), so it is imperative that police departments encourage victims to report these crimes and that dedication and support must come from police officials to show targeted communities that these crimes are a priority.<sup>1334</sup>

Similar to the Seattle PD, Curry stated that the Boston PD encourages victims to report crimes regardless of the type of bias, and the Civil Rights Unit works to not only make this process less troublesome for individuals, but also so that they know that the officers are taking them seriously.<sup>1335</sup>

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<sup>1331</sup> Robert Trestan, Director of ADL New England, Massachusetts Advisory Committee, *Briefing Transcript*, p. 13.

<sup>1332</sup> Carmen Curry, Sgt. Detective for the Boston Police Department, *Briefing Transcript*, p. 24.

<sup>1333</sup> *Ibid.*, 22-23.

<sup>1334</sup> *Ibid.*, 22.

<sup>1335</sup> *Ibid.*, 24.

In 2018, Governor Baker of Massachusetts instituted a Hate Crimes Task Force.<sup>1336</sup> According to testimony received by the Massachusetts Advisory Committee to the Commission, one of the Task Force's recommendations will be to update the mechanisms for hate crime reporting. Additionally, Governor Baker has required that every police department in the 351 towns and cities in the state must have a designated civil rights officer.<sup>1337</sup>

### Phoenix, Arizona

Phoenix, Arizona is the fifth most populous city in the United States, with a metropolitan area of approximately 4.73 million people.<sup>1338</sup> According to the 2017 American Community Survey, the population of Phoenix was 71.9 percent white, 6.9 percent black, 42.5 percent Latinx, 3.6 percent Asian and 2.0 percent Native American.<sup>1339</sup> The Phoenix Police Department (PD) is the largest law enforcement agency in the state of Arizona, and employs approximately 3000 sworn officers and 950 civilian positions. According to Detective Kevin Ham, identifying, investigating, and prosecuting bias and hate crimes has been a focus of the Phoenix PD since 1998 and the department has allocated resources and partnered with other law enforcement agencies to protect the rights of communities.<sup>1340</sup>

Arizona does not have a stand-alone criminal violation for hate crimes. Instead, Arizona Revised Statutes provides an “aggravated” or increased sentencing statute when sufficient evidence exists when a defendant is accused of committing a felony crime that appears to be motivated by bias.<sup>1341</sup> The statute states that “if a person is found to be responsible for a felony crime, and evidence satisfactory to the Court is presented, indicating the victim was intentionally selected because of race, religion, gender, national origin, sexual orientation, or disability, the Court may impose a greater sentence of up to ten additional years.”<sup>1342</sup>

The Arizona statute also mandates that all training include “courses in responding to and reporting all criminal offenses that are motivated by race, color, religion, national origin, sexual orientation, gender or disability.”<sup>1343</sup> However, on the Arizona Peace Officer Standards and Training Boards that list possible classes for officers to register for, there are not descriptions of courses regarding the reporting or investigation of hate crimes.<sup>1344</sup>

### *Investigations*

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<sup>1336</sup> Robert Trestan, Director of ADL New England, Massachusetts Advisory Committee, *Briefing Transcript*, p. 13.

<sup>1337</sup> *Ibid.*

<sup>1338</sup> Kevin Ham, Detective for the Phoenix Police Department, Submitted Briefing Materials to U.S. Commission on Civil Rights.

<sup>1339</sup> U.S. Census Bureau, 2013-2017 American Community Survey, 5-Year Estimates, Table DP05, Phoenix, Arizona.

<sup>1340</sup> Kevin Ham, Detective for the Phoenix Police Department, Submitted Briefing Materials to U.S. Commission on Civil Rights.

<sup>1341</sup> *See* Ariz. Rev. Stat. Ann. § 13-701, (West, through Legis. effective May 8, 2019 of the 1st Reg. Sess. of the 54th Leg. 2019).

<sup>1342</sup> Kevin Ham, Detective for the Phoenix Police Department, PowerPoint Slides, Submitted Briefing Materials to U.S. Commission on Civil Rights at 12.

<sup>1343</sup> *See* Arizona Rev. Stat. § 41-1822A.4.

<sup>1344</sup> *See* Arizona Peace Officer Standards and Training Board, “Classes,” <https://post.az.gov/training-information/classes> (accessed Nov. 4, 2019).

The Phoenix PD utilizes a similar definition to bias crime as the FBI, but does not include protections for victims of gender identity bias crimes.<sup>1345</sup> The state of Arizona also does not offer state protections against gender identity bias; however, other cities may extend these protections to community members (e.g., Tucson).<sup>1346</sup> The department also collects data on bias incidents, which it defines as an incident that fits the description of a bias crime, but lacks any criminal elements.<sup>1347</sup>

In briefing documents submitted to the Commission, Detective Kevin Ham stated that the department recognizes that bias crimes have far-reaching effects, not only causing greater emotional trauma to the victim, but also has lasting impacts for the entire community in which they are a part of.<sup>1348</sup> Similar to conclusions from other research, Ham states that bias crimes are consistently more violent than other crimes and often result in serious injury to the victim.<sup>1349</sup> As discussed previously, Ham acknowledges that poor or inappropriate responses from police can often cause additional trauma to victims and can cause a loss of trust and faith in the police. Further, Ham contends that hate crime investigations are extremely important because bias incidents can escalate without effective interventions from law enforcement.<sup>1350</sup>

### *Data Collection & Reporting*

In 1991, the state of Arizona mandated all law enforcement to collect data on bias crimes.<sup>1351</sup> The Arizona statute requires that police departments “collect information concerning criminal offenses that manifest evidence of prejudice based on race, color, religion, national origin, sexual orientation, gender, or disability.”<sup>1352</sup> Following this mandate, the Phoenix PD tracks bias crimes and reports these statistics to the Arizona Department of Public Safety, who then in turn, reports the state’s bias crime statistics to the FBI.<sup>1353</sup>

In documents submitted to the Commission, Detective Ham stated that the department records bias incidents (even though it may not meet the standard of a crime) for “educational, informational, and statistical purposes” and they want to track these incidents because trends show that hate motivated attacks often occur in the same area where these incidents happen.<sup>1354</sup> Thus, studying and identifying trends can be a helpful strategy in trying to prevent and solve crimes.<sup>1355</sup>

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<sup>1345</sup> Kevin Ham, Detective for the Phoenix Police Department, Submitted Briefing Materials to U.S. Commission on Civil Rights.

<sup>1346</sup> City of Tucson, “Hate Crimes and Bias-based Incidents,” <https://www.tucsonaz.gov/police/hate-crimes-and-bias-based-incidents> (accessed Nov. 4, 2019).

<sup>1347</sup> Kevin Ham, Detective for the Phoenix Police Department, Submitted Briefing Materials to U.S. Commission on Civil Rights.

<sup>1348</sup> *Ibid.*

<sup>1349</sup> Kevin Ham, Detective for the Phoenix Police Department, PowerPoint Slides, Submitted Briefing Materials to U.S. Commission on Civil Rights at 8.

<sup>1350</sup> *Ibid.*, 9.

<sup>1351</sup> *Ibid.*, 14.

<sup>1352</sup> Arizona Rev. Stat. §§ 41-1750A.3 (2017).

<sup>1353</sup> Kevin Ham, Detective for the Phoenix Police Department, PowerPoint Slides, Submitted Briefing Materials to U.S. Commission on Civil Rights at 14.

<sup>1354</sup> *Ibid.*, 7.

<sup>1355</sup> *Ibid.*

According to the FBI, in 2015, Arizona reported a total of 276 hate crimes: 162 were racially motivated, 57 were sexual orientation, 52 were religion, and 5 were based on disability bias;<sup>1356</sup> however, in 2016, 16 jurisdictions did not report hate crime data to the FBI. When investigative reporters with the *Phoenix New Times* contacted the non-reporting agencies, of those who responded, some admitted that they had “simply forgot” or missed the submission deadline; and others initially stated that they had submitted data, however, were later discovered to have submitted the data late, thus not appearing in the FBI report.<sup>1357</sup> From 2014 to 2017, Phoenix experienced a 25 percent increase in reported numbers of hate crimes.<sup>1358</sup>

In 2017, the state of Arizona reported a total of 328 hate crimes, with the vast majority reported in Phoenix (92 percent).<sup>1359</sup> FBI data show that the Phoenix PD reported 243 hate crimes in 2017, which made it the city with the third most reported hate crimes in the country (following New York City at 318 and Los Angeles at 263).<sup>1360</sup> As with national trends, UCR data show that reported hate crimes committed due to racial, ethnic, or national origin bias were the highest reported crimes from 2009 to 2017, followed by sexual orientation hate crimes (besides in 2009), then religion, and disability-based crimes (see chart 29). Breaking these numbers down, in 2017, the Phoenix PD reported 142 incidents hate crimes on the basis of racial bias (58.4 percent), 44 anti-sexual orientation incidents (18.1 percent), 41 anti-religion incidents (16.8 percent), 12 anti-gender identity incidents (4.9 percent), and 4 anti-disability incidents (1.6 percent).<sup>1361</sup>

Conversely, according to self-reported numbers from the Phoenix PD, in 2017, the agency reported 230 hate crimes.<sup>1362</sup> The bias categories were similar, with racial bias consisting of the most reports (149 incidents, 64.7 percent), followed by sexual orientation bias (38 incidents, 16.5 percent), religious bias (37 incident, 16.08 percent).<sup>1363</sup> However, Phoenix self-reported only 2 gender identity incidents (0.86 percent), but similar to UCR, reported 4 anti-disability incidents (1.7 percent).<sup>1364</sup>

### Chart 30: Reported Hate Crimes in Phoenix (2009-17)

<sup>1356</sup> FBI, UCR, Hate Crimes Statistics 2015.

<sup>1357</sup> Joseph Flaherty, “Fewer Hate Crimes in 2016, but Fewer Arizona Agencies Filed Reports on Time,” *Phoenix New Times*, Nov. 30, 2017, <https://www.phoenixnewtimes.com/news/fewer-arizona-agencies-reported-hate-crimes-to-the-fbi-9889637>.

<sup>1358</sup> FBI, UCR, Hate Crimes Statistics.

<sup>1359</sup> FBI, UCR, Hate Crimes Statistics 2017, “Arizona,” <https://ucr.fbi.gov/hate-crime/2017/tables/table-13-state-cuts/arizona.xls>.

<sup>1360</sup> FBI, UCR, Hate Crimes Statistics.

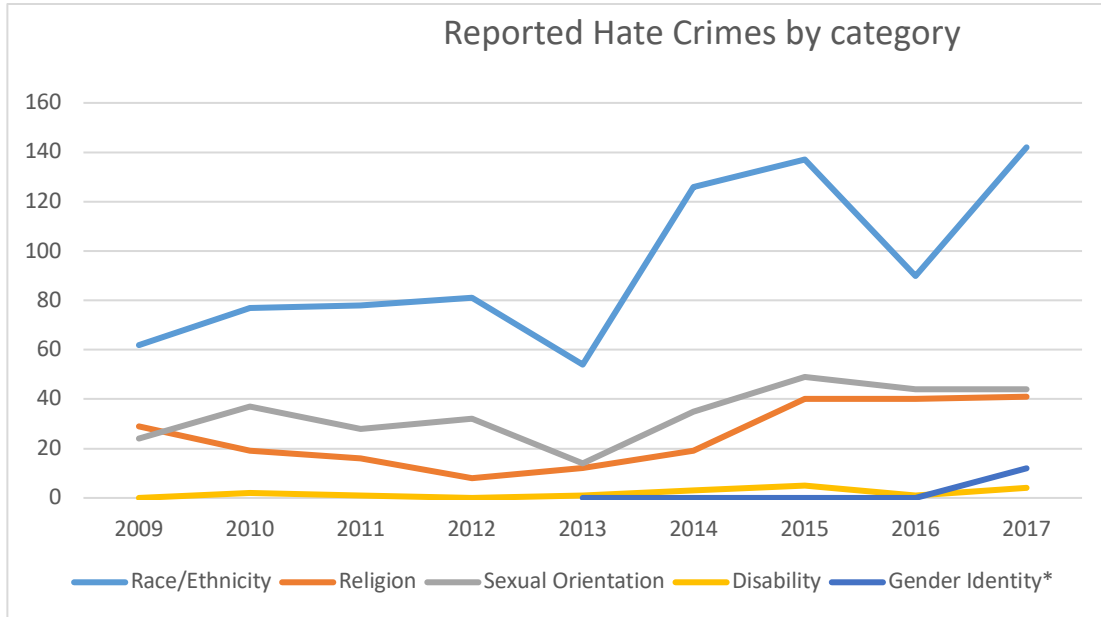
<sup>1361</sup> Ibid.

<sup>1362</sup> See City of Phoenix, “Current Crime Maps and Statistics,” Calendar Year 2017, [https://www.phoenix.gov/policesite/Documents/Website%20Report%204Qtr%202017\\_Excel.pdf](https://www.phoenix.gov/policesite/Documents/Website%20Report%204Qtr%202017_Excel.pdf).

<sup>1363</sup> Ibid.

<sup>1364</sup> Ibid.





Source: FBI, UCR; data compiled and chart created by Commission staff. Note, the gender category was excluded from the chart since Phoenix reported no gender-based hate crimes during this time period.

\*FBI began collecting data on gender identity in 2013

And according to the Phoenix PD, in the first quarter of 2018 (January-March) there were 35 hate crimes reported (see table 9).<sup>1365</sup>

**Table 9: Reported Hate Crimes (Jan-March 2018)**

Bias Type	Count
Anti-Black or African American	14
Anti-White	5
Anti-Hispanic or Latino	2
Anti-Asian	1
Anti-Multiple Races (group)	5
Anti-Gay (male)	5
Anti-Jewish	2
Anti-Islamic (Muslim)	1

Source: City of Phoenix, Crime Statistics and Maps

### *Community Outreach*

As a part of their community outreach, the Phoenix PD established a specialized Bias Crimes Unit that has officers who are specifically trained in leading hate crime investigations and working with victims and community members. Ham stated that this unit helps to ensure that these crimes are being handled properly which is vital to maintain and build community trust, especially after these

<sup>1365</sup> City of Phoenix, "Crime Statistics and Maps," <https://www.phoenix.gov/police/neighborhood-resources/crime-stats-maps> (accessed Nov. 4, 2019).

incidents occur.<sup>1366</sup> Moreover, having a specialized unit allows these crimes to be given a “priority response” due to the impact to the victim and the community.<sup>1367</sup> Detective Brandy Willingham runs the Phoenix PD’s Bias Crimes Unit and acknowledges the extra work that the department is doing to investigate these crimes. She asserts that “[w]e literally focus on these crimes and investigate them differently than a typical assault case.”<sup>1368</sup> Carlos Galindo-Elvira, director of the ADL Arizona, states that this work is recognized by communities, and the department has built relationships with targeted communities so victims are comfortable reporting these incidents when they occur.<sup>1369</sup>

Despite the rise of hate crimes in Phoenix and in the U.S. more broadly, communities in Phoenix are working to come together in light of two recent attacks, one against the Jewish community in Pittsburgh and the attack against two black men in Kentucky. In October 2018, several organizations in Phoenix hosted a vigil where over 600 people attended to promote a message of solidarity and unity.<sup>1370</sup>

While the Phoenix PD is continuing its efforts to combat hate crimes, community-police tensions have recently become strained. In June 2019, a watchdog group, The Plain View Project, launched a database that showed derogatory and offensive public Facebook posts and comments made by current and former police officers from several cities across the nation, including Phoenix.<sup>1371</sup> The investigation found 179 “questionable posts” from 97 current or former Phoenix police officers. Many of these comments included racist or violent memes against Latinx people, Muslims, women, and criminal defendants. Police Chief Jeri Williams stated:

I became aware of the entire website today which alleges misconduct by current and former Phoenix Police officers. They completely contradict how the Phoenix Police Department should speak about members of our community or others. Nor are these posts in keeping with our mission and values as city of Phoenix employees. I have high expectations for the men and women who work with me. When potential misconduct is brought to my attention, it is immediately addressed. I have asked our Professional Standards Bureau to look further into this matter.<sup>1372</sup>

In addition to the database, community-police relations became further strained after an internet video went viral that showed officers threatening to shoot a pregnant mother and her fiancé in front

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<sup>1366</sup> Kevin Ham, Detective for the Phoenix Police Department, PowerPoint Slides, Submitted Briefing Materials to U.S. Commission on Civil Rights at 17.

<sup>1367</sup> Ibid.

<sup>1368</sup> Zach Crenshaw, “Phoenix had third most reported hate crimes in the country in 2017,” *ABC 15*, Oct. 27, 2018, <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/phoenix-had-third-most-reported-hate-crimes-in-the-country-in-2017>.

<sup>1369</sup> Ibid.

<sup>1370</sup> Masai Hunter, “Despite the recent hate crime attacks, the Phoenix community stays unified,” *The State Press*, Oct. 30, 2018, <http://www.statepress.com/article/2018/10/spcommunity-phoenix-community-unifies-to-honor-lives-of-hate-crime-victims>.

<sup>1371</sup> Uriel Garcia, “Report: Phoenix police officers’ Facebook posts reveal racist, violent commentary,” *AZ Central*, June 6, 2019, <https://www.azcentral.com/story/news/local/phoenix/2019/06/03/phoenix-police-officers-facebook-posts-include-racist-violent-commentary/1331941001/>.

<sup>1372</sup> Ibid.

of their two children as they responded to a call about shoplifting at a Family Dollar store.<sup>1373</sup> The family was never charged and the couple has filed a \$10 million civil lawsuit against the city and the police department.<sup>1374</sup> In June 2019, more than 2,600 community members met with local officials, including the police chief, to discuss the relationship between residents and law enforcement. After the meeting, Police Chief Williams told reporters,

What I heard at that meeting were people who had just years and years of feeling as though they've not been listened to or not been heard. It was very clear that the police department has some work to do when it comes to regaining some of the trust that we lost as a result of several incidents we've had over the course of a couple months.<sup>1375</sup>

Furthermore, the history of racial profiling of Latinx people by Sheriff Joe Arpaio and Phoenix police and state legislation targeting Latino immigrants (both later found to be unconstitutional),<sup>1376</sup> and the subsequent pardon of Sheriff Arpaio by President Trump,<sup>1377</sup> make it more challenging for community members who are victims of hate to trust them with information about hate crimes.<sup>1378</sup> Even DHS has documented that victims of crime who may be entitled to a visa to protect them and provide immigration benefits can be hesitant to approach local police if they fear they may be subject to deportation.<sup>1379</sup>

### **Charlotte, North Carolina<sup>1380</sup>**

Charlotte, North Carolina is the sixteenth largest city in the United States with approximately 1.9 million residents in the metropolitan area. The Charlotte-Mecklenburg Police Department (CMPD) is the largest metropolitan police department between Atlanta, Georgia and Washington, D.C., with 1,972 sworn officers and 520 civilian employees.<sup>1381</sup> According to the 2017 American Community Survey, the population of Charlotte was 50.0 percent white, 35.0 percent black, 14.0 percent Latinx, 6.2 percent Asian, and 0.3 percent Native American.<sup>1382</sup>

According to the CMPD, hate crimes in Charlotte are treated not as a specific crime, but as “a designation” or possible motive for a crime, which carries a possible penalty enhancement if an

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<sup>1373</sup> Eli Rosenberg, “This city led the U.S. in police shootings last year. After a viral video, tensions are boiling over,” *Washington Post*, June 27, 2019, [https://www.washingtonpost.com/nation/2019/06/27/this-city-led-us-police-shootings-last-year-after-viral-video-tensions-are-boiling-over/?utm\\_term=.2b247e8b1718](https://www.washingtonpost.com/nation/2019/06/27/this-city-led-us-police-shootings-last-year-after-viral-video-tensions-are-boiling-over/?utm_term=.2b247e8b1718).

<sup>1374</sup> *Ibid.*

<sup>1375</sup> *Ibid.*

<sup>1376</sup> See *United States v. Arpaio*, 887 F.3d 979 (9th Cir. 2018) *cert. denied.*; *Arizona v. United States*, 567 U.S. 387 (2012);

<sup>1377</sup> Donald J. Trump, President of the United States, Executive Grant of Clemency of Joseph M. Arpaio, Aug. 25, 2017, <https://www.justice.gov/pardon/file/993586/download>.

<sup>1378</sup> See, e.g., *Rising Hate Drives Latinos and Immigrants Into Silence*, *supra* note 490 (discussion of U.S. Rep. Ruben Gallegos receiving death threats from white supremacists for opposing anti-immigrant legislation).

<sup>1379</sup> See *supra* note 504.

<sup>1380</sup> The Commission sent interrogatory and document request to the CMPD, but did not receive a response. Thus, the analysis of the police department’s practices are limited and the information provided in this section relies upon publicly available data.

<sup>1381</sup> Charlotte-Mecklenburg Police Department, <https://charlottenc.gov/CMPD/Organization/Pages/default.aspx>.

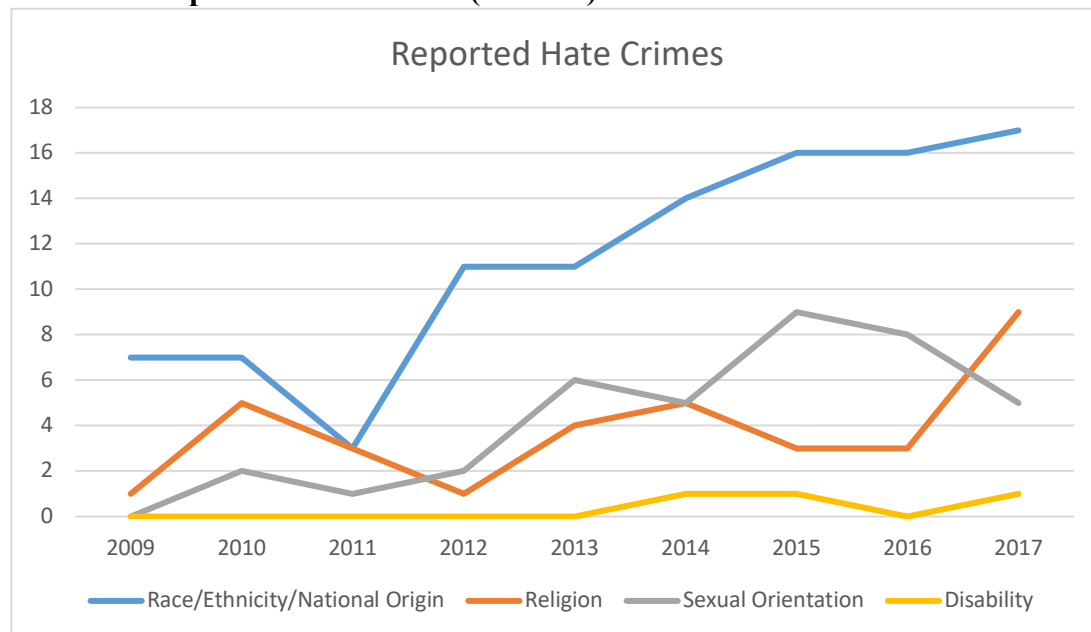
<sup>1382</sup> U.S. Census Bureau, 2013-2017 American Community Survey, 5-Year Estimates, Table DP05, Charlotte, North Carolina.

investigation demonstrates that the “offender’s prejudice or bias [was] based on the actual or perceived traits of the victim.”<sup>1383</sup> North Carolina is also one of the 15 states that does not offer hate crime protections on the basis of sexual orientation or gender identity,<sup>1384</sup> nor does it cover other statuses such as disability, ethnicity, or gender.<sup>1385</sup> However, in light of the increase in hate crimes, in May 2018, North Carolina Senators Jay Chaudhuri and Valerie Foushee filed Senate Bill 794 that would add sexual orientation, gender identity, gender expression, ethnicity, disability, and gender as protected statuses to the state’s hate crimes law.<sup>1386</sup>

### *Data Collection & Reporting*

In 2017, North Carolina reported 230 hate crimes overall, with Charlotte-Mecklenburg reporting the highest number of the reporting cities, with 32 hate crimes that year.<sup>1387</sup> As with other cities, bias crimes against race, ethnicity or national origin were the most reported crimes from 2009 to 2017 (see chart 31).

**Chart 31: Reported Hate Crimes (2009-17)**



Source: FBI, UCR; data compiled and chart created by Commission staff.

<sup>1383</sup> Charlotte, Citizens Review Board, “Hate Crimes Hotline,” Feb. 13, 2017, <https://charlottenc.gov/CommunityLetter/Documents/February%2013%20Council%20Business%20Meeting%20Community%20Policing%20Presentation.pdf#search=hate%20crimes>.

<sup>1384</sup> Movement Advancement Project, “Equality Maps: Hate Crime Laws,” [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws) (last updated Dec. 3, 2018).

<sup>1385</sup> N.C. Gen. Stat. § 14-3 (through Sess. Laws 2018-145 of the 2018 Reg. Sess. and the 1st, 2nd, and 3rd Extraordinary Sess. of the Gen. Assemb., but not including Sess. Laws 2018-146 or corrections and changes made to Sess. Laws 2018-132 through 2018-145 by the Revisor of Statutes, and through Sess. Laws 2019-3 of the 2019 Reg. Sess. of the Gen. Assemb., but not including corrections and changes made to the 2019 Legis. by the Revisor of Statutes.).

<sup>1386</sup> As of June 2019, the proposed bill had passed through the first reading and was referred to Committee on Rules and Operations of the Senate. S.B. 794, 2017 Gen. Assemb., 2018 Reg. Sess. (N.C. 2018), <https://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S794v0.pdf>.

<sup>1387</sup> FBI, UCR Hate Crimes Statistics 2017.

Note: the CMPD reported zero hate crimes on the basis of gender or gender identity, therefore that category is not shown on the graph

Similar to national trends, North Carolina (as a whole) and the Charlotte metro area experienced an increase of reported hate crimes (11 percent and 19 percent increase respectively).<sup>1388</sup> Further, much like other cities around the country, it is difficult to ascertain why there is this increase—either it is a rise in incidents or better participation and reporting by law enforcement (or a combination of both). In North Carolina, 527 law enforcement agencies submitted hate crime statistics to the FBI, but only 44 agencies actually reported hate crimes, which means that the remaining 483 North Carolina law enforcement agencies reported zero hate crimes to the FBI.<sup>1389</sup> The Charlotte-Mecklenburg region accounted for about 10 percent of the hate crimes reported to the FBI in North Carolina. Comparatively, in 2016, 528 law enforcement agencies participated in the UCR program and reported 41 hate crime incidents, accounting for 208 total incidents for that year.<sup>1390</sup>

### *Community Outreach*

Between 2010 and 2013, the population of Charlotte was second only to Austin, Texas and this is largely due to the growth of the city's Latinx population. However, the city has struggled to distinguish itself as an immigrant-friendly city in a state that has not been pro-immigrant. One strategy that the city implemented was establishing an Immigration Integration Task Force in 2013 that focused on ways to make the city more hospitable for immigrant communities.<sup>1391</sup> In 2015, the task force released a report that gathered proposals from community stakeholders, academics, and activists and released a report that included recommendations for city officials such as encouraging immigrant-owned businesses to open in Charlotte; ensuring immigrants have access to fair and safe housing; building trust between immigrant communities and law enforcement; and spreading information about naturalization and citizenship.<sup>1392</sup> One of the strategies the Task Force recommended was for Charlotte to set up a municipal or community identification card. They posit that this card will help immigrants to be less concerned about contacting police, and also, help law enforcement to identify victims and keep communities safe.<sup>1393</sup>

As discussed in this report, the need for better reporting and data collection is reliant upon forging positive community-police relationships.<sup>1394</sup> When a possible threatening situation or hate incident

<sup>1388</sup> Ibid.

<sup>1389</sup> FBI, UCR Hate Crimes Statistics 2017; Kimberly Johnson, "Hate Crimes in North Carolina On the Rise: FBI Report," *The Patch*, Nov. 14, 2018, <https://patch.com/north-carolina/charlotte/hate-crimes-north-carolina-rise-fbi-report>.

<sup>1390</sup> Ibid.

<sup>1391</sup> City of Charlotte, "International Community Relations," <https://charlottenc.gov/international-relations/intlcommunity/Pages/default.aspx>.

<sup>1392</sup> Immigrant Integration Task Force Report, March 2015, <https://charlottenc.gov/international-relations/intlcommunity/Documents/IITF%20Report%20with%20Appendices.pdf>.

<sup>1393</sup> Ibid., 96-97.

<sup>1394</sup> See e.g., *supra* notes 132-134 (discussing Seattle and Los Angeles police policies); see also, International Association of Chiefs of Police, "Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention," <https://www.theiacp.org/resources/responding-to-hate-crimes-a-police-officers-guide-to-investigation-and-prevention>, *supra* note 117; U.S. Comm'n on Civil Rights, Briefing on Federal Civil Rights Enforcement, Briefing Transcript, pp. 344.

occurs, law enforcement should act swiftly to aid the victim and also investigate the incident fully in hopes of preventing a hate crime from occurring. For instance, a Charlotte Muslim mother told police that she feared for her life when a man pulled up to her car, glared at her, and pulled a shotgun out and pointed it at her as she was breastfeeding her baby in her car at a shopping center in Charlotte.<sup>1395</sup> She ran into a local store and the owner called the police and the man drove off. Ibrahim Hooper, spokesperson for CAIR, released a statement stating: “We ask law enforcement authorities to use all resources available to apprehend the alleged perpetrator and to bring all appropriate charges, including that of ethnic intimidation.” The woman who is originally from Pakistan and has been a Charlotte resident for 11 years told reporters that she had never experienced a hate incident and she did not know if he targeted her for wearing a hijab and abaya.<sup>1396</sup> Recounting the incident, she said that she was not “going to sit [there] and let him shoot me. I took my baby in my arms and rushed toward the store.” And told reporters that the Indian store owner and the responding officers, plus other shoppers in the parking lot came to her aid and were “all very comforting.”<sup>1397</sup>

Further, as discussed, some immigrant communities may choose not to report crimes and are fearful of the police due to their immigration status.<sup>1398</sup> One of the ways the CMPD is attempting to counteract this concern is to reassure Latinx businesses around the city that if they see an incident then it is safe for them to report it.<sup>1399</sup> The agency has officers visit at church events and community festivals to show community members that the police can be trusted. A spokesperson for the CMPD said that the agency is attempting to distinguish itself from Immigration and Customs Enforcement (ICE) officers so residents will feel safe to call the police if they witness a crime. Lt. Brad Koch with the CMPD explains that “[p]eople feel that ICE and police are the same thing. So we feel it’s important that we put it down on paper: We’re not going to deport you. We want you to call us.”<sup>1400</sup> The CMPD recognizes that this outreach is important because it is a matter of public safety. For instance, Elizabeth Martinez, who is from El Salvador, told reporters that she was too afraid to call the police after her and her husband’s apartment was robbed in 2017. She explained that “[i]t’s not that I’m afraid of the police. I’m just afraid that the police will ask for my papers and take me.”<sup>1401</sup> Therefore, in order to increase public safety that will aid in hate crime reporting, it is essential that law enforcement agencies work with communities and residents to build trust.

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<sup>1395</sup> Joe Marusak, “‘I’m not going to sit here and let him shoot me,’ Muslim mom recalls of terrifying Charlotte encounter,” *The Charlotte Observer*, March 23, 2017, <https://www.charlotteobserver.com/news/local/crime/article140208923.html>.

<sup>1396</sup> Ibid.

<sup>1397</sup> Ibid.

<sup>1398</sup> See e.g., Brendan Campbell, Angel Mendoza, and Tessa Diestel, “Rising hate drives Latinos and immigrants into silence,” *News21*, Aug. 15, 2018, <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence/>; Lulu Garcia-Navarro, “Hate Crimes Against Latinos Increase In California,” *NPR*, July 15, 2018, <https://www.npr.org/2018/07/15/629212976/hate-crimes-against-latinos-increase-in-california>.

<sup>1399</sup> Teo Armus, “CMPD is trying to distance itself from immigration enforcement. But it’s not that simple,” *The Charlotte Observer*, March 29, 2019, <https://www.charlotteobserver.com/news/local/article228085294.html>.

<sup>1400</sup> Ibid.

<sup>1401</sup> Ibid.

## Overview

The five cities studied were generally comparable in population size to each other. Of the sampled cities, Phoenix had the largest population with approximately 1.64 million, compared to Boston which had the smallest population with approximately 682,000 individuals.<sup>1402</sup> In terms of demographics, the cities were all fairly racially diverse. While according to the 2017 American Community Survey they were majority white, each city had significant racial diversity.<sup>1403</sup> The challenges and emerging practices reported above add to the information about challenges and emerging practices in other cities (and states) documented in the previous chapters of this report. Some of these challenges and emerging practices mirror those at the federal level as well. For example, most jurisdictions reported that respectful community relations and outreach were important, in order to alleviate fear of reporting hate crimes, which mirrors the conclusions of the federal government.<sup>1404</sup> Various witnesses also spoke about the need to address hate incidents, and some cities are developing practices to at least track hate incidents.<sup>1405</sup> Appropriate training of police to identify hate crimes is also an emerging practice in some cities, and was recently recommended in trainings for local law enforcement provided in a Webinar by the federal government.<sup>1406</sup>

Among the five cities studied, the number of hate crimes reported to the FBI in 2017 was as follows:

**Table 10: Reported Hate Crime Incidents, FBI 2017**

	Seattle	Columbus	Boston	Phoenix	Charlotte
Race/National Origin/Ethnicity	120	50	79	142	17
Sexual Orientation	57	19	33	44	5
Religion	45	3	28	41	9
Disability	0	3	0	4	1
Gender Identity	11	0	1	12	0
Gender	1	0	0	0	0
<b>Total</b>	<b>234</b>	<b>75</b>	<b>141</b>	<b>243</b>	<b>32</b>

Source: UCR, FBI Hate Crime Statistics, 2017

As discussed above, all five of the sampled cities reported an increase in the number of reported hate crimes in 2017 compared to 2016.<sup>1407</sup> As the table above shows, hate crimes committed because of race, ethnicity, or national origin was the highest reported category in 2017 for each of the five sampled cities. Of these cities, hate crimes because of sexual orientation were the next highest category reported, besides for Charlotte, which had more religious basis hate crimes in 2017. Hate crimes committed due to religious bias was the next highest reported in 2017 among this sample; followed by gender identity, disability, and gender. In terms of each of the city's

<sup>1402</sup> Population sizes based on reported numbers from FBI Hate Crime 2017 Report.

<sup>1403</sup> See *supra* notes 1195 (Seattle), 1264 (Columbus), 1305 (Boston), 1338 (Phoenix) and 1381 (Charlotte).

<sup>1404</sup> See *supra* notes Community Outreach sections in each of the sampled cities.

<sup>1405</sup> See *supra* notes 1208-1214.

<sup>1406</sup> See *supra* notes 761.

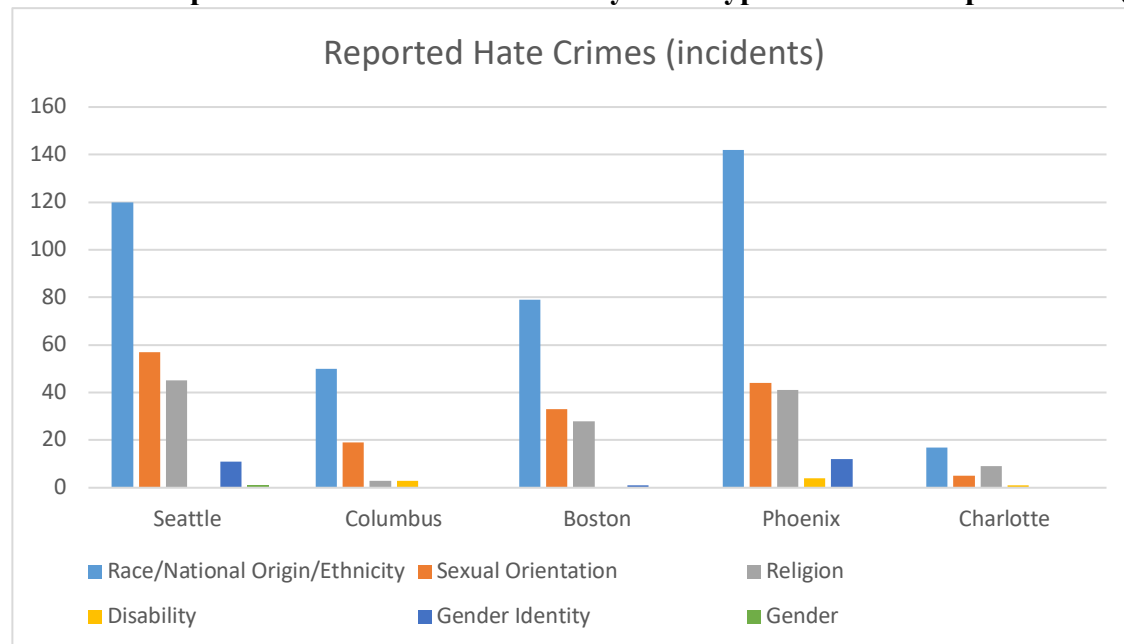
<sup>1407</sup> See UCR, FBI Hate Crime Statistics, 2017; UCR, FBI Hate Crime Statistics, 2016.

responses to community feedback, only the Seattle police department had publicly available information on its website discussing how law enforcement are addressing bias-motivated crimes.<sup>1408</sup>

This small dataset shows that at least in these five cities, the problem of hate crimes is spread across all regions of the country, from the Northeast, South, Midwest, Southwest, and Northwest. While these statistics are based on reported FBI numbers, the NCVS shows that the greatest increase of hate crimes has occurred in the West in 2011-15.<sup>1409</sup> For the aggregated five year study period, researchers found that violent hate victimization occurred at a higher percentage (46 percent) and at a higher rate (1.6 per 1,000) than any other region in the U.S. Comparatively, the South accounted for a lower percentage of reported hate victimizations (19 percent) than nonhate crime victimizations (32 percent).<sup>1410</sup>

The percent of hate crimes reported from the major protected classes also varied from city to city (see chart 32 below). As the chart below demonstrates, across the five sampled cities, reported hate crimes on the basis of racial, ethnic, or national origin bias was consistently the highest reported category in 2017.

**Chart 32: Reported Hate Crime Incidents by Bias-Type Across 5 Sampled Cities (2017)**



Source: FBI, UCR Hate Crime Statistics, 2017

However, while the number of incidents reported to the FBI varied among the sampled cities, the percentage of reported hate crimes based on race or national origin showed a range of about 15.3 percentage points (see chart 33). Columbus had the highest percentage of reported race-based hate crimes at 66.6 percent, and Seattle had the lowest at 51.3 percent.

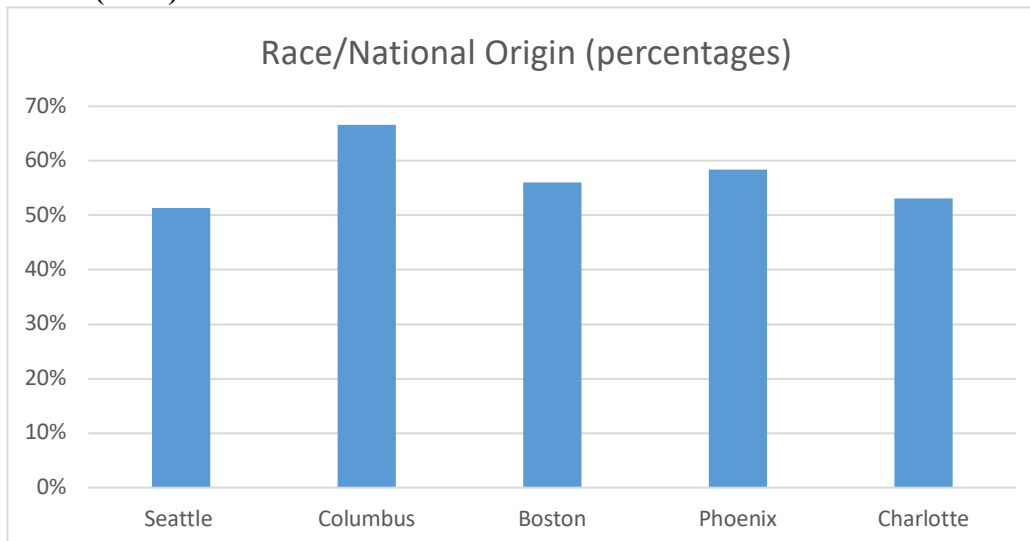
<sup>1408</sup> Seattle Police Department, “Information & Data,” <https://www.seattle.gov/police/information-and-data> (Nov. 4, 2019).

<sup>1409</sup> Madeline Masucci and Lynn Langton, “Hate Crime Victimization, 2004-2015,” Bureau of Justice Statistics, U.S. Department of Justice, June 2017, at 6.

<sup>1410</sup> Ibid.



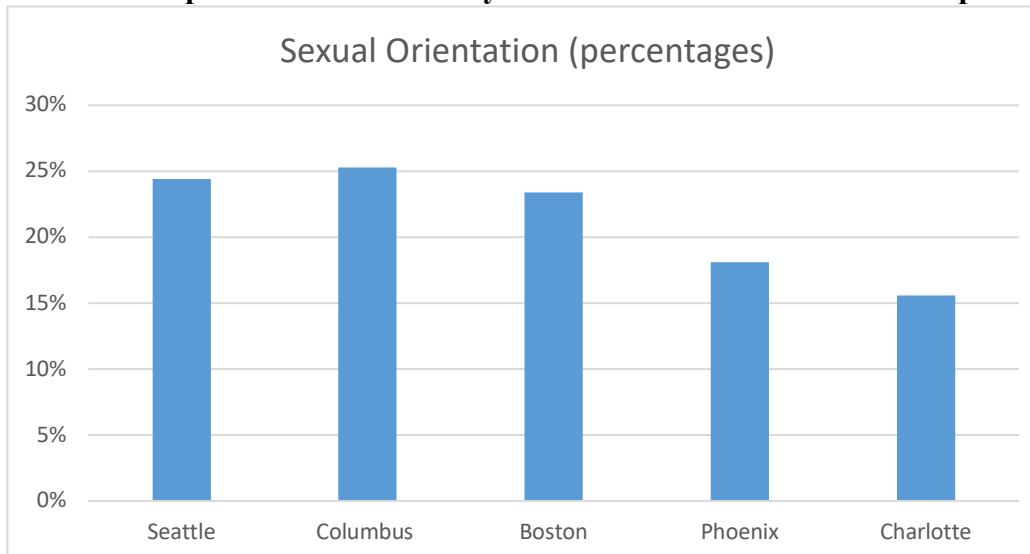
**Chart 33: Reported Hate Crimes by Race, Ethnicity, National Origin Across 5 Sampled Cities (2017)**



Source: FBI, UCR Hate Crime Statistics, 2017

Similarly, there was not a significant variation in the percentages of reported hate crimes on the basis of sexual orientation across the five cities (see chart 34). There was a range of 9.7 percentage points between the five cities, with Columbus reported the highest percentage (25.3 percent) and Charlotte reported the lowest percentage (15.6 percent).

**Chart 34: Reported Hate Crimes by Sexual Orientation Across 5 Sampled Cities (2017)**

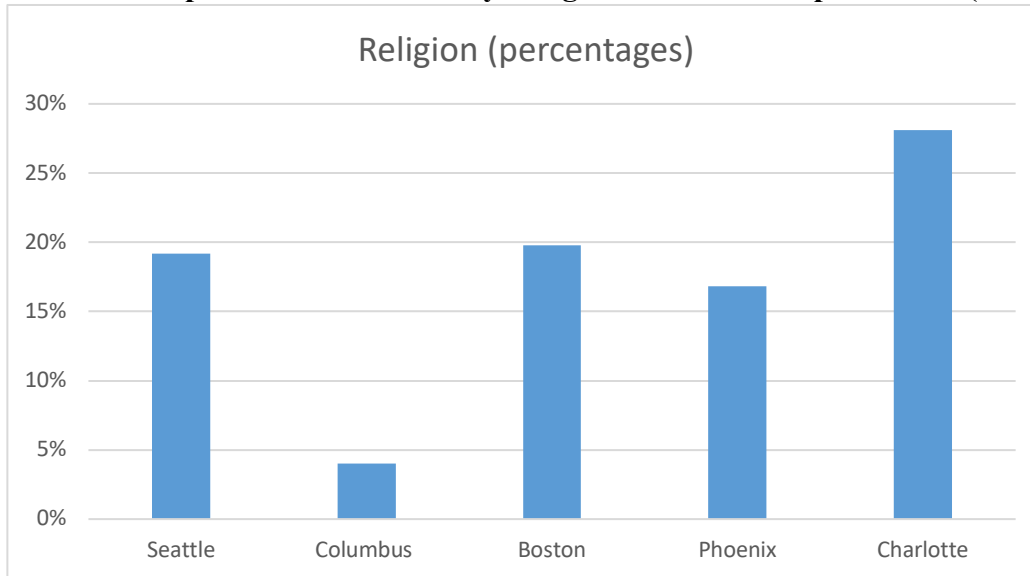


Source: FBI, UCR Hate Crime Statistics, 2017

However, there was a substantial variation in the percentages of reported hate crimes on the basis of religion (see chart 35). For reported religious-bias crimes, there was a range of 24.1 percentage

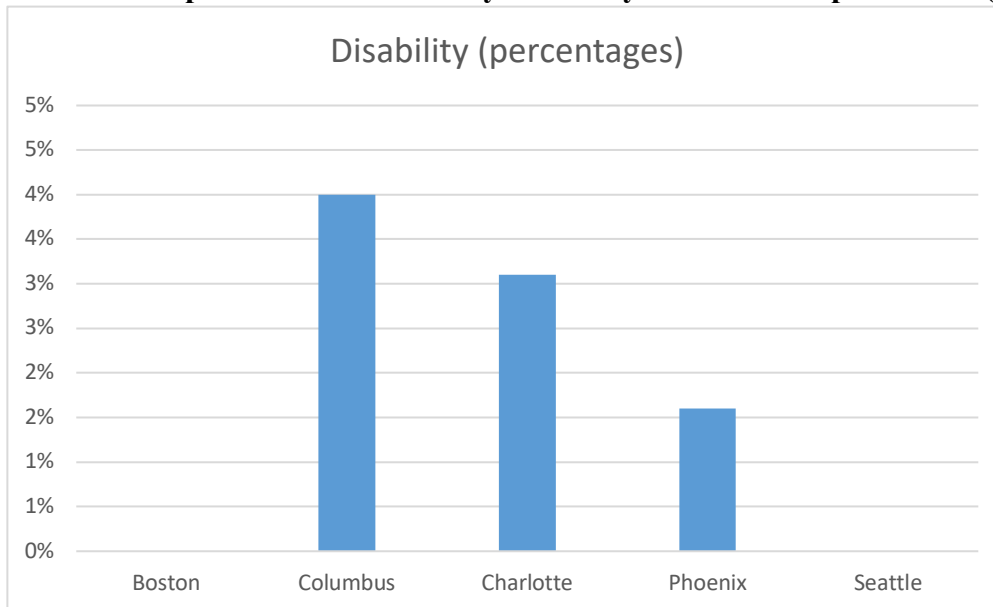
points with Charlotte reporting the highest percentage (28.1 percent) of this category across the sampled cities, compared to Columbus that only reported about 4 percent of religion-based hate crimes in 2017.

**Chart 35: Reported Hate Crimes by Religion Across 5 Sampled Cities (2017)**



Source: FBI, UCR Hate Crime Statistics, 2017

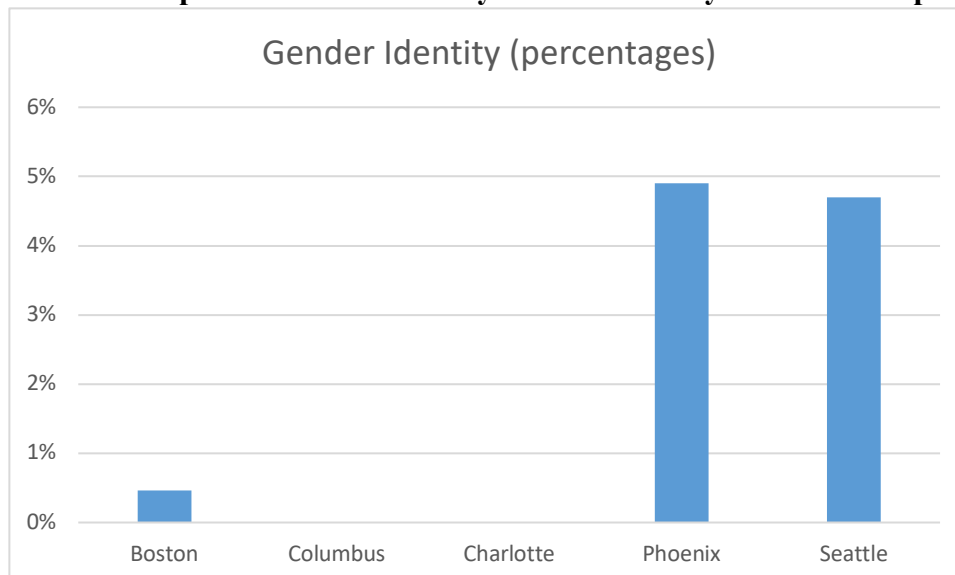
As for hate crimes based on disabilities, gender identity, and gender, only Seattle reported any hate crimes on the basis of gender (1 incident). As for hate crimes against persons with disabilities, Seattle and Boston both reported zero hate crimes in 2017, and the percentages between the remaining three cities only had a range of 2 percentage points and were all under 5 percent of their respective incident count (see chart 36).

**Chart 36: Reported Hate Crimes by Disability Across 5 Sampled Cities (2017)**

Source: FBI, UCR Hate Crime Statistics, 2017.

Note: Seattle and Boston both reported zero disability-based hate crimes in 2017.

Lastly, in terms of hate crimes on the basis of gender identity, both Columbus and Charlotte reported zero hate crimes in 2017. Of the remaining three cities, both Phoenix and Seattle reported almost 5 percent of their incident count was based on anti-gender identity crimes (see chart 37). Comparatively, Boston only reported 1 incident (or 0.46 percent) for 2017.

**Chart 37: Reported Hate Crimes by Gender Identity Across 5 Sampled Cities (2017)**

Source: FBI, UCR Hate Crime Statistics, 2017.

Note: Columbus and Charlotte both reported zero gender identity-based hate crimes in 2017.

While these emerging practices have received positive feedback from impacted community members and stakeholders, their impact on hate crime reporting cannot be fully evaluated. An

increase in reported hate crimes does not necessarily mean that hate crimes themselves are on the rise, but more likely means that victims feel more comfortable reporting incidents. For one, it could be that increased training and improved relationships with impacted communities has led victims to feel more comfortable reporting hate crimes that otherwise would have gone unreported. This is a positive reflection on law enforcement and their relationships with the communities they protect. The Commission is unable to determine if without these new and emerging practices, reported hate crimes would have been even higher or not. Until underreporting ceases to be an issue with hate crime reporting, cities where best practices have been implemented should not expect to see an immediate decrease in the number of reported hate crimes. Instead, these cities should anticipate an increase in the number of reported hate crimes taken as a sign of improving relationships with the community.

In addition, two consistent best practices that come from this analysis of individual cities are having a hate crimes statute and mandating reporting. More specific best practices will depend on the needs of the city and state. For example, Phoenix saw more reported hate crimes due to race/national origin/ethnicity than all others combined (see Chart 34), indicating that this may be an area that deserves specific attention from the city. In addition, cities such as Charlotte and Columbus, who reported no hate crimes at all related to disability or gender identity (see Table 10) may also need to direct attention to these areas and see if there were truly no hate crimes, or if this is indicative of a gap in reporting. Every different city faces unique challenges to combatting hate crimes, and it is up to the law enforcement and legislators in each city and state to address the issues that are most pertinent to the needs of their communities.

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## CHAPTER 5: Hate Crimes Findings and Recommendations

### Findings

#### I. Overview

- A. Hate crimes are increasing in America according to available evidence. Much of the evidence reflects massive underreporting of hate crimes.
- B. Many Americans are negatively impacted by hate crimes and are fearful of the heightened expression of hate and bigotry in the United States.
- C. It is critical hate crimes are addressed and prosecuted both because of their effects on victims and because their impact extends beyond the victims and impacts entire communities.
- D. The passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) in 2009 was an essential step in confronting bigotry, increasing public awareness, and improving law enforcement's tools to respond to hate-motivated violence.
- E. Preventing hate crimes is substantially more challenging without national data and police training to accurately identify and report them.
- F. Developing effective law enforcement policies, procedures, and responses to hate crimes can reduce overall crime, while simultaneously building relationships and trust between law enforcement and communities who feel targeted by acts of hate.
- G. Effective laws for, reporting of, and responses to hate violence by law enforcement officials send a message to targeted communities that these crimes and the threat they pose will be addressed through appropriate training of law enforcement officers and increased availability of resources.
- H. Several local law enforcement agencies have started collecting data on hate incidents because of the possibility of these incidents escalating into criminal actions.
- I. Hate crime prosecutions are extremely rare, in part, because the legal standards for conviction are very high even in states with comprehensive hate crime legislation.
- J. The federal government has implemented several initiatives to address the problem of hate crimes.
- K. The continued occurrence of hate crimes and bias related incidents and the recent increases in reported hate crimes underscore a need for more fulsome and more effective enforcement of existing hate crime laws as well as for improved law enforcement and educational practices around the country.

#### II. Hate Crime Data

##### A. Trends

1. Data show that reports of hate crimes and hate incidents have increased all across the nation since the 2016 Presidential election, and hate crimes and incidents affect many different communities.
2. Unlike other reported hate crimes spikes during election years, the 2016 spike is different from election year spikes largely due to the types of hate crimes that occurred

(e.g., anti-Muslim, anti-Black and anti-Latinx), and also the sheer number of them following the election.

3. Alleged perpetrators of hate crimes are most often male, 30 or older, and white.
4. White supremacists and far-right extremists have become emboldened, have felt freer to voice their hatred of minorities, and have accounted for 59 percent of all reported hate and extremist-related fatalities in 2017, a 20 percent increase from the previous year.

#### B. Impacted Communities

1. Since the passage of HCPA of 2009 through 2017, FBI data show that reported hate crimes motivated by race or ethnicity bias have consistently made up more than half of all hate crimes offenses.
2. While hate crime data demonstrates that people in black communities make up a significant percentage of hate crimes victims, data also shows that reported crimes against other communities are on the rise. Such communities include, immigrant communities, perceived immigrant communities, Latinx communities, South Asian communities, Jewish communities, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities, LGBT communities, and individuals with disabilities.
3. FBI data shows that anti-Jewish hate crimes have constituted more than half of all religious motivated crimes since 2009.
4. Native American students experience extremely high levels of bullying in schools.

#### C. Hate Crime Data Challenges

1. Although flawed, the best available sources of hate crimes data collected by law enforcement come through the annual FBI's Uniform Crime Reporting (UCR) Hate Crime Statistics and the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS).
  - a. UCR data derives from the reporting practices of voluntarily participating local and state law enforcement agencies.
  - b. NCVS data derives from victims voluntarily reporting their perception of the offender's bias against them.
2. The FBI's hate crime statistics reporting is flawed because:
  - a. In the absence of mandatory reporting and associated training from participating local and state law enforcement agencies, this reporting varies depending on the jurisdiction;
  - b. Law enforcement officers may not be well-trained in how to investigate or report possible hate crimes;
  - c. States vary greatly in the protected classes covered by their hate crime statutes;
  - d. Some victims choose not to report to law enforcement when an incident occurs because of, for example: confusion whether to report as a hate crime, perception that police would not be helpful, fear of retaliation, not wanting to disclose their sexual orientation or gender identity, lack of confidence in police to take the incident seriously, or the threat of deportation for themselves, their family members or close community members.
  - e. The trust and relationships needed between communities and law enforcement to promote greater rates of reporting hate crimes are fragile. They can be

negatively affected by policing activity beyond the role of dedicated hate crimes divisions such as constitutional policing, police use of force, and cooperating with federal immigration enforcement efforts.

3. Both UCR and NCVS show that the largest proportion of reported hate crimes are motivated by racial or ethnic bias.
4. Compared to the UCR data, NCVS data shows a larger number of hate crimes motivated by gender or gender identity, sexual orientation, or disability bias.
5. Data disparities between these two federal sources can be quite striking. For instance, the NCVS found that between 2003 and 2011, there were 250,000 victims of reported hate crimes per year in the United States. This number was 25 times higher than the reported FBI numbers for those years.
6. Law enforcement cultural competency and sensitivity, including in-language outreach, are critical to building trust between law enforcement and communities affected by hate crimes and incidents.
7. Thousands of city police agencies and county sheriff's offices — which are responsible for handling the majority of hate crime investigations — reported inconsistent data, where they would report for some years, but not others, or only report a quarter of the year.
8. The lack of comprehensive data may be due to a state's poor reporting practices to the FBI rather than the city's reporting practices to the state.
9. In part due to the weaknesses of the national data collection by the federal government, others, including local governments, journalists, and advocates, have instituted their own mechanisms for collecting data on hate crimes and bias-motivated incidents.

### **III. Enforcement**

#### **A. Federal Hate Crime Laws**

1. Hate crimes can be prosecuted through modern federal statutes prohibiting deprivation of civil rights under 42 U.S.C. § 1983 and 42 U.S.C. § 1985.
2. Although 42 U.S.C. § 1983 and 42 U.S.C. § 1985 may be used by private parties to sue for civil damages against conduct that has the same elements as a hate crime, they are not criminal laws.
3. The Hate Crimes Statistics Act (HCSA) requires the Department of Justice to collect and publish data regarding hate crimes. However, it does not require that the federal government law enforcement agencies or state and local law enforcement agencies report federal hate crimes, or require that states provide reports they receive from local law enforcement agencies in their jurisdiction.
4. As of 2009, federal hate crime law protects individuals on the basis of actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.

#### **B. Department of Justice**

##### **1. Prosecutions**

- a. Since the passage of HCPA in 2009, the DOJ has charged over 300 defendants under this law.



- b. In Fiscal Year 2018, the Justice Department pursued hate crime charges against 27 defendants in 22 cases and obtained 30 convictions. These cases are prosecuted in various jurisdictions across the country, in cooperation with local United States Attorneys' offices.
  - c. Absent bias motivation – a statutory element of 18 U.S.C. § 249 – that is both egregious and clearly evident, DOJ will not seek an indictment against an offender.
  - d. Out of the 62 hate crimes reportedly prosecuted by the federal government from 2009 to 2018, the highest number have been brought on the basis of bias against race or national origin.
    - i. CRT brought federal charges due to explicit verbal expressions of bias (e.g., slurs, epithets) stated by offenders during the assault.
    - ii. CRT has only brought a small number of cases where hate speech was not stated during or directly after the assault. Those cases have clear evidence of intent through the defendants' posts on social media.
  - e. DOJ does not provide public links to the major legal filings and decisions in its Civil Rights Division Criminal Section cases, including hate crime cases. These cases could only be located through paid legal databases such as Westlaw and PACER.
2. Resources and Outreach
- a. In 2017, the DOJ created a Hate Crimes Subcommittee of the Department's Task Force on Crime Reduction and Public Safety.
  - b. The Community Relations Service (CRS) at DOJ is considered the Department's "peacemaker" when intergroup conflicts arise; it purposefully does not have jurisdiction to investigate or prosecute hate crimes nor any law enforcement authority.
  - c. In 2018, despite significant contributions in hate crime related cases, the DOJ proposed eliminating CRS as a separate office in the DOJ.
  - d. The Office of Community Oriented Policing Services (COPS) at DOJ provides resources to law enforcement agencies and communities, while also aiding police in analyzing local hate crime problems.
  - e. The DOJ provides some funding towards anti-bias training for law enforcement officers, as former leadership in the FBI has noted that proper training builds trust between law enforcement and community members and ultimately works to increase public safety.
  - f. The COPS office's multi-year collaboration with the Not In Our Town movement to increase awareness of hate crimes, improve hate crime reporting, and promote safe, inclusive communities nationwide serves as a model on how law enforcement and communities can work together to address hate crimes.
  - g. The Office for Victims of Crime (OVC) at DOJ provides technical assistance to law enforcement and administers the Crime Victims Fund.
  - h. As of September 2018, the Crimes Victim Fund reached about \$12 billion. The Fund gives money to states in order for them to develop programs to partner with community members, assists victims of crime, and helps community

organizations and/or states raise awareness concerning victims' issues, help in compliance with victims' rights laws, and offer training and technical assistance to victim assistance professionals.

- i. In 2017, OVC allocated more than \$1.8 billion to the Victim of Crime Act Assistance Formula Grant Program that funded 56 grantees, which provided assistance to 5,088,858 victims of crime. Hate crime victims made up only 0.1 percent of those assisted.
- j. In regards to domestic terrorism, the Trump Administration has issued cuts in funding to DHS that have eliminated analysts who investigated domestic terrorism threats and has cut grants awarded to groups who specifically addressed the threats posed by white nationalism.

#### C. State Hate Crime Laws

1. Hate crime laws vary widely among the states. They often differ in the groups they protect, the crimes they cover, and the level of additional or harsher punishments they provide for those convicted.
2. As of the time of this writing, 46 states and the District of Columbia have some form of hate crime statute-leaving Arkansas, Georgia, South Carolina, and Wyoming as states without such statutes.
3. Although the HCPA extended protection to those with disabilities, 18 states still do not have any specific law protecting this class.
4. For the states that do have protections for the disability community, crimes against people with disabilities are more likely to be investigated and potentially prosecuted as a hate crime.

### IV. Schools and College Campuses

#### A. Data

1. Reported numbers of hate crimes have been increasing in K-12 schools and on college campuses.
2. While the Department of Education has jurisdiction over bias-based bullying and harassment in K-12 schools and on university campuses, if a hate crime occurs in these settings, it would fall under the jurisdiction of local law enforcement and/or the DOJ.
3. The highest percent of post-2016 election hate incidents were in K-12 schools, and the majority involved racial discrimination.
4. According to the FBI, in 2017, 10.5 percent of the overall reported hate crimes occurred at schools or colleges, which was a 25 percent increase from 2016.
5. Of the incidents that occurred at colleges or universities in 2017, religious bias was the most commonly reported basis, followed by race, then sexual orientation, disability, and gender identity.
6. Federal data show that bullying is a prevalent issue for many students. In the 2017 school year, the National Center for Education Statistics found approximately 20 percent of students ages 12-18 reported experiencing bullying at schools.
7. More female students than male students reported being bullied.

8. More male students than female students reported being threatened with physical harm.
9. Muslim students in elementary and secondary schools often experience high rates of bullying due to their religious identity.
10. A majority (60 percent) of LGBTQ students reported feeling unsafe while at school during the 2017 academic year.
11. While bullying does not necessarily reach the level of a hate crime, these incidents are significant for educators, researchers, and parents and students to pay attention to and actively work with students to prevent.
12. Similar to trends across the nation, reported hate crimes at public colleges and universities also spiked in November 2016.

**B. Department of Education**

1. The Department of Education has released several guidance documents and resources on the prevention of harassment and bullying in elementary and secondary schools in addition to postsecondary institutions.

**C. School Responses**

1. In response to the increase in reported hate crimes over the past several years, over 100 colleges and universities have established “bias response teams” to aid in creating safe and inclusive school environments, respond to reports of bias incidents, hate speech, and/or hate crimes on college campuses, while also balancing free speech protections.

**V. Observed Best Practices**

- A.** Some local law enforcement agencies are working diligently with the limited resources they have to try to provide accurate data on and prevent hate crime incidents that occur in their cities, and have implemented a variety of strategies and tools to meet this need. The Commission studied these cities: Seattle, Washington; Columbus, Ohio; Boston, Massachusetts; Phoenix, Arizona; and, Charlotte, North Carolina.

1. Even in cities that have been identified as leading the way on hate crime outreach, their efforts can be blunted by other issues that negatively impact the relationship between police and communities, making it difficult for police to do their job/communities to report.

**B. Seattle, Washington**

1. Seattle has implemented several strategies to aid in their mission of reducing hate crimes and protecting the citizens of the city including: training officers to investigate reported crimes for all possible elements, including bias; referring potential bias crimes to the Bias Crimes Coordinator for specialized review; maintaining statistical data and producing reports on bias and hate incidents; conducting outreach to multiple communities; leading training classes for recruits; establishing an LGBTQ liaison to work with LGBTQ communities; identifying non-criminal bias incidents; leading educational workshops; developing programs for targeted communities; sharing hate crimes information with local universities and K-12 schools; and aiding in the prosecution of hate crimes.

### C. Columbus, Ohio

1. Per the best practices identified by the Commission on Accreditation for Law Enforcement Agencies, when Columbus officers are in doubt about whether a crime is a hate crime, they are to report it as a hate crime and detectives should review the circumstances and make any applicable changes to the report.
2. Columbus officers undergo training both in the academy and in-service to learn how to properly document a hate crime allegation and collect the necessary information for possible prosecution.
3. The Columbus Police Department works with communities by meeting with and educating community groups and citizens about hate crimes and bias-motivated incidents and meeting with various groups by request to discuss various crime and safety topics.
4. The Columbus Police Department does not share information about hate crimes with the public, but does provide public records upon request.

### D. Boston, Massachusetts

1. The Boston Police Department established a specific hate crimes unit over 40 years ago that has the sole purpose to focus on hate crimes and work with the victims involved in these crimes.
2. The Massachusetts Executive Office of Public Safety and Security put out annual reports of hate crime data based on reports it gets from law enforcement agencies across the state.
3. In 2018, Governor Baker of Massachusetts instituted a Hate Crimes Task Force and required every police department in the 351 towns and cities of Massachusetts to designate a civil rights officer.

### E. Phoenix, Arizona

1. The Phoenix Police Department tracks bias crimes and reports these statistics to the Arizona Department of Public Safety, who then in turn, reports the state's bias crime statistics to the FBI.
2. The Phoenix Police Department records bias incidents because trends show that hate motivated attacks occur in the same area where these incidents happen.
3. The Phoenix Police Department has a specialized Bias Crimes Unit with specifically trained officers who lead hate crime investigations and work with victims and community members.

## Recommendations

### I. Improving Data

- A. Congress should pass legislation and provide adequate funding that would incentivize local and state law enforcement to more accurately report hate crimes to the FBI, and promote greater transparency and accountability, which would aid in building community trust. Congress should also pass legislation to ensure that federal law enforcement agencies collect and report their hate crime data to the FBI and that states are accurately reporting hate crime data they receive from local law enforcement agencies in their jurisdiction. The federal government should require, as a condition for federal funding, that state and local law enforcement agencies report their data to the FBI, publish data on a quarterly basis, undergo data auditing for accuracy, and work with affinity groups to report hate crimes to the federal government even if a victim does not want to prosecute.

### II. Enforcement and Prevention

- A. Congress
  1. Congress should pass legislation that includes hate crime prevention and response programs at higher education institutions and ensures that students and faculty are aware of related safety concerns on and around campuses.
  2. Congress should allocate additional funding towards anti-bias training for law enforcement officers.
- B. Department of Justice
  1. The DOJ should create a separate working group or task force to address hate violence and bias-motivated incidents in the United States, rather than embedding these issues into a subcommittee under the Task Force on Crime Reduction and Public Safety.
  2. The DOJ should create, and Congress should fund, a federal repository for resources related to hate crimes and bias-motivated incidents. This repository should also include reporting records on federal hate crime prosecutions and convictions, including court records and DOJ litigation documents to demonstrate to the public the cases that DOJ has prosecuted.
  3. The DOJ should provide grants, training materials, and resources for police departments to receive cultural competency and sensitivity training related to hate crimes and incidents.
    - a. Training materials could include a readily accessible online best practices training for all law enforcement and train the trainers version of the curriculum.
- C. Department of Education
  4. The Department of Education's Office for Civil Rights must vigorously enforce the protections against harassment that are guaranteed to students under civil rights law and provide the necessary leadership for school officials and administrators at primary, secondary, and higher education institutions.
  5. The Department of Education must encourage school officials to continue to address issues of bullying and harassment in order to keep students safe on campus, recognizing freedom of speech and the sharing of ideas are essential to the learning environment.
- D. Trump Administration

6. The Trump Administration should reinstate the joint ED and DOJ guidance regarding protections for transgender students.
7. The Trump Administration should reinstate groups within DHS who analyze the threat of domestic terrorism and reinstate grants awarded to groups who counter white supremacist terror.

### **III. Best Practices**

#### **A. State and Local**

1. Law enforcement agencies that do not yet engage in this practice should start investigating “hate incidents” even if they do not escalate to meet the legal definition of a crime. Documenting and investigating hate and bias incidents may aid in the prevention of hate crimes and enhance public trust and safety.
2. State legislators should pass legislation that clearly defines hate crimes and hate incidents.
3. Effective practices employed in Seattle, Washington and Boston law enforcement agencies should serve as models for other city law enforcement agencies in their efforts to reduce hate crimes and protect their citizens.
4. Local law enforcement agencies should increase real-time reporting and transparency through the very promising Police Data Initiative, now led by the Police Foundation and share information about hate crimes with the public rather than only doing so upon request. The information should be shared in an easily accessible format such as a website and should be available in multiple languages.
5. Local law enforcement agencies should have dedicated hate crimes units to gain a better understanding about hate crimes that are occurring in their cities and to increase the likelihood of accurate classification.

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## Commissioners' Statements and Rebuttals

### Statement of Chair Catherine E. Lhamon

During the nearly three years I have served on this Commission, my fellow Commissioners and I have repeatedly, rightfully, and unanimously, voted to call all Americans to stand against hate and to call on the federal government to more aggressively enforce hate crime laws and nondiscrimination laws that can prevent hate from materializing in criminal acts.<sup>1</sup> With this report, we reiterate a warning the Commission issued as long ago as 1983, when the Commission cautioned against taking any federal actions that would give perceived permission to express and act out hate.<sup>2</sup>

Certainly that warning persists in its urgency still today, when data, news, and experience in communities reflect increases in reports of hate crimes nationwide and distressing sameness as well as variability in manifestations of hate. In just the weeks between our finalization of this report text and the writing of this statement, headlines reflect additional perpetration of hate: In Arkansas, vandals spray-painted “die,” “move,” and “white power SS” on a biracial family’s garage and car and slashed their car tires.<sup>3</sup> In Kansas, news reported burning of a family’s gay pride flag.<sup>4</sup> In Illinois, students found a noose hanging in a university dorm elevator.<sup>5</sup> In Texas, a man shot a transgender woman while yelling a number of slurs about the woman’s gender identity.<sup>6</sup> In New York, a Muslim hijab-wearing teenager reported that a woman made several anti-Muslim statements to the teenager, and then spat on and threw soda at her.<sup>7</sup> In California, a synagogue found anti-Semitic graffiti including a statement scrawled on its entrance sign declaring that the 6 million people who died in the Holocaust were “not enough.”<sup>8</sup>

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<sup>1</sup> U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Statement on Charlottesville, Virginia,” Aug. 18, 2017, [https://www.usccr.gov/press/2017/Statement\\_08-18-2017\\_Charlottesville.pdf](https://www.usccr.gov/press/2017/Statement_08-18-2017_Charlottesville.pdf); U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Condemns Recent Hate Incidents and Calls for Federal Action,” Mar. 20, 2017, <https://www.usccr.gov/press/2017/03-20-Hate-Incidents-Statement.pdf>; U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Mourns the Loss of Life in Pittsburgh, Pennsylvania and Jeffersontown, Kentucky,” Nov. 2, 2018, <https://www.usccr.gov/press/2018/11-02-Pittsburgh-Jeffersontown-PR.pdf>.

<sup>2</sup> U.S. Commission on Civil Rights, “Intimidation and Violence: Racial and Religious Bigotry in America,” Jan. 1983, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11077.pdf>.

<sup>3</sup> Thomas Saccente, “Fort Smith vandalism weighed as hate crime,” *Northwest Arkansas Democrat Gazette*, Sept. 13, 2019, <https://www.nwaonline.com/news/2019/sep/13/fort-smith-vandalism-weighed-as-hate-cr-1/>.

<sup>4</sup> Becca Yenser, “Gay pride flag burned in Riverside in apparent hate crime,” *The Sunflower*, Sept. 22, 2019, <https://thesunflower.com/44217/news/gay-pride-flag-burned-in-riverside-in-apparent-hate-crime/>.

<sup>5</sup> Dara Sharif, “U of Illinois Student Charged With Hate Crime, Accused of Hanging a Noose in a Dorm Elevator,” *The Root*, Sept. 3, 2019, <https://www.theroot.com/u-of-illinois-student-charged-with-hate-crime-accused-1837856778>.

<sup>6</sup> Erin Donaghue, “Transgender woman shot in apparent hate crime in Dallas,” *CBS News*, Sept. 23, 2019, <https://www.cbsnews.com/news/transgender-woman-shot-in-dallas-police-investigate-as-possible-hate-crime/>.

<sup>7</sup> Zainab Iqbal, “‘What Is That Rag On Your Head,’ Lady on B6 Says to Muslim Girl Before Spitting On Her,” *Bklyner*, Aug. 26, 2019, <https://bklyner.com/islamophobia-b6-bus-crime/>.

<sup>8</sup> R.J. Johnson, “Anti-Semitic Vandalism Found on Another L.A. Synagogue,” *KFIAM Los Angeles*, Sept. 19, 2019, <https://kfiam640.iheart.com/content/2019-09-19-anti-semitic-vandalism-found-on-another-la-synagogue/>.



Notoriety and repetition of ugly violence perpetrated because of hate against persons' faith, race, gender expression, and other identity characteristics call attention to the vulnerability of the American concept, which promises fairness, equity, and commitment to respect for the dignity of each of us. Those promises have always been aspirational but what we witness now is that if we do not hold fast to those dreams, and commit ourselves to making them real in the lives of all in our communities, then our communities quickly fray. As this report reflects, the nation urgently needs leadership against hate, promoting respect for the dignity of all persons in our communities.

This report does not capture what text likely cannot: the daily toll of living with recognition that others hate us for who we are and that we risk physical and psychic violence just for being who we are. None of us is immune to the harm of hate. As is broadly true for black Americans, I have lived my entire consciousness and raised my children aware that lynching and Klan violence are not our nation's distant past. As is broadly true for women, I have lived my entire consciousness and raised my daughters with safety lessons about locking doors behind us immediately upon entering a home, walking in well-lit places at night, and how to use self-defense. I grew up witnessing cruel slights and sometimes more directed at my brother based on his physical disability. The regular visibility into harm based on identities I live has afforded me empathy for the harms others experience, and may experience, based on the identity characteristics they share. I hope this report helps all who read it to hold that same empathy regardless of our own individual experience and to commit to eradicating the hate that demeans all of us.

The Commission structured recommendations in this report to guide our current reality about how we as a nation can fulfill our ideals of a pluralistic, equitable democracy, respectful of all persons who live and work among us. I hope for a brighter time when we see hate less manifest, and I recommit to intense work toward that future.

## Statement of Commissioner Karen K. Narasaki

Like<sup>1</sup> many Asian Americans of my generation, the 1982 murder of Vincent Chin left me shaken. Two white men chased Chin down and bludgeoned him to death with a baseball bat in a Detroit parking lot just days before Chin's wedding. One of the men allegedly had said that, "It's because of you little motherfuckers that we're out of work!" apparently blaming the Chinese American for the Japanese competition in the auto industry.<sup>2</sup> My own feelings of fear, violation, and anger were not unique. Hate crimes terrorize communities. The brutal attack served as a warning that as Asian Americans, we are seen as perpetual foreigners in our own country, and that we are vulnerable to being held responsible for the real or imagined transgressions of others of our race. Hate crimes are the ultimate form of discrimination with deadly consequences.

These feelings of vulnerability deepened and turned to outrage because the justice system also failed. Stating, "These aren't the kind of men you send to jail,"<sup>3</sup> the Michigan judge sentenced the men to three years-probation and a fine of \$3,000 that was never paid. No prosecuting attorney was even present at the sentencing to object to the leniency. A decade later, as the Washington Representative for the Japanese American Citizens League, I attended the trials of eight of the young white men who beat to death a pre-med Vietnamese American student in Coral Springs, Florida, Luyen Phan Nguyen. I witnessed again the devastating impact of hate violence, compounded further when it was virtually ignored by the national media, as so many anti-Asian American hate crimes are even today.<sup>4</sup>

As a result, I have spent much of my career seeking to address the severe harm hate crimes inflict on vulnerable communities, trying to raise awareness about Anti-Asian violence<sup>5</sup> and working to

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<sup>1</sup> I would like to thank the Commission staff for their work in organizing our briefing and in researching, drafting, and revising this report. I would also like to thank my Special Assistants Peach Soltis and Jason Lagria and summer law clerk Erin Drolet from George Washington University Law School for their work on this report and statement.

<sup>2</sup> Francis Kai-Hwa Wang, "Who is Vincent Chin? The History and Relevance of a 1982 Killing," *NBC News*, June 15, 2017. <https://www.nbcnews.com/news/asian-america/who-vincent-chin-history-relevance-1982-killing-n771291>

<sup>3</sup> *Id.*, "One of Our First Cases, Vincent Chin Tragedy Catalyzes Asian American Activism," *Asian Americans Advancing Justice*, <https://www.advancingjustice-la.org/blog/one-our-first-cases-vincent-chin-tragedy-catalyzes-asian-american-activism#.XU3aVflKjRY>.

<sup>4</sup> Michael McLeod, "The Death of Luyen Phan Nguyen," *The Orlando Sentinel*, Nov 15, 1992, <https://www.orlandosentinel.com/news/os-xpm-1992-11-15-9211111103-story.html>; "7 Charged in Death of Student Who Objected to Racial Slur," *The New York Times*, Sept. 11, 1992, <https://www.nytimes.com/1992/09/11/news/7-charged-in-death-of-student-who-objected-to-racial-slur.html>.

<sup>5</sup> Before I came to Washington in 1992, I was a member of the National Network Against Anti-Asian Violence and helped to create a handbook on Anti-Asian hate crimes. For two decades, I was President and Executive Director of what is now Asian Americans Advancing Justice - AAJC. While in that position, one of the first projects we undertook was an audit of hate crimes and bias incidents against Asian Americans to document and highlight that Asian Americans were also victims of hate crimes. See Nat'l Asian Pac. Am. Legal Consortium, *Audit of Violence Against Asian Pacific Americans: Anti-Asian Violence, A National Problem, First Annual Report* (1993). Anti-Asian violence was persistently underreported by the community and virtually ignored by the mainstream media. Hate crimes against Asian Americans have been persistent ever since the first Chinese Americans came to the United States in the 1800s. Terri Yuh-lin Chen, Note, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 *Asian Am. L.J.* 69, 71 (2000) (available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1062&context=aalj>). The issues Asian Americans face with hate crimes is not a new concept for the Commission. The Commission's 1992 Report "Civil Rights Issues Facing Asian Americans in the 1990's," documented that Asian Americans are also victims of civil rights

pass the Hate Crimes Statistics Act in 1990 and the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, which expanded federal hate crime law to include crimes motivated by gender, anti-LGBT and anti-disability bias. Many of the barriers to successfully addressing hate crimes I saw then are sadly the same issues we discuss in our report. There still is a lack of commitment and investment in addressing the root causes and in ensuring that the justice system works. While a court can't bring a victim back to life, it can send a message to would be perpetrators and reassure our communities that our lives are valued. Particularly for attacks not resulting in death, hate crime laws make it more likely that law enforcement will invest in apprehending the perpetrator and that courts will determine an appropriate sentence. In society, we measure what matters so hate crime laws with data collection requirements ensure greater attention and investment.

In order to effectively combat hate crimes, it is critical that we, as a nation, understand the nature and extent of hate crimes, and this requires accurate data on and full reporting of hate crimes.<sup>6</sup> Tragically, as our report states, hate crimes are notoriously underreported. According to the Bureau of Justice's (BJS) statistics, if the FBI's 2017 hate crime report took into account the hate crimes that were never reported, the total number of hate crimes would be closer to 250,000, as opposed to the roughly 7,000 reflected in current data.<sup>7</sup> In addition, from 2014-2016, the National Crime Victimization Survey (NCVS) reported an average of 210,890 victimizations, compared to the 7,170 victimizations reported by FBI for that same time.<sup>8</sup>

The chronic underreporting of hate crimes has many contributing factors. One central reason is victims' lack of understanding of laws designed to protect them, a lack of language access, and isolation from information and resources that could inform them of their rights and how to report hate crimes.<sup>9</sup> In many cases, the victims simply do not have the emotional ability to come forward with such reports, or are unaware that there are support networks and resources available to them.<sup>10</sup> Information on what a victim's rights are, what hate crimes are, and how to report hate crimes is critical to share with frequently targeted groups. When hate crimes are underreported, it can often be because there is simply a lack of access to resources. And, for others, it is the fear of deportation or confrontation with law enforcement that prevents reporting.<sup>11</sup> Here is where community based organizations and law enforcement leaders should be working to form new partnerships for education and outreach.

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discrimination. See U.S. Comm'n on Civil Rights, "Civil Rights Issues Facing Asian Americans in the 1990's," (Feb. 1992), <https://www.ncjrs.gov/pdffiles1/Digitization/135906NCJRS.pdf>.

<sup>6</sup> Report at 70 ("Jonathan Greenblatt, CEO of the Anti-Defamation League (ADL), argues that accurate reporting of hate crimes by local law enforcement is important because it provides a "measure of accountability and how well prepared they are to address hate crimes when they occur.").

<sup>7</sup> Emily Moon, "Hate Crimes Are On The Rise. Why Do Many Still Go Unreported?" *Pacific Standard*, Feb. 21, 2019, <https://psmag.com/news/hate-crimes-are-on-the-rise-why-do-many-still-go-unreported>.

<sup>8</sup> Report at 55. (This discrepancy is due to the fact that the NCVS data are based on victim perception and includes incidents that were not reported to the police whereas the FBI's data are selected from the pool of incidents already reported to the police).

<sup>9</sup> Ronald L. Davis, "The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High," *Police Chief Magazine*, <https://www.policechiefmagazine.org/the-hate-crimes/>.

<sup>10</sup> Ibid.

<sup>11</sup> Catherine Devine & Lillianna Byington, "Hate in American: Millions are victims of hate crimes, though many never report them," *USAToday*, Oct. 30, 2018, <https://www.usatoday.com/story/news/investigations/2018/10/30/news-21-report-hate-crime-victims/1385139002/>.

But a second, more pernicious, reason for underreporting is the pervasive distrust between communities affected by hate crimes and the law enforcement agencies and officers called to protect them. Many victims do not report hate crimes to the police because they don't think the police could or would help.<sup>12</sup> They fear that police actually sympathize with the perpetrators and will not take their claims seriously.<sup>13</sup> Without trust, targeted groups are less likely to turn to the police when they are put in danger and the subsequent inaction and lack of consequences for perpetrators of hate crimes merely perpetuates the problem and encourages perpetrators to continue their acts of hate. Moreover, lack of acknowledgement and effective responses to hate crimes by local law enforcement can engender or deepen mistrust with the communities they serve, making it more difficult for law enforcement to recruit officers from those communities and to work in partnership to prevent and solve crimes and safeguard communities.

During the Commission's hate crimes briefing, the Deputy Assistant Attorney General of the Civil Rights Division's Criminal Section of the DOJ noted that hateful statements are impediments to forming bridges between law enforcement and impacted communities.<sup>14</sup> The childhood saying goes that "Sticks and stones may break my bones but words will never hurt me"—it is simply wrong. Racial slurs and hateful words can encourage hate violence. The damage done to police-community relations from hateful statements by elected leaders and law enforcement is obvious, particularly when social media and online activity is such a strong driver of public information and sentiment.<sup>15</sup> Hateful statements foster distrust of government and law enforcement, and embolden others to express and act on similar sentiments.

The fact that hate crime numbers are rising even while there is severe under-reporting is not a new problem. This is why we also looked at what police departments in several cities are doing to address it. A critical first step in ensuring that hate crimes do not continue to go under-reported is focusing efforts to create and fund programs that would effectively educate law enforcement on how to respond to and report hate crimes. Creating incentives to build a culture of prioritizing the identification, investigation, and reporting of hate crimes is crucial to ensuring they are reported,

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<sup>12</sup> Report at 56. (NCVS data shows that from 2011-2015, of the hate crime victims who did not report, 23% were because they believed the police would not want to be bothered or get involved, would be ineffective, or would cause additional trouble for the victim).

<sup>13</sup> Report at 109. (Transgender Latinas state that police rarely take offenses against their community seriously and often they are blamed for their own victimization).

<sup>14</sup> *Briefing Transcript* at 93.

<sup>15</sup> Orion Donovan-Smith and Kayla Epstein, "72 Philadelphia police officers pulled off the street amidst probe into racist Facebook posts," *The Washington Post*, June 20, 2019 (Reporting that the Philadelphia police force placed 72 of its officers on desk duty after findings from an investigative report uncovered racist or otherwise offensive Facebook posts made by police officers across the country, which included racist memes, conspiracy theories, and Islamophobia. The Philadelphia police commissioner notes "...how disturbing, how disappointing and upsetting these posts are. . . They will undeniably impact police-community relations."), Michael Kunzelman and Astrid Galvan, "Trump words linked to more hate crime? Some experts think so," *AP News*, August 7, 2019 (Reporting that some extremism experts believe that data suggest heated rhetoric from President Trump and ensuing reports of hate crimes are linked, using his statements about an "invasion of illegals" from Mexico, "very fine people on both sides" of a white-supremacist and counter-protester clash, and the need for a "total and complete shutdown of Muslims entering the United States" as examples).

and that comes from training that is reinforced.<sup>16</sup> In addition, police forces must be given support and trained to interact with communities that face language barriers so that they do not feel isolated and neglected by their law enforcement officers. Inability to communicate in English with law enforcement should never be the reason a hate crime is not reported.

Our report highlights additional potential best practices. These are practices that can be studied and replicated by other law enforcement agencies across the country.

For instance, the Seattle Police Department documents “non-criminal bias incidents,” which captures derogatory or offensive comments directed at a particular identity.<sup>17</sup> Having this data on non-criminal incidents can preview emerging tensions and problems within communities before they escalate into the stage of violent crime. The Seattle Police Department also has increased accessibility to their public online reporting system by providing instructions in multiple languages.<sup>18</sup>

One of the ways the Charlotte-Mecklenburg Police Department in North Carolina is attempting to counteract this concern is to reassure Latinx businesses around the city that if they see an incident then it is safe for them to report it. The agency has officers visit church events and community festivals to show community members that the police can be trusted.<sup>19</sup> A spokesperson for the CMPD said that the agency is attempting to distinguish itself from Immigration and Customs Enforcement (ICE) officers so residents will feel safe to call the police if they witness a crime.<sup>20</sup> As a part of their community outreach, the Phoenix Police Department established a specialized Bias Crimes Unit that has officers who are specifically trained in leading hate crime investigations and working with victims and community members.<sup>21</sup> This helps to ensure that these crimes are being handled properly which is vital to maintain and build community trust, especially after these incidents occur. Moreover, having a specialized unit allows these crimes to be given a “priority response” due to the impact to the victim and the community.<sup>22</sup> The lack of accurate reporting not only creates problems around the proper allocation of resources and training needed to improve reporting, but it also leaves open the opportunity for critics of hate crime laws to dismiss the importance and scope of the issue.

Sadly, in their efforts to argue against the need to specifically address attacks driven by racism, xenophobia, sexism, homophobia, religious and other bigotry, some critics focus on the infinitesimal number of hate crimes that turn out to be hoaxes by claiming them to be “uncommonly high.”<sup>23</sup> The reality is this number was only about two dozen from January 2016 to

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<sup>16</sup> Ronald L. Davis, “The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High,” *Police Chief Magazine*, <https://www.policechiefmagazine.org/the-hate-crimes/>.

<sup>17</sup> Report at 185.

<sup>18</sup> Report at 187.

<sup>19</sup> Report at 211.

<sup>20</sup> Report at 211.

<sup>21</sup> Report at 206.

<sup>22</sup> Report at 207.

<sup>23</sup> Gail Heriot & Lara Schwartz, “Hate Crimes Legislation Online Debate,” *The Federalist Society*, Aug. 17 2009, <https://fedsoc.org/commentary/publications/hate-crimes-legislation>.

April 2018.<sup>24</sup> Two dozen is paltry when compared to the thousands of hate crimes reported by law enforcement in that timeframe, and miniscule when compared to the estimates including unreported hate crimes, likely in the hundreds of thousands, according to BJS estimates.<sup>25</sup> Focusing on a handful of false reports is a slap in the face to the thousands of victims and their communities who are terrorized by hate crimes. This argument is a dangerous distraction from the importance of seeking redress and justice for the unique harm of hate crimes to real victims. Moreover, peddling in theories that hate crime laws are unnecessary because of the rare instances of false reports exacerbates the underreporting problem by reinforcing to targeted communities the fear that they will not be taken seriously if they report.

A few argue that there is no need for hate crime laws because crimes such as murder or assault are already punishable and the addition of hate crime statutes could lead to double jeopardy when the defendant could be prosecuted at the state and federal levels.<sup>26</sup> However, just as there are different types of homicide laws that require increasing punishments because they are planned and committed in increasingly heinous ways, the purpose of a federal hate crime statute is to punish a crime that was committed because of bias. The Supreme Court has already unanimously held that judges may consider a perpetrator's prejudice when seeking to enhance punishment and this directly applies to the federal prosecution of hate crimes.<sup>27</sup> Federal hate crime laws also ensure that hate crimes are prosecuted if a state does not have an applicable hate crimes statute or chooses not to prosecute the crime as a hate crime.<sup>28</sup> Not understanding the federal role ignores the history and present reality that there are still places in America where law enforcement, prosecutors or judges hold discriminatory views towards those most likely to be targeted.

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<sup>24</sup> Brian Levin & John David Reitzel, "Report to the nation hate crimes rise in U.S. cities and counties in time of division & foreign interference", Center for the Study of Hate & Extremism, California State University, San Bernardino (May 2018) (*available at* [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf?\\_ga=2.201749777.1870485830.1564689104-111610290.1564689104](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf?_ga=2.201749777.1870485830.1564689104-111610290.1564689104)).

<sup>25</sup> Emily Moon, "Hate Crimes Are On The Rise. Why Do Many Still Go Unreported?" *Pacific Standard*, Feb. 21, 2019, <https://psmag.com/news/hate-crimes-are-on-the-rise-why-do-many-still-go-unreported>. (In 2017, over 7,000 hate crimes were reported to the FBI while the BJS estimates the number to be closer to 250,000). Conservatively assuming two dozen false reports of hate crime per year, this puts the false reporting rate for hate crimes at either a minimum of  $24/250,000 = 0.0096\%$ , or at most  $24/7,170 = 0.33\%$ . Compared to the 2% average for many other violent crimes such as murder, "forcible rape," aggravated assault, and robbery and the 2-10% estimate for false reporting for all sexual assaults, this puts the number of false hate crime reports either significantly below average, or similar to that of other violent crimes. Emily Moon, "False reports of sexual assault are rare. But why is there so little reliable data about them," *Pacific Standard*, Oct. 5, 2018, <https://psmag.com/news/false-reports-of-sexual-assault-are-rare-but-why-is-there-so-little-reliable-data-about-them>. (citing [https://ucr.fbi.gov/crime-in-the-u.s/1996/96sec2.pdf?\\_ga=2.143886261.1665998884.1564672966-1178504311.1563473642](https://ucr.fbi.gov/crime-in-the-u.s/1996/96sec2.pdf?_ga=2.143886261.1665998884.1564672966-1178504311.1563473642) at 24).

<sup>26</sup> See [https://www.judiciary.senate.gov/imo/media/doc/heriot\\_testimony\\_06\\_25\\_09.pdf](https://www.judiciary.senate.gov/imo/media/doc/heriot_testimony_06_25_09.pdf); but see *Gamble v. United States*, 139 S. Ct. 1960, 1979 (2019) (wherein the Supreme Court held that it is not double jeopardy to charge someone on the state and federal levels because they are separate sovereigns).

<sup>27</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that a sentence that was enhanced because it was determined that the defendant chose his victim because of the victim's race was not unconstitutional because the punishment was aimed at conduct not protected by the First Amendment and because there is a strong desire to redress the harm created by hate crimes that goes over and above mere disagreement with the offenders' beliefs or biases).

<sup>28</sup> Report at 41-42. (This ruling is significant, because HCPA gave the federal government the authority to step in and prosecute state cases, which can be a critical tool in hate crime cases, especially for those crimes that occur in states without hate crime statutes (or limited statutes)).

As our report points out, hate crimes are more likely to be violent than non-hate crimes and have a more detrimental impact on the victim's mental health, including increased fear of being targeted again and post-traumatic stress disorder.<sup>29</sup> Moreover, the repercussions of a hate crime do not begin and end with the individual who was attacked, ridiculed, or targeted for their race or some other protected characteristic. The effects extend to that individual's mother, father, partner, children, family, friends and community. Simply witnessing a hate crime against a member of one's community can lead to psychological distress.<sup>30</sup> When an individual is victimized because of an immutable aspect of the individual's identity, the people who share that identity or care about those who share that identity legitimately fear that the same kind of crime could happen to them or others they cherish. That is what I felt when I heard about the venomous racist attack on Vincent Chin.

The mass shootings at the Pulse nightclub in Florida, the Sikh temple in Oak Creek, Wisconsin, the historically black church in Charleston, South Carolina, and recently at the Walmart in El Paso, Texas<sup>31</sup> deeply affected not only victims and their families, but also their communities and the nation. Pardeep Kaleka, who lost his father in the mass shooting at the Oak Creek temple, was among the many who attended a recent interfaith vigil after the shootings in Gilroy, California, Dayton, Ohio and El Paso, Texas to remember the victims of these massacres and to commemorate the seventh anniversary of the Oak Creek shooting.<sup>32</sup> The vigil brought together dozens of faith leaders, worshippers, political leaders, and community members to remember the victims.<sup>33</sup> At the vigil, Darryl Morin, president of Forward Latino said, "To all of our Sikh brothers and sisters, we tell you, 'You are not alone. We are all Oak Creek today.'"<sup>34</sup>

The impact of hate crimes on a community are best heard in the voices and stories of those who have been the target of a hate crime or have experienced the effects of hate crimes in their own community. Vincent Chin's mother, Lily Chin, worked at a brush factory and had recently become widowed when her son was killed. He was her only son. Though Ms. Chin spoke limited English, she did not let that stop her from spending much of the remainder of her life speaking throughout the country about her experience and raising peoples' consciousness about racial prejudice. She often said, "There is nothing I can do to bring back Vincent, but I don't want any other mother to go through what I went through."<sup>35</sup> One of the ways we can pay respect to the victims and those who loved them is to commit to seriously addressing the root causes of these crimes and making

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<sup>29</sup> Report at 3. (When comparing hate crime victims to other crime victims, researchers find that hate crime victims are significantly more likely to report being fearful, expect to be targeted for additional victimizations... suffer from health issues, have difficulties overcoming victimization, and suffer from post-traumatic stress disorder).

<sup>30</sup> "The Psychology of Hate Crimes," American Psychological Association, (<https://www.apa.org/advocacy/interpersonal-violence/hate-crimes>).

<sup>31</sup> Robert Moore & Mark Berman, "El Paso suspect said he was targeting 'Mexicans,' told officers he was the shooter, police say," *The Washington Post*, Aug. 9, 2019, [https://www.washingtonpost.com/national/el-paso-suspect-said-he-was-targeting-mexicans-told-officers-he-was-the-shooter-police-say/2019/08/09/ab235e18-bac9-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/national/el-paso-suspect-said-he-was-targeting-mexicans-told-officers-he-was-the-shooter-police-say/2019/08/09/ab235e18-bac9-11e9-b3b4-2bb69e8c4e39_story.html). The El Paso shooting was followed by another mass shooting less than 24 hours later in Dayton, Ohio.

<sup>32</sup> Meg Jones, "On 7th Anniversary of Sikh Temple Shooting, Son of Slain Leader Says: 'What is Going to be the Tipping Point?'" *Milwaukee Journal Sentinel*, Aug. 5, 2019, <https://www.jsonline.com/story/news/2019/08/05/oak-creek-sikh-temple-shooting-victims-son-asks-what-is-going-to-be-the-tipping-point/1924216001/>

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Elaine Woo, "Lily Chin, 82; Son's Killing Led to Rights Drive." *L.A. Times*, June 14, 2002. <https://www.latimes.com/archives/la-xpm-2002-jun-14-me-chin14-story.html>

sure that crimes are reported, taken seriously and fully addressed. It is my hope that the best practices in our report provide a path for communities and law enforcement who believe that we can and must do better.



### Statement of Commissioner Michael Yaki

It is important to understand that the importance and relevance of this Report has an inescapable and incontrovertible nexus to one individual: President Trump.

Since the beginning of his Presidential campaign, a pattern of public speech by the President has emerged that can only be described as unprecedented in modern American history in not only his willingness to demonize ethnic, religious, and racial groups, but his unwillingness to tackle the rise of white supremacists.

As an armchair scholar of American history, and a member of this Commission for over 14 years, I have had disagreements – both friendly and not-so-friendly -- on policy with my conservative peers; we have battled on the appropriate role of the federal government on the enforcement of civil rights and voting rights in this country.

My disagreement with this President, however, goes beyond the interpretation of the 14th amendment and the scope and sweep of the Voting and Civil Rights Acts. It goes to the role that the President plays in our political and social order, a role that this President has not only abdicated but has led a retrogression in leadership during his two years in office, a role that I have memorialized in Appendix A to this statement.

I recognize that no one is perfect. Presidents have, at times in their life, been reflections of their society and surroundings. What has distinguished Presidents, however, is their ability to rise above their upbringing and prejudices and embrace the role of leading us to the better angels of our nature. So, to remember what we have had and should continue to demand, are examples of what I mean.

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“As Americans, we believe that every man should be free to live his life as he wishes. He should be limited only by his responsibility to his fellow countrymen. If this freedom is to be more than a dream, each man must be guaranteed equality of opportunity. The only limit to an American’s achievement should be his ability, his industry and his character . . . When I say all Americans, I mean all Americans.”

President Harry Truman, June 29, 1947, address to the NAACP.

“And so with deep confidence, I call upon the citizens of the State of Arkansas to assist in bringing to an immediate end all interference with the law and its processes. If resistance to the Federal Court order ceases at once, the further presence of Federal troops will be unnecessary and the City of Little Rock will return to its normal habits of peace and order; and a blot upon the fair name and high honor of our nation in the world will be removed. Thus will be restored the image of America and of all its parts as one nation, indivisible, with liberty and justice for all.

President Dwight D. Eisenhower, September 24, 1957, Addressing the Nation on the Desegregation in Little Rock, Arkansas

“The heart of the question is — whether all Americans are to be afforded equal rights and equal opportunities. Whether we are going to treat our fellow Americans as we want to be treated. If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?”

President John F. Kennedy, June 11, 1963, Address to the Nation on Civil Rights

“There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem. And we are met here tonight as Americans--not as Democrats or Republicans--we are met here as Americans to solve that problem . . . . This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, North and South: "All men are created equal"--"government by consent of the governed"--"give me liberty or give me death. . . . Those words are a promise to every citizen that he shall share in the dignity of man. This dignity cannot be found in a man's possessions; it cannot be found in his power, or in his position. It really rests on his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom, he shall choose his leaders, educate his children, and provide for his family according to his ability and his merits as a human being.”

President Lyndon B. Johnson, March 15, 1965, Address to Joint Session of Congress

"In this Land of the Free, it is right, and by nature it ought to be, that all men and all women are equal before the law. Now, therefore, I, Gerald R. Ford, President of the United States of America, to remind all Americans that it is fitting and just to ratify the Equal Rights Amendment adopted by the Congress of the United States of America, in order to secure legal equality for all women and men, do hereby designate and proclaim August 26, 1975, as Women's Equality Day."

President Gerald R. Ford, Presidential Proclamation 4383

“We have already found a high degree of personal liberty, and we are now struggling to enhance equality of opportunity. Our commitment to human rights must be absolute, our laws fair, our natural beauty preserved; the powerful must not persecute the weak, and human dignity must be enhanced. . . . Because we are free, we can never be indifferent to the fate of freedom elsewhere. Our moral sense dictates a clear-cut preference for those societies which share with us an abiding respect for individual human rights.”

President Jimmy Carter, Jan. 20, 1977, Inaugural Address

“Abraham Lincoln freed the black man. In many ways, Dr. King freed the white man. How did he accomplish this tremendous feat? Where others — white and black — preached hatred, he taught the principles of love and nonviolence. We can be so thankful that Dr. King raised his mighty eloquence for love and hope rather than for hostility and bitterness. He took the tension he found in our nation, a tension of injustice, and channeled it for the good of America and all her people.”

President Ronald Reagan, Jan. 15, 1983,

“If we seek--and I believe that every one of us does--to build a new era of harmony and shared purpose, we must make it possible for all Americans to scale the ladder of opportunity. If we seek to ease racial tensions in America, civil rights legislation is, by itself, not enough. The elimination of discrimination in the workplace is a vital element of the American Dream, but it is simply not enough.”

President George H. W. Bush, Nov. 21, 1994, Remarks on signing the Civil Rights Act of 1991

What happened here changed the course of our country here forever. Like Independence Hall, where we first embraced the idea that God created us all equal; like Gettysburg, where Americans fought and died over whether we would remain one Nation, moving closer to the true meaning of equality; like them, Little Rock is historic ground, for surely it was here at Central High that we took another giant step closer to the idea of America . . . .All of us should embrace the vision of a colorblind society, but recognize the fact that we are not there yet and we cannot slam shut the doors of education and economic opportunity."

President William J. Clinton, Sept. 25, 1997, Remarks at Little Rock 40th Anniversary

“The face of terror is not the true faith of Islam. That’s not what Islam is all about. Islam is peace. These terrorists don’t represent peace. They represent evil and war. When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that’s made brothers and sisters out of every race—out of every race. America counts millions of Muslims amongst our citizens, and Muslims make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.”

President George W. Bush, September 17, 2001, Remarks to the Islamic Center

“The American instinct that led these young men and women to pick up the torch and cross this bridge is the same instinct that moved patriots to choose revolution over tyranny. It’s the same instinct that drew immigrants from across oceans and the Rio Grande; the same instinct that led women to reach for the ballot and workers to organize against an unjust status quo; the same

instinct that led us to plant a flag at Iwo Jima and on the surface of the Moon. It's the idea held by generations of citizens who believed that America is a constant work in progress; who believed that loving this country requires more than singing its praises or avoiding uncomfortable truths. It requires the occasional disruption, the willingness to speak out for what's right and shake up the status quo."

President Barack Obama, March 14, 2015, Commemorating "Bloody Sunday", Selma, Alabama

## Addendum to Commissioner Michael Yaki's Statement

### I. Introduction

This Appendix does not presume to be a catalogue of all of President Trump's comments, both written and verbal, which reflect the breadth of his support of white nationalism, racism, and religious bigotry. A truly comprehensive compilation of that nature would be virtually impossible to construct. Many quotes not included herein either are not fully available on the internet or are mentioned only in tertiary-level media outlets of questionable credibility. This Appendix is a representative, and reasonably wide-ranging, compendium of statements which are can be traced back to reliable sources.

In the course of preparing this Appendix, it became clear that even respected media outlets often either only reference, rather than provide, quotes of this nature, or present mere fragments of them. Therefore, when needed and possible, the contents of this Appendix have been tracked to, and copied from, original sources such as Twitter and White House statements, and transcribed from the auditory tracks of video clips of interviews and speeches.

### II. Denying the Seriousness of Global White Nationalism

March 15, 2019, The Oval Office, The White House. "I think [white nationalists across the globe are] a small group of people that have very, very serious problems." <https://abcnews.go.com/Politics/president-trump-white-nationalism-rise-world-small-group/story?id=61719373>.

August 13, 2018, Trump Tower. "What about the alt-left that came charging at, as you say, at the alt-right? ... Do they have any semblance of guilt? ...

I've condemned neo-Nazis. I've condemned many different groups. But not all of those people were neo-Nazis, believe me. ... You had many people in that group other than neo-Nazis and white nationalists. ... The press has treated them absolutely unfairly. ...

You also had some very fine people on both sides. ...

Many of those people were there to protest the taking down of the statue of Robert E. Lee. ... This week, it is Robert E. Lee. And I notice that Stonewall Jackson is coming down. I wonder, is it George Washington next? And is it Thomas Jefferson the week after? You know, you have to ask yourself, where does it stop?"

<https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

### III. President Trump's Comments of Disparagement

#### A. Mexicans and Central American Latinx people

July 10, 2014, Twitter. "When will the U.S. stop sending \$'s to our enemies, i.e. Mexico and others."

[https://twitter.com/realDonaldTrump/status/487316463204986880?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E487316463204986880&ref\\_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F](https://twitter.com/realDonaldTrump/status/487316463204986880?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E487316463204986880&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F).

February 24, 2015, Twitter. "The Mexican legal system is corrupt, as is much of Mexico. Pay me the money that is owed me now - and stop sending criminals over our border[.]"

[https://twitter.com/realDonaldTrump/status/570384640281870337?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E570384640281870337&ref\\_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F](https://twitter.com/realDonaldTrump/status/570384640281870337?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E570384640281870337&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F).

March 5, 2015, Twitter. "Mexico's court system corrupt.I [sic] want nothing to do with Mexico other than to build an impenetrable WALL and stop them from ripping off U.S."

[https://twitter.com/realDonaldTrump/status/573646783416508416?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E573646783416508416&ref\\_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F](https://twitter.com/realDonaldTrump/status/573646783416508416?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E573646783416508416&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F).

March 30, 2015, Twitter. "The border is wide open for cartels & terrorists. Secure our border now. Build a massive wall & deduct the costs from Mexican foreign aid!"

[https://twitter.com/realDonaldTrump/status/582645393227419648?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E582645393227419648&ref\\_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F.n](https://twitter.com/realDonaldTrump/status/582645393227419648?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E582645393227419648&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F.n)

June 12, 2015, Trump Tower, Manhattan, NY. "When do we beat Mexico at the border? They're laughing at us, at our stupidity. And now they are beating us economically. They are not our friend, believe me. But they're killing us economically. ... When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us [sic]. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. ... I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall."

<https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?noredirect=o>.

June 30, 2015, Twitter. "I love the Mexican people, but Mexico is not our friend. They're killing us at the border and they're killing us on jobs and trade. FIGHT!"

[https://twitter.com/realDonaldTrump/status/615866741994954752?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E615866741994954752&ref\\_url](https://twitter.com/realDonaldTrump/status/615866741994954752?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E615866741994954752&ref_url)

[=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F.](https://time.com/4473972/donald-trump-mexico-meeting-insult/)

July 13, 2015, Twitter. “El Chapo and the Mexican drug cartels use the border unimpeded like it was a vacuum cleaner, sucking drugs and death right into the U.S.”  
[https://twitter.com/realDonaldTrump/status/620545104525307904?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E620545104525307904&ref\\_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F](https://twitter.com/realDonaldTrump/status/620545104525307904?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E620545104525307904&ref_url=https%3A%2F%2Ftime.com%2F4473972%2Fdonald-trump-mexico-meeting-insult%2F).

May 27, 2016, Rally, San Diego, CA. “I have a judge who is a hater of Donald Trump, a hater. He’s a hater. His name is Gonzalo Curiel. ... He is not doing the right thing. And I figure, what the hell? Why not talk about it for two minutes? ... We’re in front of a very hostile judge. ... The judge was appointed by Barack Obama, federal judge. Frankly, he should recuse himself because he’s given us ruling after ruling after ruling, negative, negative, negative. ... What happens is the judge, who happens to be, we believe, Mexican, which is great. I think that’s fine. ... I think Judge Curiel should be ashamed of himself. ... I’m telling you, this court system, judges in this court system, federal court, they ought to look into Judge Curiel. Because what Judge Curiel is doing is a total disgrace, OK?”

[https://blogs.wsj.com/washwire/2016/05/27/trump-attacks-federal-judge-in-trump-u-case/?mod=article\\_inline](https://blogs.wsj.com/washwire/2016/05/27/trump-attacks-federal-judge-in-trump-u-case/?mod=article_inline).

June 3rd, 2016, CNN interview, The Lead with Jake Tapper. “[Judge Curiel]’s a Mexican. We’re building a wall between here and Mexico. The answer is, he is giving us very unfair rulings, rulings that people can’t even believe. This case should have ended years ago on summary judgment. The best lawyers — I have spoken to so many lawyers, they said this is not a case, this is a case that should have ended. ... This judge is giving us unfair rulings. Now I say why? Well, I want to — I’m building a wall, OK, and it’s a wall between Mexico, not another country....”  
<http://cnnpressroom.blogs.cnn.com/2016/06/03/tapper-to-trump-is-that-not-the-definition-of-racism/>.

January 11, 2018, Twitter. “The Democrats seem intent on having people and drugs pour into our country from the Southern Border, risking thousands of lives in the process. It is my duty to protect the lives and safety of all Americans. We must build a Great Wall, think Merit and end Lottery & Chain. USA!”

<https://twitter.com/realdonaldtrump/status/951675713089888256?lang=en>.

May 16, 2018, The Oval Office, The White House. “We have people coming into the country... or trying to come, we’re stopping a lot of them, and we’re taking them out of the country... you wouldn’t believe how bad they are, these are not people, they’re animals....”

<https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>

June 19, 2018, Twitter. “Democrats are the problem. They don’t care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13. They can’t win on their terrible policies, so they view them as potential voters!”

<https://twitter.com/realDonaldTrump/status/1009071403918864385>.

June 24, 2018, Twitter. “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents....”

<https://twitter.com/realdonaldtrump/status/1010900865602019329>.

October 14, 2018, Rally, Mosinee, Wisconsin. ““We are [getting MS-13 members out of the U.S.] actually. We actually are. Right? We are getting them out of this country by the thousands, if you can believe it. But, you know, it’s like liberating, like a war, like there’s a foreign invasion.”

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

October 29, 2018, Twitter. “Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border. Please go back, you will not be admitted into the United States unless you go through the legal process. This is an invasion of our Country and our Military is waiting for you!”

[https://twitter.com/realDonaldTrump/status/1056919064906469376?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1056919064906469376&ref\\_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fadministration%2F413624-trump-calls-migrant-caravan-an-invasion](https://twitter.com/realDonaldTrump/status/1056919064906469376?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1056919064906469376&ref_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fadministration%2F413624-trump-calls-migrant-caravan-an-invasion).

November 1, 2018, Remarks by President Trump on the Illegal Immigration Crisis and Border Security, Roosevelt Room, The White House. “At this very moment, large, well-organized caravans of migrants are marching towards our southern border. Some people call it an ‘invasion.’ It’s like an invasion. They have violently overrun the Mexican border. You saw that two days ago. These are tough people, in many cases. A lot of young men, strong men. And a lot of men that maybe we don’t want in our country. But again, we’ll find that out through the legal process. ... But they’ve overrun the Mexican police, and they’ve overrun and hurt badly Mexican soldiers. So this isn’t an innocent group of people. It’s a large number of people that are tough. They’ve injured, they’ve attacked, and the Mexican police and military has actually suffered. ... So let me begin by stating that these illegal caravans will not be allowed into the United States, and they should turn back now, because they’re wasting their time. ... And we’ve already dispatched, for the border, the United States



military. And they will do the job. They are setting up right now, and they're preparing. We hope nothing happens. But if it does, we are totally prepared. Greatest military anywhere in the world, and it's going to be, and is now, in great shape. No longer depleted like it was when I took over as the President of the United States. ... These caravans and illegal migrants are drawn to our country by Democrat-backed laws and left-wing judicial rulings. We're getting rulings that are so ridiculous, so bad. They're writing the laws. Can't do that. ... Furthermore, contained within this giant flow of illegal migration to our southwest border is the movement of illicit and deadly narcotics. It's in the southwest, most of it comes in. Nearly 100 percent of heroin in the United States enters through the southern border— think of that: 100 percent, almost, of heroin comes in through the southern border, along with roughly 90 percent of cocaine, and the majority of meth, and a substantial portion of the ultra-lethal fentanyl killing our youth. Fentanyl is killing our youth. These drugs destroy the lives and kill much more than 70,000 Americans every single year. And the number goes up. It goes up and up and up, because we are so foolish with our laws that we allow this to happen. A death toll equivalent of the size of an entire American city every year. The current influx, if not halted, threatens to overwhelm our immigration system and our communities, and poses unacceptable dangers to the entire nation. We have to have our borders. Can't let drugs come in. Not just — it's not just people. It's people; it's drugs. It's human traffickers. ... If these caravans are allowed into our country, only bigger and more emboldened caravans will follow. And you see that's what's happening now. We have one that's coming up, and it's being somewhat dissipated, as they march. But then other people are joining it. And then it gets bigger. And now, if you look back at Honduras, and if you look at El Salvador, other ones are solving and they're forming. They're forming. You have new ones that are forming. And we call it 'caravan number two' is unbelievably rough people. Very, very hard for the military to stop it. Our military will have no problem. But very, very hard. Mexico is having a very, very hard time with it. ... This is an invasion, and nobody is even questioning that. ... There's nothing political about a caravan of thousands of people, and now others forming, pouring up into our country. We have no idea who they are. All we know is they're pretty tough people when they can blast through the Mexican military and Mexican police. They're pretty tough people. Even Mexico said, 'Wow, these are tough people.' I don't want them in our country. And women don't want them in our country. Women want security. Men don't want them in our country. But the women do not want them. Women want security. You look at what the women are looking for. They want to have security. They don't want to have these people in our country. And they're not going to be in our country. It's a very big thing. ... If they want to throw rocks at our military, our military fights back. We're going to consider — and I told them, consider it a rifle. When they throw rocks like they did at the Mexico military and police, I say, consider it a rifle." <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

November 4, 2018, Rally, Chattanooga, Tennessee. "No nation can allow its borders to be overrun. And that's an invasion. I don't care what they say. I don't care what the fake media says. That's an invasion of our country."

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

November 18, 2018, Twitter. "The Mayor of Tijuana, Mexico, just stated that 'the City is ill-prepared to handle this many migrants, the backlog could last 6 months.' Likewise, the U.S. is ill-prepared for this invasion, and will not stand for it. They are causing crime and big problems in Mexico. Go home!"

[https://twitter.com/realDonaldTrump/status/1064227483187318784?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1064227483187318784&ref\\_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion](https://twitter.com/realDonaldTrump/status/1064227483187318784?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1064227483187318784&ref_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion).

January 11, 2019, Twitter. "Humanitarian Crisis at our Southern Border. I just got back and it is a far worse situation than almost anyone would understand, an invasion! I have been there numerous times - The Democrats, Cryin' Chuck and Nancy don't know how bad and dangerous it is for our ENTIRE COUNTRY...."

[https://twitter.com/realDonaldTrump/status/1083756525196320773?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1083756525196320773&ref\\_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion](https://twitter.com/realDonaldTrump/status/1083756525196320773?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1083756525196320773&ref_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion).

January 31, 2019, Twitter. "More troops being sent to the Southern Border to stop the attempted Invasion of Illegals, through large Caravans, into our Country. We have stopped the previous Caravans, and we will stop these also. With a Wall it would be soooo much easier and less expensive. Being Built!"

[https://twitter.com/realDonaldTrump/status/1090986128805687296?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1090986128805687296&ref\\_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion](https://twitter.com/realDonaldTrump/status/1090986128805687296?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1090986128805687296&ref_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F8%2F7%2F20756775%2Fel-paso-shooting-trump-hispanic-invasion).

February 15, 2019, Announcing border emergency declaration, The White House. "So, we're going to be signing today, and registering [a] national emergency. And it's a great thing to do because we have an invasion of drugs, invasion of gangs, invasion of people, and it's unacceptable."

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

March 2, 2019, Twitter. "Tens of thousands of illegals are being apprehended (captured) at the Border and NOT allowed into our Country. With another President, millions would be pouring in. I am stopping an invasion as the Wall gets built."

[https://twitter.com/realDonaldTrump/status/1104505623293710337?ref\\_src=twsrc](https://twitter.com/realDonaldTrump/status/1104505623293710337?ref_src=twsrc)

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

March 6, 2019, Workforce advisory meeting, The White House. “I call [the crossing of undocumented people at the southern U.S. border an] ‘invasion.’ They always get upset when I say ‘an invasion.’ But it really is somewhat of an invasion.”

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

March 28, 2019, Rally, Grand Rapids, MI. “We are on track for one million illegal aliens trying to rush our borders. It is an invasion, you know that. I say invasion. They say isn’t that terrible? I don’t know what these people are thinking.”

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

April 6, 2019, Republican Jewish Coalition conference, Las Vegas, NV. “I’ll do whatever is necessary to stop the invasion of our country ... That’s what it is.”

<https://www.vox.com/identities/2019/8/7/20756775/el-paso-shooting-trump-hispanic-invasion>.

May 8, 2019, Rally, Panama City Beach, FL. “This is an invasion. When you see these caravans starting out with 20,000 people, that’s an invasion. I was badly criticized for using the word ‘invasion.’ It’s an invasion. And it’s also an invasion of drugs coming in from Mexico, OK? It’s an invasion of drugs. I mean, when you have 15,000 people marching up, and you have hundreds and hundreds of people and you have two or three border security people that are brave and great — And don’t forget, we don’t let them and we can’t let them use weapons. We can’t. Other countries do. We can’t. I would never do that. But how do you stop these people? ... That’s only in the panhandle, can you get away with that statement [about shooting migrants at the southern U.S. border]. ... Only in the panhandle.”

<https://abcnews.go.com/Politics/trump-team-defends-president-twitter-supporter-shouts-shoot/story?id=62928006>.

May 30, 2019, Statement from the President Regarding Emergency Measures to Address the Border Crisis, The White House. “As everyone knows, the United States of America has been invaded by hundreds of thousands of people coming through Mexico and entering our country illegally. This sustained influx of illegal aliens has profound consequences on every aspect of our national life—overwhelming our schools, overcrowding our hospitals, draining our welfare system, and causing untold amounts of crime. Gang members, smugglers, human traffickers, and illegal drugs and narcotics of all kinds are pouring across the Southern Border and directly into our communities. Thousands of innocent lives are taken every year as a result of this lawless chaos. It must end NOW! ... For decades, the United States has suffered the

severe and dangerous consequences of illegal immigration. Sadly, Mexico has allowed this situation to go on for many years, growing only worse with the passage of time. From a safety, national security, military, economic, and humanitarian standpoint, we cannot allow this grave disaster to continue. The current state of affairs is profoundly unfair to the American taxpayer, who bears the extraordinary financial cost imposed by large-scale illegal migration. Even worse is the terrible and preventable loss of human life. Some of the most deadly and vicious gangs on the planet operate just across our border and terrorize innocent communities.”

<https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/>.

June 2, 2019, Twitter. “People have been saying for years that we should talk to Mexico. The problem is that Mexico is an “abuser” of the United States, taking but never giving. It has been this way for decades. Either they stop the invasion of our Country by Drug Dealers, Cartels, Human Traffickers.... ....Coyotes and Illegal Immigrants, which they can do very easily, or our many companies and jobs that have been foolishly allowed to move South of the Border, will be brought back into the United States through taxation (Tariffs). America has had enough!”

<https://twitter.com/realDonaldTrump/status/1135150118120939521>.

August 7, 2019, Press pool interview, South Lawn, The White House. “I am concerned about the rise of any group of hate. I don't like it... Whether it's white supremacy, whether it's any other kind of supremacy. Whether it's Antifa.’ Whether it's any group of hate. I am very concerned about it and I'll do something about it.”

[https://twitter.com/cspan/status/1159098940379279360?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed&ref\\_url=safari-reader%3A%2F%2Fwww.huffpost.com%2Fentry%2Ftrump-white-supremacy-antifa-equal-threat\\_n\\_5d4ae062e4b01e44e473a06e](https://twitter.com/cspan/status/1159098940379279360?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed&ref_url=safari-reader%3A%2F%2Fwww.huffpost.com%2Fentry%2Ftrump-white-supremacy-antifa-equal-threat_n_5d4ae062e4b01e44e473a06e).

## **B. Africans, African Americans, and others of African descent**

### **1. Nations with majority Black populations**

June (exact date unspecified), 2017, The Oval Office, The White House. “[Haitians] all have AIDS. ... {Nigerians will never} go back to their huts.”

<https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?module=inline>.

Jan. 11, 2018, White House meeting: “Why are we having all these people from shithole countries [Haiti, El Salvador and African countries] come here? ... Why do we need more Haitians?” [https://beta.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://beta.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html).

## 2. U.S. Rep. Maxine Waters

June 25, 2018, Twitter. “Congresswoman Maxine Waters, an extraordinarily low IQ person, has become, together with Nancy Pelosi, the Face of the Democrat Party. She has just called for harm to supporters, of which there are many, of the Make America Great Again movement. Be careful what you wish for Max!”  
<https://twitter.com/realDonaldTrump/status/1011295779422695424>.

August 4, 2018, Rally, OH (unspecified location). “Maxine Waters, she’s leading the charge. Maxine. She’s a real beauty. Maxine. A seriously low-I.Q. person. Seriously. Maxine Waters. She’s leading the charge.”  
[https://www.washingtonpost.com/video/politics/trump-on-maxine-waters-low-iq-person/2018/08/04/b7511bb8-9846-11e8-818b-e9b7348cd87d\\_video.html](https://www.washingtonpost.com/video/politics/trump-on-maxine-waters-low-iq-person/2018/08/04/b7511bb8-9846-11e8-818b-e9b7348cd87d_video.html).

## 3. U.S. Rep. Elijah Cummings

July 27, 2019, Twitter. “Rep, Elijah Cummings has been a brutal bully, shouting and screaming at the great men & women of Border Patrol about conditions at the Southern Border, when actually his Baltimore district is FAR WORSE and more dangerous. His district is considered the Worst in the USA.....  
....As proven last week during a Congressional tour, the Border is clean, efficient & well run, just very crowded. Cumming District is a disgusting, rat and rodent infested mess. If he spent more time in Baltimore, maybe he could help clean up this very dangerous & filthy place[.]”  
<https://twitter.com/realdonaldtrump/status/1155073964634517505?lang=en>.

July 28, 2019, Twitter. “Someone please explain to Nancy Pelosi, who was recently called racist by those in her own party, that there is nothing wrong with bringing out the very obvious fact that Congressman Elijah Cummings has done a very poor job for his district and the City of Baltimore. Just take ... a look, the facts speak far louder than words! The Democrats always play the Race Card, when in fact they have done so little for our Nation’s great African American people. Now, lowest unemployment in U.S. history, and only getting better. Elijah Cummings has failed badly!”  
<https://twitter.com/realDonaldTrump/status/1155439938684575744>.

August 2, 2019, Twitter: “Really bad news! The Baltimore house of Elijah Cummings was robbed. Too bad!”  
<https://twitter.com/realDonaldTrump/status/1157259424794324992>.

#### 4. Omarosa Manigault Newman

August 14, 2018, Twitter. "When you give a crazed, crying lowlife a break, and give her a job at the White House, I guess it just didn't work out. Good work by General Kelly for quickly firing that dog!"

<https://twitter.com/realdonaldtrump/status/1029329583672307712?lang=en>.

#### 5. LeBron James and Don Lemon

August 3, 2018, Twitter. "Lebron James was just interviewed by the dumbest man on television, Don Lemon. He made Lebron look smart, which isn't easy to do."

<https://twitter.com/realDonaldTrump/status/1025586524782559232>.

#### 6. "The Squad" (U.S. Rep. Alexandria Ocasio-Cortez, U.S. Rep. Ayanna Pressley, U.S. Rep. Ilhan Omar, and U.S. Rep. Rashida Tlaib)

Note: The quotes in this section overlap the sections herein in which the President voices his perceptions of Latinx people, Muslims, and African Americans.

July 14, 2019, Twitter. "1) So interesting to see 'Progressive' Democrat Congresswomen, who originally came from countries whose governments are a complete and total catastrophe, the worst, most corrupt and inept anywhere in the world (if they even have a functioning government at all), now loudly..... 2) ....and viciously telling the people of the United States, the greatest and most powerful Nation on earth, how our government is to be run. Why don't they go back and help fix the totally broken and crime infested places from which they came. Then come back and show us how.... 3) ....it is done. These places need your help badly, you can't leave fast enough. I'm sure that Nancy Pelosi would be very happy to quickly work out free travel arrangements!"

<https://twitter.com/realDonaldTrump/status/1150381396994723841>.

July 15, 2019, Twitter. "When will the Radical Left Congresswomen apologize to our Country, the people of Israel and even to the Office of the President, for the foul language they have used, and the terrible things they have said. So many people are angry at them & their horrible & disgusting actions!"

<https://twitter.com/realDonaldTrump/status/1150720283654938625>.

July 15, The White House. "They hate our country. They hate it, I think, with a passion. ... If you're not happy here, then you can leave. ... As far as I'm concerned, if you hate our country, if you're not happy here, you can leave."

[https://www.washingtonpost.com/politics/trump-calls-on-minority-congresswomen-to-apologize-after-he-said-they-should-go-back-to-their-countries/2019/07/15/897f1dd0-a6ef-11e9-a3a6-ab670962db05\\_story.html](https://www.washingtonpost.com/politics/trump-calls-on-minority-congresswomen-to-apologize-after-he-said-they-should-go-back-to-their-countries/2019/07/15/897f1dd0-a6ef-11e9-a3a6-ab670962db05_story.html).

July 16, 2019, Twitter. “The Democrat Congresswomen have been spewing some of the most vile, hateful, and disgusting things ever said by a politician in the House or Senate, & yet they get a free pass and a big embrace from the Democrat Party. Horrible anti-Israel, anti-USA, pro-terrorist & public..... ... shouting of the F... word, among many other terrible things, and the petrified Dems run for the hills. Why isn’t the House voting to rebuke the filthy and hate laced things they have said? Because they are the Radical Left, and the Democrats are afraid to take them on. Sad!”

<https://twitter.com/realDonaldTrump/status/1151089268535767042>.

July 16, 2019, Twitter. “Those Tweets were NOT Racist. I don’t have a Racist bone in my body! The so-called vote to be taken is a Democrat con game. Republicans should not show “weakness” and fall into their trap. This should be a vote on the filthy language, statements and lies told by the Democrat..... ... Congresswomen, who I truly believe, based on their actions, hate our Country. Get a list of the HORRIBLE things they have said. Omar is polling at 8%, Cortez at 21%. Nancy Pelosi tried to push them away, but now they are forever wedded to the Democrat Party. See you in 2020!”

<https://twitter.com/realDonaldTrump/status/1151129281134768128>. (Note: The first two sentences of this Tweet are cited in the second section of this document along with other quotes in which the President expresses his belief that he is not a racist.)

July 17, 2019, Rally, North Carolina (unspecified location). "If they don't like it, let them leave," Trump told the crowd. "I think in some cases they hate our country."

<https://www.usatoday.com/story/news/politics/elections/2019/07/17/donald-trump-rally-greenville-n-c-amid-fury-over-squad-tweets/1749987001/>.

July 21, 2019, Twitter. “I don’t believe the four Congresswomen are capable of loving our Country. They should apologize to America (and Israel) for the horrible (hateful) things they have said. They are destroying the Democrat Party, but are weak & insecure people who can never destroy our great Nation!”

[https://twitter.com/realDonaldTrump/status/1152912995938443269?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1152912995938443269&ref\\_url=https%3A%2F%2Ftime.com%2F5631135%2Ftrump-squad-tweets-attacks%2F](https://twitter.com/realDonaldTrump/status/1152912995938443269?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1152912995938443269&ref_url=https%3A%2F%2Ftime.com%2F5631135%2Ftrump-squad-tweets-attacks%2F).

July 22, 2019, Twitter. “The “Squad’ is a very Racist group of troublemakers who are young, inexperienced, and not very smart. They are pulling the once great Democrat Party far left, and were against humanitarian aid at the Border...And are now against ICE and Homeland Security. So bad for our Country!”

<https://twitter.com/realdonaldtrump/status/1153315875476463616>.

July 23, 2019, Twitter. "In 2016 I almost won Minnesota. In 2020, because of America hating anti-Semite Rep. Omar, & the fact that Minnesota is having its best economic year ever, I will win the State! 'We are going to be a nightmare to the President,' she say. No, AOC Plus 3 are a Nightmare for America!"

<https://twitter.com/realDonaldTrump/status/1153648770883706880>.

August 15, 2019: Twitter. "It would show great weakness if Israel allowed Rep. Omar and Rep. Tlaib to visit. They hate Israel & all Jewish people, & there is nothing that can be said or done to change their minds. Minnesota and Michigan will have a hard time putting them back in office. They are a disgrace!"

<https://twitter.com/realDonaldTrump/status/1162000480681287683>.

September 2, 2019, Twitter. "The Amazon Washington Post did a story that I brought racist attacks against the 'Squad.' No, they brought racist attacks against our Nation. All I do is call them out for the horrible things they have said. The Democrats have become the Party of the Squad!"

[https://twitter.com/realDonaldTrump/status/1168496276918480896?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1168496276918480896&ref\\_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fmedia%2F459611-trump-fires-at-news-media-democrats-in-labor-day-tweets](https://twitter.com/realDonaldTrump/status/1168496276918480896?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1168496276918480896&ref_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fmedia%2F459611-trump-fires-at-news-media-democrats-in-labor-day-tweets).

### C. Muslims

March 30, 2011, Fox News interview with Bill O'Reilly. "Absolutely [there is a Muslim problem in the world]. I mean, I don't notice Swedish people knocking down the World Trade Center. There is a Muslim problem in the world, and you know it and I know it."

<https://www.youtube.com/watch?v=wuWoR7MUIY4&feature=youtu.be&t=6m3>.

April 12, 2011, CBN interview. "[The Quran] teaches some very negative vibe [sic] ... when you look at people blowing up in the street in some countries in the Middle East ... when you look at 250 people who die in a supermarket while shopping .... There's a lot of hatred there someplace."

[https://www.youtube.com/watch?time\\_continue=8&v=fWzDAvemJG8](https://www.youtube.com/watch?time_continue=8&v=fWzDAvemJG8).

May 16, 2015, Iowa National Security Action Summit. "Muslims can come in but other people can't; Christians can't come into this country but Muslims can. Something has got to be coming down from the top... the Muslims aren't in danger but the Christians are."

<https://www.youtube.com/watch?v=t2G6qVhfBOE>.

November 16, 2015, unspecified location. "I would hate to [close mosques], but it's something that you're going to have to strongly consider because some of the



ideas and some of the hatred — the absolute hatred — is coming from these areas.”  
<https://www.youtube.com/watch?v=nMndxpFf0dc&feature=youtu.be&t=10s>.

November 17, 2015, Twitter. “Refugees from Syria are now pouring into our great country. Who knows who they are - some could be ISIS. Is our president insane?”  
<https://twitter.com/realdonaldtrump/status/666615398574530560?lang=en>.

November 19, 2015, Newtown Iowa campaign trail comment to NBC reporter. “I would certainly implement [a mandatory database to track Muslims in the United States]. Absolutely.”  
<https://www.foxnews.com/us/donald-trump-says-he-would-absolutely-implement-muslim-database-if-elected>.

November 19, 2015, Twitter. “Eight Syrians were just caught on the southern border trying to get into the U.S. ISIS maybe? I told you so. WE NEED A BIG & BEAUTIFUL WALL!”  
<https://twitter.com/realdonaldtrump/status/667329429912338432?lang=en>.

November 20, 2015, Fox News interview. “I want a database for Syrian refugees that Obama’s gonna let in ... if they come in. But they’re already started coming in ... which is absolutely ridiculous. I think it’s a Trojan horse, and plenty of problems are going to be caused.”  
<https://video.foxnews.com/v/4624096999001/#sp=show-clips.5>.

November 21, 2015, Rally, Alabama. “I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering. So something’s going on. We’ve got to find out what it is.”  
[https://www.huffpost.com/entry/donald-trump-911\\_n\\_565b1950e4b08e945feb7326](https://www.huffpost.com/entry/donald-trump-911_n_565b1950e4b08e945feb7326).

November 22, 2015, ABC’s “This Week” interview. “It did happen. I saw it. It was on television, I saw it. ... [I]t did happen. There were people that were cheering on the other side of New Jersey where you have large Arab populations. ... They were cheering as the World Trade Center came down. I know it might be not politically correct for you to talk about it, but there were people cheering as that building came down — as those buildings came down, and that tells you something. It was well covered at the time.” <https://www.youtube.com/watch?v=LXmcwfp-RKI>.

December 6, 2017, CBS’ “Face The Nation” interview. “You have people coming out of mosques with hate and death in their eyes.”  
<https://www.youtube.com/watch?v=bCjTkmyzLU&feature=youtu.be&t=1m13s>.

December 7, 2015, campaign statement. “Without looking at the various polling data, it is obvious to anybody the hatred [of many Muslims for the United States] is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem [of terrorism by Muslims on U.S. soil] and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.” <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>.

December 7, 2015, Rally, Mt. Pleasant, South Carolina. “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on. ... We have no choice. We have no choice. We have no choice.” <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>.

December 8, 2015, MSNBC Morning Joe interview. “It’s not unconstitutional keeping people out, frankly, and until we get a hold of what’s going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at presidential proclamations back a long time ago ... what he was doing with Germans, Italians, and Japanese, because he had to do it. Because look, we are at war with radical Islam.” <https://www.youtube.com/watch?v=5I3E3-U-1jc&feature=youtu.be&t=10s>.

December 13, 2015, Fox News Sunday interview. “There’s a sickness. They’re sick people. There’s a sickness going on. There’s a group of people that is very sick. And we have to figure out the answer. And the Muslims can help us figure out the answer.” <https://www.youtube.com/watch?v=wuDJ5aFDcd4&feature=youtu.be&t=3m13s>.

March 9, 2016, CNN interview. “I think Islam hates us. There’s something there that — there’s a tremendous hatred there. There’s a tremendous hatred. We have to get to the bottom of it. There’s an unbelievable hatred of us.” <https://www.youtube.com/watch?v=C-Zj0tfZY6o&feature=youtu.be&t=2s>.

March 22, 2016, Fox Business Network interview. “We’re having problems with the Muslims, and we’re having problems with Muslims coming into the country... You need surveillance. You have to deal with the mosques, whether you like it or not. These attacks are not done by Swedish people.” <https://medium.com/nilc/86-times-donald-trump-displayed-or-promoted-islamophobia-49e67584ac10>.

June 14, 2016, rally, Manchester, NH. “I called for a ban after San Bernardino. And it was met with great scorn and anger. Many are saying that I was right to do so. And although the pause is temporary, we must find out what is going on. We have to do it. It will be lifted, this ban, when and as a nation we’re in a position to properly and perfectly screen these people coming into our country. ...”

<https://www.youtube.com/watch?v=zV40c4bPCrA&feature=youtu.be&t=19m43s>

June 16, 2016, Twitter. “What has happened in Orlando is just the beginning. Our leadership is weak and ineffective. I called it and asked for the ban. Must be tough[.]”

<https://twitter.com/realdonaldtrump/status/742096033207844864?lang=en>.

July 27, 2018, Twitter. “Crooked Hillary Clinton wants to flood our country with Syrian immigrants that we know little or nothing about. The danger is massive. NO!”

<https://twitter.com/realdonaldtrump/status/758242674646323200?lang=en>.

August 15, 2016, speech, Youngstown, Ohio. “We should only admit into this country those who share our values and respect our people. ... In addition to screening out all members or sympathizers of terrorist groups, we must also screen out any who have hostile attitudes towards our country or its principles — or who believe that sharia law should supplant American law. Those who do not believe in our Constitution, or who support bigotry and hatred, will not be admitted.”

<https://www.latimes.com/politics/la-na-pol-trump-national-security-20160815-snap-story.html>.

October 9, 2016, Second Presidential Debate, CNBC. “The Muslim ban is something in some form that has morphed into a extreme vetting from certain areas of the world. ... It’s called extreme vetting. ... People are coming into our country like we have no idea who they are, where they’re from, what their feelings about our country are.”

<https://www.youtube.com/watch?v=2UWOijzPr1M&feature=youtu.be&t=20s>.

January 30, 2017, Twitter. “If the [January 27, 2016 Muslim entry] ban were announced with a one week notice, the ‘bad’ would rush into our country during that week. A lot of bad "dudes" out there!”

<https://twitter.com/realdonaldtrump/status/826060143825666051?lang=en>.

February 11, 2017, Twitter. “Our legal system is broken! ... ‘77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries.’ (WT) SO DANGEROUS!”

<https://twitter.com/realdonaldtrump/status/830389130311921667?lang=en>.

June 3, 2017, Twitter. “We need to be smart, vigilant and tough. We need the courts to give us back our rights. We need the Travel Ban as an extra level of safety!”

<https://twitter.com/realdonaldtrump/status/871143765473406976?lang=en>

November 24, 2017, Twitter. “Will be calling the President of Egypt in a short while to discuss the tragic terrorist attack, with so much loss of life. We have to get TOUGHER AND SMARTER than ever before, and we will. Need the WALL, need the BAN! God bless the people of Egypt.”

<https://twitter.com/realdonaldtrump/status/934131805409697792?lang=en>.

#### **D. American Jewish Community and Loyalty**

August 20, 2019, The Oval Office. ““Where has the Democratic Party gone? ... Where have they gone where they are defending these two people [U.S. Rep. Ilhan Omar and U.S. Rep. Rashida Tlaib] over the state of Israel? And I think any Jewish people that vote for a Democrat, I think it shows either a total lack of knowledge or great disloyalty.” <https://www.nytimes.com/2019/08/20/us/politics/trump-jewish-voters.html?action=click&module=inline&pgtype=Homepage>; see also <https://www.cnn.com/2019/08/20/politics/donald-trump-jewish-americans-democrat-disloyalty/index.html>.

August 21, 2019, The White House. “If you want to vote Democrat, you are being very disloyal to Jewish people and very disloyal to Israel.”

<https://www.nytimes.com/2019/08/21/us/politics/trump-jews-disloyalty.html>.

August 21, 2019, Twitter. “Thank you to Wayne Allyn Root for the very nice words. ‘President Trump is the greatest President for Jews and for Israel in the history of the world, not just America, he is the best President for Israel in the history of the world...and the Jewish people in Israel love him... ..like he’s the King of Israel. They love him like he is the second coming of God...But American Jews don’t know him or like him. They don’t even know what they’re doing or saying anymore. It makes no sense! But that’s OK, if he keeps doing what he’s doing, he’s good for..... ..all Jews, Blacks, Gays, everyone. And importantly, he’s good for everyone in America who wants a job.’ Wow!”

[https://twitter.com/realDonaldTrump/status/1164138796205654016?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1164138796205654016&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F08%2F21%2Fus%2Fpolitics%2Ftrump-jews-disloyalty.html](https://twitter.com/realDonaldTrump/status/1164138796205654016?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1164138796205654016&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F08%2F21%2Fus%2Fpolitics%2Ftrump-jews-disloyalty.html).

#### **E. Native Americans**

Congressional Hearing, (exact date undocumented), 1993. “[The Mashantucket Pequot] don’t look like Indians to me, and they don’t look like Indians to Indians.”

[https://www.huffpost.com/entry/donald-trump-on-native-americans\\_n\\_5b505f19e4b004fe162f92cc](https://www.huffpost.com/entry/donald-trump-on-native-americans_n_5b505f19e4b004fe162f92cc).

February 9, 2019, Twitter. “Today Elizabeth Warren, sometimes referred to by me as Pocahontas, joined the race for President. Will she run as our first Native American presidential candidate, or has she decided that after 32 years, this is not playing so well anymore? See you on the campaign TRAIL, Liz!”  
<https://twitter.com/realDonaldTrump/status/1094368870415110145>.

## Dissenting Statement of Commissioner Gail Heriot

I voted against publishing this report in its present form. It needs work.

Perhaps its most troubling aspect is its failure to acknowledge—much less address—many of the most serious issues relating to the enforcement of hate crimes laws. Among those issues are the large numbers of hoaxes and false alarms as well as the overbroad statutory definitions of “hate crime,” all of which may inflate the statistics. These things need to be discussed. I worry that these statistics may have given many Americans a false sense of how common hate crimes are.<sup>1</sup>

Also among the serious issues that need to be discussed is the potential for double jeopardy abuse. Not all hate crimes laws have this potential. It’s the federal statute—the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009—that does.<sup>2</sup> Like all federal criminal statutes that duplicate what state criminal statutes already cover, that law makes it possible to re-prosecute defendants who have been acquitted in state court. But since hate crimes tend to cause emotions to run high, the danger of abuse is particularly acute.<sup>3</sup>

In the unusually limited time allotted to me to write this statement, I can discuss these issues only very briefly.<sup>4</sup> They deserved much more extended treatment in this report.

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Dr. Wilfred Reilly, a professor of political science at Kentucky State University, a historically black university, has studied the hate crimes phenomenon extensively.<sup>5</sup> In his 2019 book, *Hate Crime Hoax*, he came to conclusions that will likely be unpopular in some quarters. Those conclusions can be summarized this way: *There is no rising tide of hate crimes. But there are people who want to scare others into believing there is. Sadly, their motivations are not always as pure as one might hope for.*<sup>6</sup>

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<sup>1</sup> See *infra* at p. 262-63.

<sup>2</sup> 18 U.S.C. § 249. See *infra* at 277-81. See also Gail Heriot, Civil Rights: Lights!, Camera!, Legislation!: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy, *Engage* (February 2009) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2891096](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096).

<sup>3</sup> See *infra* at p. 273-277.

<sup>4</sup> Ordinarily Commissioners, who are part-time officials, are given 30 days to respond to a report after it is adopted by the Commission. This month, we have three reports going at the same time. In the past, the Commission has staggered the due dates when two reports were approved close in time.

<sup>5</sup> Wilfred Reilly, “Hate crime hoaxes, like Jussie Smollett’s alleged attack, are more common than you might think,” *USA Today*, February 22, 2019, available at <https://www.usatoday.com/story/opinion/2019/02/22/jussie-smollett-empire-attack-fired-cut-video-chicago-fox-column/2950146002/>.

<sup>6</sup> Wilfred Reilly, *Hate Crime Hoax* (2019). Another possible useful source is the web site [fakehatecrimes.org](http://fakehatecrimes.org), which purports to have compiled a comprehensive database of the publicly known false reports of hate crimes in the United States. Currently, it lists 368. It does not, of course, purport to list hate crimes that were never revealed to the public or that were never determined to be hoaxes by the authorities.

If Dr. Reilly is even partially right, this report may be part of the problem. It encourages Americans to believe that potentially violent racial, ethnic and religious hatred is simmering below the surface in every corner of the country. I believe the Commission's time would have been better spent if it had looked at the aggregate hate crimes statistics with a bit more skepticism. Rather than being too low as the report suggests, they may be too high.

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Almost thirty years ago, in their book, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, Jack Levin and Jack McDevitt argued in lurid tones that a hate crimes epidemic was sweeping the country:

It has become nearly impossible to keep track of the shocking rise in brutal attacks directed against individuals because they are black, Latino, Asian, white, disabled, women, or gay. Almost daily, the newspapers report new and even more grotesque abominations. These “hate crimes” have become a growing threat to the well-being of our society—on the college campus, in the workplace, and around our neighborhoods. As ugly as this situation is now, it is likely to worsen throughout the remainder of the decade and into the next century as the forces of bigotry continue to gain momentum.<sup>7</sup>

The foreword to the book was by Morris Dees, the now-disgraced former head of the Southern Poverty Law Center<sup>8</sup>—an advocacy organization that famously raises millions and millions of dollars each year to fight “hate groups” (but spends little of what it raises actually doing so). The authors' sensationalized prose reads a bit like one of the SPLC's fundraising letters.<sup>9</sup>

In the final chapter, entitled “The Coming Crisis,” Levin & McDevitt acknowledged that polls indicated that Americans were becoming increasingly *tolerant* of differences rather than *intolerant*. They nevertheless predicted that things would get increasingly nasty. As proof of their fears, they offered only that “almost every advocacy organization reports that hate crimes are on the rise.” It apparently did not occur to them that advocacy organizations, whose funding

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<sup>7</sup> Jack Levin & Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* ix (1993).

<sup>8</sup> Katherine Hignett, Morris Dees and His History of Alleged Racism: Ousted SPLC Chief Has a Controversial Past, *Newsweek*, March 15, 2019; Michael Brice-Saddler, Southern Poverty Law Center Fires Co-Founder, Declines to Say What He's Alleged to Have Done, *Washington Post*, March 14, 2019; A Shocking Shake-Up at the Southern Poverty Law Center, *N.Y. Post*, March 14, 2019 (“In recent years, though, its listing of hate groups in particular has seemed unhinged—putting the socially conservative Family Research Council on the same level as the Klan.”)

<sup>9</sup> Unfortunately, “hate group” is a description the SPLC promiscuously gives to organizations whose views its leaders disagree with. See *infra* at p. 268-9. See also Joe Simonson, Southern Poverty Law Center Pays Millions to Group It Wrongly Labeled Bigoted, *Daily Signal*, June 18, 2018 (SPLC pays \$3.375 million to settle claim for wrongly naming Quilliam and its founder as anti-Muslim extremists when in fact Quilliam is a respected anti-extremist Muslim group); Dennis Prager, The Southern Poverty Law Center's Smear Campaign Against PragerU, *Daily Signal*, June 19, 2018; Greg Scott, How a “Far-Left Propaganda Machine” Got a Respected Legal Group Expelled by Amazon, *Daily Signal*, May 3, 2018 (SPLC defamed Alliance Defending Freedom, a public interest law firm supporting religious freedom, which has won nine cases before the Supreme Court).

depends on frightening donors, might not be the most trustworthy sources. Or if it did, they did not say so.

James B. Jacobs and Kimberly Potter debunked Levin & McDevitt's claim of a hate crimes explosion in the 1998 book, *Hate Crimes: Criminal Law & Identity Politics*. Unlike Levin & McDevitt, Jacobs & Potter wrote in a scholarly and measured tone. As they demonstrated, it was simply not true that hate crimes were increasing during that period.<sup>10</sup>

By 1998, however, the “epidemic” story had been repeated so often in the media that it was difficult to dislodge from the public consciousness. Sensational stories about a rising tide of prejudice-based violence sell newspapers and magazines much better than the truth—that such violence was actually much reduced over its historic highs.

In recent years, the claim of skyrocketing numbers of hate crimes has again been made. Is it true this time? It is not clear to me how the Commission—or any other body—can determine the truth or falsity of that claim without a serious examination of the problem of hoaxes and false alarms. If the claim is not true, those who promote it are doing a great disservice to the country. They are exacerbating divisions within the country rather than helping to heal them.<sup>11</sup>

None of this is to say that there are no horrific crimes motivated by racial, ethnic or religious hatred or by misogyny. Of course there are, but it is important to remember that there always have been. The crimes of Dylann Roof and Robert Bowers are particularly stunning examples. Both were merciless killers, motivated by ancient hatreds,<sup>12</sup> the former targeting African Americans,<sup>13</sup> the latter Jewish Americans.<sup>14</sup>

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<sup>10</sup> See also Laird Wilcox, *Crying Wolf: Hate Crime Hoaxes in America* (1994).

<sup>11</sup> In 1998, Jacobs and Potter warned of the possible effects of the widespread belief that hate crimes were rising. “The uncritical acceptance of stories of an epidemic may well have sociopolitical ramifications,” they wrote. Among the consequences they discuss is worsening societal divisions. See *id.* at 64. Later in their book, Jacobs & Potter caution against hate crimes statutes as a response to hate crimes for much the same reason:

The proponents of bias crime laws believe that their symbolic impact will be to teach Americans that prejudice is wrong and, in the long run, lead to less prejudice and less prejudice-motivated crime. ... [T]his belief may be misguided. Breaking down generic criminal law into new crimes and punishment hierarchies depending on the prejudices of offenders and the demographic identities of victims may exacerbate rather than ameliorate social schisms and conflicts.

*Id.* at 144.

<sup>12</sup> On the other hand, had Dylann Roof been born into a country in which everyone was of the same race or had Robert Bowers been born in a country with only one religion, they may well have found others to blame for their troubles—the rich, payday lenders, lawyers, bureaucrats, oil & gas executives, women, elected officials, the Masons, or even their own families. There are many kinds of hatred, ancient and modern. Roof and Bowers were driven by a rage born of mental illness, and mental illness can find its reasons.

<sup>13</sup> Alan Blinder & Kevin Sack, Dylann Roof Sentenced to Death in Charleston Church Massacre, *N.Y. Times*, January 17, 2017.

<sup>14</sup> Julie Turkewitz & Kevin Rose, Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting?, *N.Y. Times*, October 27, 2018.



Other mass killers may not be motivated by precisely the same kinds of hatred, but their crimes as well as their mental states are more like those of Roof and Bowers than they are different. For example, Seung-Hui Cho, who killed 32 persons at Virginia Tech in 2007, claimed to be outraged by “rich” students.<sup>15</sup> One day we may better understand the demons that drove these grotesque crimes. But I am not expecting it to happen anytime soon.<sup>16</sup>

One thing we know for certain is that mass murders do not escape notice. Whether motivated by racial hatred or something entirely different and unrelated, there is never a case in which, without hate crimes statutes, the perpetrator would have gone unnoticed or unprosecuted. In the cases in which the perpetrator survives, he can expect to be charged with first-degree murder, which ordinarily carries with it a maximum punishment of either death or life in prison.

Nor are grotesque “hate murders” involving only one victim likely to slip by unnoticed.<sup>17</sup> The federal hate crimes statute—the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009—is named for two victims thought to have been targeted by their assailants for their sexual orientation and their race respectively. As far as I am aware, no one denies that James Byrd’s assailants—Shawn Berry, Lawrence Brewer, and John King—were motivated at least in large part by race. But there is no suggestion that the State of Texas failed to prosecute them vigorously. King and Brewer were tried and convicted of capital murder. They were duly executed by lethal injection. Berry was sentenced to life imprisonment in an 8’ x 6’ cell. He is allowed out only for one hour of exercise per day.

There is a dispute over whether Matthew Shepard was targeted on account of his sexual orientation or of a drug deal gone bad.<sup>18</sup> But it is not at all clear why it should matter. Shepard’s

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<sup>15</sup> Alex Johnson, *College Gunman Disturbed Teachers, Classmates*, *NBCNews.com*, April 17, 2007.

DeWayne Craddock, who killed 12 at a Virginia Beach municipal complex in 2019 appears to have been a disgruntled employee whose wife had left him, but no one is really sure what motivated him. Lee Brown, *DeWayne Craddock was Violent with Co-Workers Before Virginia Beach Shooting: Report*, *N.Y. Post*, June 2, 2019; *Neighbors Recall Virginia Beach Gunman’s Ex-Wife as Questions of Motive Linger*, *NewsOne*, June 1, 2019. The Sandy Hook killer—Adam Lanza—had longstanding psychiatric problems and there is some evidence that his 2012 rampage may have been connected to a tendency toward pedophilia. Dave Collins, *Sandy Hook Shootings: FBI Files Reveal Mass Killer Adam Lanza Had Paedophilic Interest in Children*, *The Independent*, October 25, 2017.

<sup>16</sup> In Malaysian and Indonesian cultures, they have a word for an otherwise inexplicable mass murder—*meng-â muk*—from which English speakers derive their term “running amok.” According to Wikipedia, in those cultures, it was “believed that amok was caused by the *hantu belian*, which was an evil tiger spirit that entered one’s body and caused the heinous act.”

<sup>17</sup> If it could be shown that state prosecutors systematically under-prosecute violent crimes that victimize individuals of a particular race, color, religion, sex or national origin, then Congress would certainly have the power to remedy this problem under its Section 5 power of the Fourteenth Amendment. But there is no such claim.

<sup>18</sup> See Stephen Jimenez, *The Book of Matt: Hidden Truths About the Murder of Matthew Shepard* (2013). Journalist Stephen Jimenez went to Wyoming two years after the murder hoping to do research for a screenplay about what he thought was an obvious hate crime. After interviewing more than a hundred witnesses, he changed his mind. I shouldn’t have to mention that Jimenez is gay himself, but in the current climate some find research conducted by

life was sacred in either event. And the State of Wyoming treated it that way. Shepard's murderers—Aaron McKinney and Russell Henderson—are each serving two consecutive life sentences in prison. While Wyoming has the death penalty, Shepard's parents reportedly didn't wish to pursue it against their son's killers.<sup>19</sup>

My point is that hate crimes statutes—whether at the federal or state level—are largely superfluous in heinous cases like these. The main thing that the federal statute does is add the possibility that a defendant can be re-prosecuted if the jury acquits. Prosecutors can have a second bite at the apple. In other words, the Constitution's protection against double jeopardy does not apply to cases filed by "separate sovereigns." Under current constitutional doctrine at least, a failed state prosecution cannot oust federal prosecutors from jurisdiction; nor can a failed federal prosecution prevent a subsequent state prosecution. I will touch on whether the potential for double prosecutions is a good thing or a bad thing (or a little of both) further into this statement.<sup>20</sup> My point right now is that we don't need special hate crimes statutes to prosecute cases of murder.

At the other end of the spectrum are the minor "hate crimes." These are much more common than the cases involving murder. Here sometimes state and federal crimes laws do add greater penalties than would otherwise be applicable to the crime. It is therefore here that hate crimes statutes have to justify themselves. One important question is this: Are we better off treating these crimes as special or would we be better off treating them the same way we do crimes motivated by other kinds of hatred (e.g. hatred of the homeless or the perpetrator's competitors in business) or by greed or envy?

That is a complicated question that I cannot fully take on in this short Statement. Instead I will focus on asking about one or two corners of it: Is our current focus on hate crimes fueling the rash of hoaxes and false alarms? Are broadly worded definitions of hate crimes causing crimes to be included as "hate crimes" that the average American would not view as hate crimes? Are Americans being led to believe that there is more hatred out there than there is? These are issues that I would have liked the Commission to try to shed light on.

***False Alarms and Broadly Worded Hate Crimes Statutes:*** These days, some people appear to be seeing sinister actions when none is there. For example, reports of seeing a threatening "noose" are common. Almost always, such a report turns out to be either a false alarm or an outright hoax.<sup>21</sup> Somehow our fears have gotten out of hand.

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anyone whose "identity" (as that term is defined in the modern world) differs from the subject of his or her research to be suspect.

<sup>19</sup> Michael Janofsky, Parents of Gay Obtain Mercy for His Killer, *N.Y. Times*, November 5, 1999.

<sup>20</sup> See *infra* at p. 277-81.

<sup>21</sup> See Dave Huber, Facebook Friends Each Reported Nooses at Different Colleges: One Was a Damaged Power Cable, *The College Fix*, July 26, 2019; Dave Huber, Not a Hate Crime: "Noose" at U. Michigan Hospital Was a Fishing Knot, *The College Fix*, July 17, 2019; Sarah Elms, No Noose Found at Toledo Sewer Facility, *The Toledo Blade*, June 28, 2018; Megan Moser, Report About Noose on Campus in May Unravels, *The Mercury* (Manhattan, Kansas), November 11, 2017; Dave Huber, "Noose" that Turns Out to be Lost Shoelace Causes Uproar at Michigan State, *The College Fix*, October 5, 2017; No Noose, But UD Group Proceeds to Protest "Unsatisfactory Racial Curriculum and General Racist Tone," *The College Fix*, September 26, 2015 (the "noose" reported at the University

Real but ordinary crimes are easily mistaken for hate crimes, especially when police officers are being encouraged by reports like this one to report more hate crimes, and prosecutors are being encouraged to prosecute them more. For example, when people who lack self-control get angry, they often throw out whatever insults they can. Sometimes all they know about the person they are arguing with is that person's race, ethnicity or sex, so that's what they use. It doesn't mean they are racists or sexists.<sup>22</sup> It means they are idiots.<sup>23</sup>

Consider, for example, a conflict over a parking space: The argument escalates to the trading of ethnic slurs and then, briefly, becomes somewhat physical. The cause of the conflict wasn't racial animus. The cause was frustration over not getting a parking space. The story would have unfolded in the same way without the racial element.

It is worth pointing out that this appears to have actually happened, perhaps many times.<sup>24</sup> In 2018, in a parking structure at Santa Monica College Performing Arts Center, an African-American woman parked her car in two spaces and an 80-year-old white man got into an argument with her. The argument boiled over when the man began engaging in childish name-calling and kicking.<sup>25</sup> The combatants were strangers, and while they knew each other's race, they didn't know

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of Delaware turned out to be the remnants of lanterns that had been hanging in a tree); Lindsay Welbers, Length of Rope Identified; Not a Noose, *Hyde Park Herald* (Chicago), July 31, 2013; Daniel De Vise, Georgetown U.: Rope Found on Campus Not a Noose, *Washington Post*, October 1, 2010; Kate Hessling, Police Determine Hanging Rope in Chandler Twp. Is Not a Noose, *Huron Daily Tribune*, September 16, 2008; Laurie Willis, Hate-Crime Case Closed as Family Learns Rope in Yard Was Not a Noose, *Baltimore Sun*, May 12, 2000 (rope was remnant of an old swing). Other nooses have also turned out not to be what they seem. See Robby Soave, Duke Student Who Hung A Noose on a Tree Made a Bad Pun. Expel Him Anyway?, *Reason.com*, May 4, 2015 ("The student wished to invite his friends to join him outside, and so he tied a piece of yellow cord around a tree branch, snapped a picture of it, and texted it to them as a request to 'hang out.'"). Other nooses have turned out to be hoaxes, often perpetrated by the individual who reported them to the authorities. See Wilfred Reilly, Hate Crime Hoaxes Like Jussie Smollett's Alleged Attack, Are More Common Than You Think, *USA Today*, February 22, 2019; Justin Fenton, Firehouse Incident with a Noose Was a Hoax, *Baltimore Sun*, December 2, 2007; Black Students Connected to [Salisbury University] Racist Drawing, *DelmarvaNow.com*, April 28, 2016. See also Becket Adams, Student Arrested in Yet Another Suspected Campus Hate Crime Hoax, *Washington Examiner*, October 22, 2018.

<sup>22</sup> In the novel *The Godfather* and the movie based on it, movie producer Jack Woltz insults lawyer Tom Hagen by calling him a "dago guinea wop greaseball goombah." Hagen replies, "I'm German-Irish." Without missing a beat, Woltz switches to referring to Hagen as "my kraut-mick friend." His choice of insults seems here not springing from deep-seated animus against Italian, German, and/or Irish Americans, but by the need to land whatever punch on Hagen that would work. Though this example is fictional, ethnic insults have been tossed off in similar, non-animus-driven ways in real life.

<sup>23</sup> That leads to an interesting hypothetical: Imagine two otherwise identical simple batteries. In one, the perpetrator uses an ethnic slur as he slaps the victim's face. In the other, he calls the victim ugly or stupid. Is the first really more hurtful than the other? Ugly and stupid are negative qualities. Membership in a particular racial or ethnic group is not.

<sup>24</sup> Note that I am not saying that parking disputes can never result in serious crimes or that they can never result in clear hate crimes. Of course they can.

<sup>25</sup> See Melissa Etehad, Fight Over Santa Monica Parking Spot Turns Into What Campus Police Call a Hate Crime, *L.A. Times*, May 3, 2018, available at <https://www.latimes.com/local/lanow/la-me-ln-santa-monica-parking-lot-fight-20180503-story.html>.

many other facts about each other that could be used to injure. While the man used a well-known racial epithet, there was no evidence that he harbored actual ill feelings toward African Americans as a group. The “group” he really had a beef with was people who take up two spaces with one car. But Santa Monica College police took him into custody (rightly, since he committed a battery) and the act was classified as a hate crime (without more facts, perhaps wrongly).

What would have happened if the Commission had undertaken the hard work of looking at the minor crimes reported to federal authorities as hate crimes for statistical purposes? How many would have fallen into the category of “Well ... maybe, maybe not” in terms of the proof that the crime was motivated by hatred of one of the specially protected groups? Without careful study we have no way of knowing. That is why I would have liked such an effort to be undertaken.

Another underappreciated problem here is that the federal hate crimes statute, for one, does not prohibit crimes based on “hate” or even crimes based on bias or prejudice.<sup>26</sup> It is much more loosely worded than that. It requires only that the crime be committed “*because of*” someone’s (not necessarily the victim’s) actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability. Hatred is not required (despite the statute’s misleading title, the Matthew Shepard and James Byrd, Jr. *Hate Crimes* Prevention Act of 2009). So consider:

- Rapists are seldom indifferent to the gender of their victims. They are almost always chosen “because of” their gender.
- A thief might well steal only from the disabled because, in general, they are less able to defend themselves. Literally they are chosen “because of” their disability.<sup>27</sup>
- An employer might become violent and irate when an employee fails to complete a task on time, but the reason for the employee’s lack of speed may be a disability.

Indeed, large numbers of crimes occur “because of” somebody’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability that the average person would not regard as a “hate crime.” A good lawyer can frequently make a plausible argument that a particular ordinary crime was a hate crime under such a loose definition.

This was not just sloppy draftsmanship. The language was chosen deliberately. Administration officials wanted something susceptible to broad construction. As a staff member of the Senate Committee on the Judiciary back in 1998, I had several conversations with DOJ representatives about an earlier version of the bill. They repeatedly refused to disclaim the view that all rape would be covered, and resisted efforts to correct any ambiguity by re-drafting the language.<sup>28</sup> They *liked* the bill’s broad sweep. The last thing they wanted was to limit the scope

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<sup>26</sup> I have not made a study of state hate crimes statutes.

<sup>27</sup> I have used precisely these hypotheticals before. See Gail Heriot, Civil Rights: Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy, *Engage* 4, 5 (February 2009), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2891096](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096).

<sup>28</sup> This inclusion of all rape as a “hate crime” would be in keeping with at least one previous Congressional statement. For example, Senate Report 103-138, issued in connection with the Violence Against Women Act, stated

of the statute's reach by requiring that the defendant be motivated by ill will toward the victim's group.<sup>29</sup>

It would have been useful for the Commission to look into the question of whether the "hate crimes" being prosecuted always involved actual hatred or sometimes involved something less than that. Are federal prosecutors taking advantage of the statute's loose wording or not?

**Hoaxes:** This is surely a touchy subject. But it's one that the U.S. Commission on Civil Rights needs to get out into the open. Our job is to get the truth out, not to toe a particular party line.

Dr. Reilly reports in *Hate Crime Hoax* that he "put together a fairly large database of hate crime allegations—346 of them—by searching for relevant terms such as 'hate crime,' 'campus hate crime,' 'hate crime allegation,' and 'hate crime controversy' on Google, JSTOR, and Google Scholar." Here is what he found:

Over several years I was able to confirm that *fewer than a third of these cases could even possibly have been genuine hate crimes*. . . . The literal majority of these incidents, which were almost all initially reported with a great deal of fanfare and breast-beating, were later exposed as hoaxes. Well, in truth, "exposed" is a gross exaggeration. Evidence demonstrated that they were fake hate crimes. But that fact got very little exposure in the press—particularly in comparison with the initial publicity for the supposed hate crimes. The initial headlines that had touted each case as a horrific example of contemporary bigotry vanished from the internet, replaced by either nothing at all or by low-key rueful acknowledgements that a hoax had taken place.<sup>30</sup>

Reilly's figure is extraordinary--fewer than a third of cases were even *possibly* genuine. If the genuine cases were twice that, we would still have an enormous problem on our hands. Have we somehow focused so intently on hate crimes as a "special" problem that we are encouraging attention seekers to claim falsely to be victims? Are these hoaxes frightening people into believing

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that "[p]lacing [sexual] violence in the context of civil rights laws recognizes it for what it is—a hate crime." See Kathryn Carney, Rape: The Paradigmatic Hate Crime, 75 ST. JOHN L. REV. 315 (2001)(arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act, HARV. WOMEN'S L. J. 157 (1994)(arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution in Transforming a Rape Culture* 47, 52 (Emilie Buchwald, et al, eds. 1993)("Rape is a hate crime, the logical outcome of an ancient social bias against women.")

<sup>29</sup> In response to the argument that all rape could arguably fit under the statute, Senator Edward Kennedy seems to have disclaimed any intention of covering classifying all rape that way. See Edward Kennedy, Hate Crimes: The Unfinished Business of America, 44 BOSTON BAR J. 6 (Jan./Feb. 2000)("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes"). Instead he argued that it should take something more. He suggests "such aggravating factors as a serial rapist." But the statutory language as passed does not easily support such a distinction.

<sup>30</sup> Reilly at xxii (emphasis added).

that hatred of this kind is more common than it is? It would have been useful for the Commission to try to determine how common these hoaxes are, how much publicity they get both before and after they are revealed to be hoaxes, and what effect they have on Americans. I am disappointed that the Commission did not do so.

After the Jussie Smollett case, it is hard to imagine that anyone in the country hasn't heard of hate crime hoaxes. Smollett's story was extremely difficult to believe from the start for those who knew the facts and the context. He is a resident of Streeterville, one of the toniest neighborhoods in the city (and indeed the country). Chicago's Magnificent Mile is just steps from Smollett's residence. Yet he claimed to have been attacked by two thugs wearing MAGA hats.

Only 12.5% of Chicagoans voted for Trump,<sup>31</sup> and the ones that did ordinarily do not hang out in Streeterville wearing MAGA hats at 2:00 a.m. on a bitter cold January night armed with a hangman's noose in hopes that an African American or gay individual might walk by alone at a moment during which no witnesses (and no cameras) would catch the incident. It was an implausible story. Crimes happen in Chicago. But not *that* crime. Not in Streeterville ... at 2:00 a.m. ... with MAGA hats and a cheesy noose made of clothesline ... when it's colder than the hinges of hell ... and with cameras on every corner.

Thugs can't even easily tell a potential victim's race or sex on a cold Chicago night when nearly every inch of his or her body is likely to be covered in coat, a hat, gloves, a hood and a scarf. But to add to the unlikelihood of it all, Smollett claimed that his attackers recognized him as one of the actors in the Fox television series *Empire*. That series depicts an African American family in the hip hop entertainment business. Smollett plays the gay, middle son of the family. Somehow his attackers were not just familiar with the show and able to identify him as one of its supporting players. They also presumed that Smollett himself is gay and not just the character he played.<sup>32</sup>

As a former Chicagoan, I thought that Smollett's story would likely unravel. In the meantime, however, many Americans understandably assumed Smollett's story was true and expressed their solidarity with him.

While most Americans are now aware of how the Smollett story turned out (including the lenient treatment he received), there are many hundreds of hoaxes that are less well known but nevertheless documented. And, of course, the number of hoaxes that have never been determined definitively to be hoaxes is likely many times larger.

Dr. Reilly listed a number of examples that I had never heard about. Like this one at Kean University:

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<sup>31</sup> Luke Seeman, How Chicago Voted for President, *Chicago Magazine*, November 9, 2016, <https://www.chicagomag.com/city-life/November-2016/Chicago-Election-Results-President/>.

<sup>32</sup> *Empire* is a popular show, but even popular shows do not make their supporting players instantly recognizable on a cold winter night to everyone. According to Nielsen ratings at or near the time of the Smollett hoax, the show had a little more than 4 million viewers. In other words, by far, most Americans *don't* watch it. Travis Clark, "Empire" Ratings Hit Series Low After Jussie Smollett's Arrest, *Business Insider*, March 21, 2019, available at <https://www.businessinsider.com/empire-ratings-fall-after-jussie-smolletts-arrest-nielsen-2019-3>.

In 2016, at Kean University, the now-suspended Twitter account @keanuagainstblk was used to tweet out multiple disturbing messages such as “I will kill all the Blacks (who) go to Kean University,” tauntingly tagging the campus police department in some of the tweets. This was taken as evidence that the university president, himself a minority activist named Dawood Farahi, had failed to “(do) enough to address racial tensions,” and massive demonstrations swept the campus. The state police and Department of Homeland Security were involved, and the total bill for restoring order and identifying the maker of the threats ran to \$100,000. In the end, however, an IP-address trace by police showed that every one of the tweets came from the computer of one Kayla McKelvey, a leader of anti-administration protests with past grievances against Kean.<sup>33</sup>

McKelvey, an African American, said her intent was to expose racism on campus. She was sentenced to 90 days in the county jail.<sup>34</sup> Note that her story was a hoax only in the sense that the perpetrator was not a racist as had been assumed. The students she was threatening were not less terrorized when she made her threats.

Reilly reports that “[i]t would not be hard at all to fill a full-length book simply with campus incidents” like this. Some are frighteningly similar to the Kean incident:

In late 2012, a remarkable and disturbing string of “hate incidents” swept the pleasant three-lined campus of the University of Wisconsin-Parkside, about one hour’s drive due north of Chicago. First an object resembling a hangman’s noose, woven out of rubber bands, was found on campus by a group of students. The very next day, an honor student named Aubriana Banks was sent a second noose made of corded string in the mail. Later that night, students came across professionally made flyers posted around campus, reading “Nig[\*\*\*]s will DIE in two days,” with the names of thirteen Black students written on the bottom of each. Finally, after a great deal of shouting and some detective work, most of the apparently anti-Black incidents were traced back to Black student Khalilah Ford. ... Incredibly, Ford defended her racist flyers and death threats by claiming that the Parkside administration has not responded quickly enough to the first “noose” found on campus—for which she rather implausibly denied responsibility—and needed to be prodded away from such unacceptable “racism.”<sup>35</sup>

But many of the incidents Reilly reports took place off campus. Like this one:

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<sup>33</sup> Reilly at 7-8.

<sup>34</sup> Kean Student Sentenced for Sending Threatening Tweets, *NewJersey.News12.com*, (undated) available at <http://newjersey.news12.com/story/34864813/kean-student-sentenced-for-sending-threatening-tweets>.

<sup>35</sup> Reilly at 8.

... Yasmin Seweid—the Muslim student who garnered headlines worldwide after claiming to have been accosted on New York City’s Line 6 train by three drunken white men who called her a terrorist and yanked at her hijab—claimed that her assailants were yelling “Donald Trump.” After being confronted by police about multiple inconsistencies in her story, however, Seweid broke down and admitted to making the whole thing up in order to avoid confessing to her strict Muslim parents that she had been out late enjoying a night of underage drinking with her boyfriend.<sup>36</sup>

Many of the hoaxes—like Smollett’s and Seweid’s—involve accusations that Trump supporters had committed the crime. A historic African American church in Greenville, Mississippi was torched with the words “Vote Trump!” scrawled on the wall. The perpetrator turned out to be an African American parishioner with a history of problems. He was not a Trump supporter. In Indianapolis, the individual who defaced a church with swastikas and the words, “Heil Trump” turned out to be the organist who was seeking to discredit Trump. Dr. Reilly devotes a whole chapter of his book to Trump-related hate crime hoaxes. Suffice it to say there are a lot of them.<sup>37</sup>

But there have been plenty of other examples, dating back decades: in 1997, two African American Duke University students were discovered to have hung a black baby doll from a tree near the spot where the Black Student Alliance was planning a protest. A year later, a St. Cloud University student slashed her own face and claimed that two men had done it while yelling anti-gay insults. In 2004, a visiting professor at Claremont McKenna College painted a swastika on her own car and slashed its tires.<sup>38</sup> Frequently, these incidents have provoked dramatic responses on the campuses where they occur ... until they are found to be hoaxes.

### ***Cui Bono?***

Beyond individual attention seekers, who benefits from trying to convince decent Americans that the level of racial, ethnic, and religious hatred is worse than it is? One possibility is the Southern Poverty Law Center, an organization that currently has about 254 employees and an endowment of \$471 million.<sup>39</sup> An examination of its web site could easily lead some to believe that the nation is chock full of white supremacists and Nazi stormtroopers. But, while the SPLC doesn’t say so, among the real “hate groups” it identifies, most have only a miniscule membership.

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<sup>36</sup> Reilly at 11.

<sup>37</sup> See also Peter Hasson, “19 ‘Hate Crimes’ That Were Hoaxes or Different Than Media Suggested,” *Daily Signal*, February 19, 2019, available at <https://www.dailysignal.com/2019/02/19/19-hate-crimes-in-trump-era-that-were-hoaxes-complicated/>.

<sup>38</sup> Bradley Campbell and Jason Manning, “Hate Crime Hoaxes Are More Common Than You Might Think,” *Quillette*, February 22, 2019, available at <https://quillette.com/2019/02/22/hate-crime-hoaxes-are-more-common-than-you-think/>.

<sup>39</sup> Ben Schreckinger, Has a Civil Rights Stalwart Lost Its Way?, *Politico*, July/August 2017, available at <https://www.politico.com/magazine/story/2017/06/28/morris-dees-splc-trump-southern-poverty-law-center-215312>.



Some apparently have only one member.<sup>40</sup> The rest are not hate groups at all; they are victims of an SPLC smear.

For example, the Alliance Defending Freedom is a public interest law firm that defends religious freedom. It has argued nine cases before the Supreme Court and won all nine. Yet the SPLC has condemned it as some sort of menace. Other individuals and organizations the SPLC has slimed in recent years include popular radio personality Dennis Prager's Prager U, feminist author Ayaan Hirsi Ali, Vanderbilt University law professor Carol Swain, U.S. Senator Rand Paul, and HUD Secretary Ben Carson.<sup>41</sup>

The SPLC does not agree with these individuals and organizations. Fine. I don't always agree with them myself. Some (but by no means all) of them have said things that I have considered over the top or needlessly unkind. But that doesn't make them into a modern day Ku Klux Klan.

I am disappointed that the staff-generated part of this report extensively cites the SPLC for its supposed expertise in hate crimes. The Commission appears to be among the last to learn about the SPLC's methods.

Note that it is by no means just conservatives who come to be skeptical of the SPLC. To the contrary, over the years, most of penetrating criticisms have come from left-of-center publications. *The Progressive*, *The Nation* and *Harper's* have all taken on the organization. Up until recently, most newspapers and most conservative publications have been too timid to criticize such an organization—much to their discredit. It has only been since co-founder Morris Dees and

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<sup>40</sup> Nathan J. Robinson, The Southern Poverty Law Center Is Everything that is Wrong With Liberalism, *Current Affairs*, March 26, 2019. Robinson wrote:

In fact, when you actually look at the hate map [on the SPLC's web site], you find something interesting: Many of these "groups" barely seem to exist at all. A "Holocaust denial group in Kerrville, Texas called carolynyeager.net appears to just be a woman called Carolyn Yeager. A "male supremacy" group called Return of the Kings is apparently just a blog published by pick-up artist Roosh V and a couple of his friends, and the most recent post is an announcement from six months ago that the project was on indefinite hiatus. Tony Alamo, the abusive cult leader of "Tony Alamo Christian Ministries," died in prison in 2017. (Though his ministry's web site still promotes "Tony Alamo's Unreleased Beatles Album.") A "black nationalist" group in Atlanta called "Luxor Couture" appears to be an African fashion boutique.

If the SPLC's assertion that hate groups are on the rise means anything, it is that everybody seems to have a web site these days, even nut cases. But it isn't that these nut cases didn't exist before.

<sup>41</sup> As a result of criticism, the SPLC later walked back its statements about Ayaan Hirsi Ali and Ben Carson. Hemant Mehta, The SPLC Has Removed Its Controversial Page Listing "Anti-Muslim Extremists", *Friendly Atheist*, April 19, 2018, available at <https://friendlyatheist.patheos.com/2018/04/19/the-splc-has-removed-its-controversial-page-listing-anti-muslim-extremists/>; SPLC Statement on Dr. Ben Carson, February 11, 2015, available at [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/splc\\_statement\\_carson\\_feb2015.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/splc_statement_carson_feb2015.pdf).

president Richard Cohen were fired without explanation that criticisms have rained down on the organization.

Writing for *The New Yorker* in 2019, Bob Moser, a former SPLC staff member, told this story:

In the days since the stunning dismissal of Morris Dees, the co-founder of the Southern Poverty Law Center, on March 14<sup>th</sup>, I've been thinking about the jokes my S.P.L.C. colleagues and I used to tell to keep ourselves sane. Walking to lunch past the center's Maya Lin-designed memorial to civil-rights martyrs, we'd cast a glance at the inscription from Martin Luther King, Jr., etched into the black marble—"Until justice rolls down like waters"—and intone, in our deepest voices, "Until justice rolls down like dollars." The Law Center had a way of turning idealists into cynics.<sup>42</sup>

The SPLC may have started off well-intentioned enough. But its campaign to sue the Ku Klux Klan out of existence didn't require as much legal skill and financial support as some of its donors may have thought. By the 1980s, when the SPLC's assault began, the KKK was a tiny group of losers with no more influence on public affairs than the typical town drunk. As one of the SPLC's staff attorneys admitted, suing them was a bit like shooting fish in a barrel.<sup>43</sup>

What the SPLC excelled at was fundraising. Founder Morris Dees is an excellent salesman—*so good that he has been inducted into the Direct Marketing Association's Hall of Fame*.<sup>44</sup> And he is not ashamed to describe himself in terms of his salesmanship:

"I learned everything I know about hustling from the Baptist church," he once told a reporter. "Spending Sundays sitting on those hard benches listening to the preacher pitch salvation—why, it was like getting a Ph.D. in selling."<sup>45</sup>

With his KKK project he found a product that would sell well to well-meaning donors. In his 1988 exposé entitled *Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan*, journalist John Egerton quoted a former SPLC staffer:

"The money poured in," [the staffer] says. "Everybody, it seems, was against the Klan. We developed a whole new donor base, anchored by wealthy Jewish contributors on the East and West Coasts, and they gave big bucks. Our budget

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<sup>42</sup> Bob Moser, The Reckoning of Morris Dees and the Southern Poverty Law Center, *New Yorker*, March 21, 2009.

<sup>43</sup> John Egerton, Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan, *The Progressive* 14, 17 (July 1988).

<sup>44</sup> Daniel Schlozman, How the SPLC's Co-Founder Morris Dees and the Conservative Richard Viguerie Changed American Politics, *Washington Post*, April 2, 2019.

<sup>45</sup> John Egerton, Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan, *The Progressive* 14, 15 (July 1988).

shot up tremendously—and still, we were sometimes able to raise as much as \$3 million a year more than we could spend.”<sup>46</sup>

How did all of that money get spent? Part of it went to build the SPLC’s 150,000 square foot office building, which was designed by a New York architecture firm and is located in Montgomery, Alabama. Dubbed the “Poverty Palace,” it cost \$15 million to build. Part of it went to high salaries for its top employees. Morris Dees and Richard Cohen each earned over \$300,000 just in salary from the SPLC.<sup>47</sup> Much of it was socked away in the SPLC’s “endowment.”

Of course, most of the publicity Morris Dees got during these early decades was complimentary, even celebratory. In 1991, there was a NBC made-for-television movie entitled *Line of Fire: The Morris Dees Story*. By 2000, however, things began to change and much less flattering treatment started to dominate. In that year, Ken Silverstein, writing in *Harper’s*, delivered a devastating critique:

Ah, tolerance. Who could be against something so virtuous? And who could object to the Southern Poverty Law Center, the Montgomery, Alabama-based group that recently sent out [a] heartwarming yet mildly terrifying appeal to raise money ...? Cofounded in 1971 by civil rights lawyer cum direct-marketing millionaire Morris Dees, a leading critic of "hate groups" and a man so beatific that he was the subject of a made-for-TV movie, the SPLC spent much of its early years defending prisoners who faced the death penalty and suing to desegregate all-white institutions like Alabama's highway patrol. That was then. Today, the SPLC spends most of its time—and money—on a relentless fund-raising campaign, peddling memberships in the church of tolerance with all the zeal of a circuit rider passing the collection plate. "He's the Jim and Tammy Faye Bakker of the civil rights movement," renowned anti-death-penalty lawyer Millard Farmer says of Dees, his former associate, "though I don't mean to malign Jim and Tammy Faye." The center earned \$44 million last year alone--\$27 million from fund-raising and \$17 million from stocks and other investments—but spent only \$13 million on civil rights programs, making it one of the most profitable charities in the country.<sup>48</sup>

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<sup>46</sup> Egerton at 17.

<sup>47</sup> Nathan J. Robinson, The Southern Poverty Law Center Is Everything that is Wrong With Liberalism, *Current Affairs*, March 26, 2019.

<sup>48</sup> Ken Silverstein, The Church of Morris Dees: How the Southern Poverty Law Center Profits from Intolerance, *Harper’s*, November 2000, available at <https://rkeefe57.files.wordpress.com/2015/01/church-of-morris-dees.pdf>.

Several years later, Silverstein published a letter in his *Harper’s* blog with the following message:

Many of you out there have no doubt received in the mail desperate cries for help from the Southern Poverty Law Center (SPLC), the do-gooder group that does very little good considering the vast sums of money it raises. But before you pull out your checkbook, make sure to read the following letter that Stephen Bright, an Atlanta-based civil rights and anti-death penalty attorney, recently wrote in declining an invitation to an event that honors Morris Dees, head of the SPLC.

Kenneth C. Randall, Dean and

Several years later, in 2009, Alexander Cockburn, writing in *The Nation*, wondered what the SPLC would do after the election of Barack Obama as President and a Democratic Congress to boot:

What is the archsalesman of hatemongering, Morris Dees of the Southern Poverty Law Center, going to do now? Ever since 1971, US Postal Service mailbags have

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Thomas L. McMillan, Professor of Law  
School of Law  
University of Alabama  
249 Law Center  
Box 870382  
101 Paul W. Bryan Drive  
Tuscaloosa, AL 35487-0382

Dear Dean Randall:

Thank you very much for the invitation to speak at the law school's commencement in May. I am honored by the invitation, but regret that I am not able to accept it due to other commitments at that time.

I also received the law school's invitation to the presentation of the "Morris Dees Justice Award," which you also mentioned in your letter as one of the "great things" happening at the law school. I decline that invitation for another reason. Morris Dees is a con man and fraud, as I and others, such as U.S. Circuit Judge Cecil Poole, have observed and as has been documented by John Egerton, *Harper's*, the Montgomery Advertiser in its "Charity of Riches" series, and others.

The positive contributions Dees has made to justice—most undertaken based upon calculations as to their publicity and fund raising potential—are far overshadowed by what *Harper's* described as his "flagrantly misleading" solicitations for money. He has raised millions upon millions of dollars with various schemes, never mentioning that he does not need the money because he has \$175 million and two "poverty palace" buildings in Montgomery. He has taken advantage of naive, well-meaning people—some of moderate or low incomes—who believe his pitches and give to his \$175-million operation. He has spent most of what they have sent him to raise still more millions, pay high salaries, and promote himself. Because he spends so much on fund raising, his operation spends \$30 million a year to accomplish less than what many other organizations accomplish on shoestring budgets.

The award does not recognize the work of others by associating them with Dees; it promotes Dees by associating him with the honorees. Both the law school and Skadden are diminished by being a part of another Dees scam.

Again, thank you for the invitation to participate in your commencement. I wish you and the law school the very best.

Sincerely,

Stephen B. Bright

cc: Morris Dees  
Arthur Reed  
Dees award committee

Ken Silverstein, The Southern Poverty Business Model, The *Harper's* Blog, November 2, 2007, available at <https://harpers.org/blog/2007/11/the-southern-poverty-business-model/>.

bulged with his fundraising letters, scaring dollars out of the pockets of trembling liberals aghast at his lurid depictions of a hate-sodden America in dire need of legal confrontation by the SPLC.<sup>49</sup>

The SPLC has occasionally had to pay a price for smearing legitimate organizations as “hate groups.” For example, last year it paid \$3.375 million to Maajid Nawaz's Quilliam Foundation after admitting to falsely labeling that organization as an anti-Muslim extremist group. In fact, the Quilliam Foundation is anything but that. It is an organization of moderate Muslims seeking to discourage extremism. In connection with the settlement, the SPLC apologized for its defamatory statements.<sup>50</sup>

Weirdly enough, one of the SPLC's most dangerous overreaches itself led to a crime of hatred. On August 15, 2012, a gunman attempted to enter the offices of the Family Research Council. He brought with him a number of Chick-Fil-A sandwiches. His intent was to kill as many FRC staff members as possible and smear the Chick-Fil-A over their bodies. A heroic unarmed security guard saved them, but only at the cost of taking a bullet in the arm himself.<sup>51</sup>

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<sup>49</sup> Alexander Cockburn, King of the Hate Business: With Haters on the Wane, What Will the Hate Seekers Do?, *The Nation*, April 29, 2009.

<sup>50</sup> Greg Price, Southern Poverty Law Center Settles Lawsuit After Falsely Labeling “Extremist” Organization, *Newsweek*, June 18, 2018.

<sup>51</sup> FRC staff member Jessica Prol Smith described that day this way:

I'll never forget the moment I learned we were on lockdown. It was Aug. 15, 2012. My frustration mingled with fear. Trapped on the sixth floor, we knew someone had been shot. We knew we couldn't leave yet. We knew little else.

While I was missing lunch, a crime scene played out in the office lobby below me. My coworker and friend Leo wasn't armed, but he had played the quick-thinking and inadvertent hero, disarming a young man on a mission to kill me and as many of my colleagues as possible. The gunman had packed his backpack with ammo and 15 Chick-fil-A sandwiches—later admitting that he had planned to smear them on our lifeless faces as a political statement. Leo took a bullet in the arm but managed to hold the attacker until law enforcement arrived.

I wrote and edited for the Family Research Council, a public advocacy organization that promoted the principles I have cared about since childhood: protecting the family, promoting the dignity of every human life and advocating for religious liberty. It reads like a tagline, but it's also just what I believed and the way I chose to match my career with my convictions.

I never expected that everyone would celebrate or share my beliefs. But I did expect to be able to discuss and debate these differences without becoming a political target in an act of terrorism, the first conviction under Washington, D.C.'s 2002 Anti-Terrorism Act.

It was the type of violent incident that one could expect a group that purportedly monitors “hate” like the Southern Poverty Law Center, to notice, research and decry. In fact, we were on the center's radar but for all the wrong reasons. The assailant acknowledged later in FBI testimony that he had selected our office precisely because the SPLC had labeled my employer a “hate group.”

As it turned out, the gunman had learned about the FRC from the Southern Poverty Law Center, which had labeled the organization a hate group. In fact, the FRC is a socially conservative Christian organization that opposes pornography, abortion, and same-sex marriage. The SPLC condemned the gunman's action, but continues to view the FRC as a hate group though its positions are quite mainstream among conservative evangelicals and certainly in no way violent.

The SPLC's many overreaches are by no means harmless.

***Potential for Double Jeopardy Abuse:***<sup>52</sup> A final issue I believe the report should have addressed is the potential for double jeopardy abuse posed by the *federal* hate crimes statute.<sup>53</sup> This is not a potential that is unique to the federal hate crimes statute (as opposed to other federal criminal statutes), but owing to the hate crimes statute's broad wording and to the emotional response that the term "hate crime" tends to trigger, the potential for abuse is particularly significant.

Here are the outlines of the story: Like many federal criminal laws, the federal hate crimes statute only criminalizes actions that are already criminalized by state law. In other words, it does not prohibit any activity that wasn't prohibited already.<sup>54</sup>

The main legal ramification of this double coverage is to make it possible for federal

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It has always been easier to smear people rather than wrestle with their ideas. It's a bully who calls names and spreads lies rather than thoroughly reading a brief's legal arguments or challenging the rationale underlying a policy proposal. The SPLC has chosen to take the easy path—to intimidate and mislead for raw political power and financial benefit.

Jessica Prol Smith, The Southern Poverty Law Center is a Hate-Based Scam that Nearly Caused Me to Be Murdered, *USA Today*, August 17, 2019.

<sup>52</sup> I have previously made these points in Gail Heriot, Civil Rights: Lights!, Camera!, Legislation!: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy, *Engage* (February 2009) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2891096](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096).

<sup>53</sup> I believe that the statute is also unconstitutional in part. See Brief Amicus Curiae of Gail Heriot and Peter N. Kirsanow, in Support of Petitioner in *Metcalfe v. United States*, No. 17-9340 (filed July 16, 2018). The brief argues that the portion of the Act that relies on the Thirteenth Amendment for its authorization is unconstitutional.

<sup>54</sup> What justification exists for this redundancy? Back in 1998, Administration officials argued that it was needed, because state procedures often make it difficult to obtain convictions. They cited a Texas case involving an attack on several black men by three white hoodlums. Texas law required the three defendants to be tried separately. By prosecuting them under federal law, however, they could have been tried together. As a result, admissions made by one could be introduced into evidence at the trial of all three without falling foul of the hearsay rule.

One might expect that argument to send up red flags among civil libertarian groups like the ACLU. But political correctness seems to have caused them to abandon their traditional role as advocates for the accused. See ACLU Applauds Senate Introduction of Hate Crimes Legislation, available at [www.aclu.org/lgbt/gen/29340prs20070412.html](http://www.aclu.org/lgbt/gen/29340prs20070412.html) (April 12, 2007). Still, the argument cries out: Isn't this just an end-run around state procedures designed to ensure a fair trial? The citizens of Texas evidently believe that separate trials are necessary to ensure innocent men and women are not punished. No one is claiming that Texas applies this rule only when the victim is black or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

authorities to re-prosecute a defendant after a state jury has declined to convict. Indeed, it is overwhelmingly likely that this was the reason some wanted the law. This creates obvious problems.<sup>55</sup>

School children are taught that the Double Jeopardy Clause of the Constitution guarantees that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>56</sup> They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. As the Supreme Court put it in *United States v. Lanza*, a defendant who violates the laws of two sovereigns has “committed two different offenses by the same act, and [therefore] a conviction by a court [of one sovereign] of the offense that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy.”<sup>57</sup> A state cannot oust the federal government from jurisdiction by prosecuting first; similarly the federal government cannot oust the state. Indeed, New Jersey cannot oust New York from jurisdiction over a crime over which they both have authority, so in theory at least a defendant may face as many of 51 prosecutions for the same incident.<sup>58</sup>

The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the “prosecutorial punch,” it can, in effect, veto the implementation of federal policy (and vice versa). In 1922, the Court in *Lanza* put it in terms of Prohibition, which was then hotly controversial. Allowing a state to “punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines,” it wrote, will lead to “a race of offenders to the courts of that State to plead guilty and secure

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<sup>55</sup> The ACLU endorsed the bill without any discussion of the potential double jeopardy issues it raises. See *supra* at n. 53. Professor Paul Cassell reports that the ACLU was split on the federal prosecution on the police officers accused of using excessive force against Rodney King following their acquittal on state charges. Although the ACLU’s Board of Directors ultimately mustered a vote of 37 to 29 to support the proposition that re-trials constitute double jeopardy, several chapters continued to demand that federal civil rights law be employed to prosecute the Rodney King defendants, notably the Southern California chapter, where the conduct took place. See Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693, 709-15 (1994). See Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights “Exception,”* 41 UCLA L. REV. 649 (1994) (Legal Director of the ACLU Foundation of Southern California makes argument in favor of re-prosecutions in cases involving “civil rights”).

<sup>56</sup> U.S. CONST. AMEND. V.

<sup>57</sup> 260 U.S. 377, 382 (1922). See *Abbate v. United States*, 359 U.S. 187 (1959) (federal prosecution upheld following state conviction); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852) (dictum); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 424-35 (1847) (dictum).

<sup>58</sup> At the time of *Lanza*, the Double Jeopardy Clause was thought not to apply to the states and some arguments for the dual sovereignty doctrine rely on that view. But the Supreme Court has held steadfastly to the dual sovereignty doctrine even after *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Clause had been incorporated through the Fourteenth Amendment. See *Heath v. Alabama*, 474 U.S. 82, 87-89 (1985) (case involving the dual sovereignty of Alabama and Georgia); *United States v. Wheeler*, 435 U.S. 313 (1978); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. R. REV. 1, 11-18 (1995).

immunity from federal prosecution.”<sup>59</sup>

But the dual sovereignty doctrine is still at best troubling. And its most troubling aspect is that it applies even when the defendant has been *acquitted* of the same offense in the first court and is now being re-tried.<sup>60</sup> Prosecutors in effect have two bites at the apple (or in a case in which two or more states are concerned, three, four, or five bites). The potential for abuse should be of concern to all Americans.

In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last couple of decades, this is no longer true.<sup>61</sup> The nation is facing the very real possibility that double prosecutions could become routinely available to state and federal prosecutors who wish to employ them.

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act added substantially to the problem in two ways. By declining to require that the defendant be motivated by hatred or even malice in order to establish a “hate crime,” it vastly expanded the reach of the federal criminal code. A creative prosecutor will be able to charge defendants in a very broad range of cases—cases that ordinary users of the English language would never term “hate crimes.” And it makes the most controversial cases—those that were arguably motivated by race, color, religion, national origin, gender identity, sexual orientation, or disability—front and center on the federal stage.

It should come as no surprise that re-prosecutions are more common in cases that are emotionally-charged—cases like the Rodney King prosecutions and the Crown Heights murders (both of which brought under statutes that were previously existing). As Judge Guido Calabresi put it in 1995:

Among the important examples of successive federal-state prosecution are (1) the federal prosecution of the Los Angeles police officers accused of using excessive

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<sup>59</sup> 260 U.S. at 385. See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995)(expressing concern over the doctrine while noting that “[t]he danger that one sovereign may negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence, is ... obvious”)(separate opinion of Calabresi, J.). See also Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986).

<sup>60</sup> See *Bartkus v. Illinois*, 359 U.S. 121 (1959)(state prosecution following federal acquittal upheld); *United States v. Avants*, 278 F.3d 510, 516 (5th Cir.), cert. denied 536 U.S. 968 (2002)(under the “dual sovereignty doctrine,” “the federal government may ... prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical”); *United States v. Farmer*, 924 F.2d 647, 650 (7th Cir. 1991)(a “double jeopardy claim based on [a] prior state acquittal of murder is defeated by the ‘dual sovereignty’ principle”).

<sup>61</sup> See generally James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese, III, Chair of the American Bar Association’s Task Force on Federalization of Criminal Law, there are at least 3,000 federal crimes. See Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 FED. SENTENCING REP. 129, 129 (1998).



force on motorist Rodney King after their acquittal on state charges, (2) the federal prosecution of an African-American youth accused of murdering a Hasidic Jew in the Crown Heights section of Brooklyn, New York, after his acquittal on state charges, and (3) the Florida state prosecution—seeking the death penalty—of the anti-abortion zealot who had been convicted and sentenced to life imprisonment in federal court for killing an abortion doctor.<sup>62</sup>

While Judge Calabresi expressed no opinion about the merits of these cases, he noted that “there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts” and that it was “to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted.” It “is especially troublesome,” he stated, “that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern.”<sup>63</sup>

Hate crimes are perhaps the most emotionally-charged criminal issue in the nation today. According to CNN’s Kyra Phillips, “Thousands of people converg[ed] on the U.S. Justice Department” on November 16, 2007 “demanding more federal prosecutions of hate crimes.”<sup>64</sup> It is not easy to argue that political pressure of this sort will have no effect on the judgment of federal officials.

Supporters of federal hate crimes legislation argued that the actual risk of abuse at the Department of Justice is quite minimal. DOJ has its own internal guidelines, known as the “Petite Policy,” under which it limits double prosecutions to cases that meet certain standards. Unfortunately, the standards are vague. For example, they authorize double prosecutions whenever there are “substantial federal interests demonstrably unvindicated” by successful state procedures. These federal interests are undefined and indefinable. Moreover, courts have consistently held that a criminal defendant cannot invoke the Petite policy as a bar to federal prosecution.<sup>65</sup>

I would like to have seen the Commission examine any and all cases—such as the George Zimmerman case—in which public or private pressure was brought to bear on the Department of Justice to re-prosecute pursuant to the federal hate crimes statute a person who had been acquitted under state law. The potential for abuse here is too important to ignore.

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<sup>62</sup> *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995).

<sup>63</sup> *Id.* at 499.

<sup>64</sup> Thousands Protest Hate Crimes, CNN Newsroom Transcript (November 16, 2007) (available on LexisNexis). According to the report, the Department of Justice spokesman said that the Department of Justice was aggressively pursuing hate crimes. One of the reasons cited for the failure to prosecute more hate crimes was the narrowness of the applicable statutes.

<sup>65</sup> See, e.g., *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir.), cert. denied, 440 U.S. 976 (1979) (noting that the Petite policy is “a mere housekeeping provision”); *United States v. Musgrove*, 581 F.2d 406, 407 (4th Cir. 1978) (stating the rule that “a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with [Petite] policy on dual prosecutions.”); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978) (“Our view that [the Petite policy] is at most a guide for the use of the Attorney General and the United States Attorneys in the field ....”); *United States v. Wallace*, 578 F.2d 735, 740 (8th Cir. 1978).

Conclusion:

The current Commission is composed of eight lawyers. We should have done more to pay attention to the problems with the current federal hate crimes law including the increased risk of double prosecutions that it brings and the constitutional issues that are raised by it. We also have largely succumbed to a panic about an alleged surge in hate crimes, when we should have cast a more critical eye. I had hoped for better.

**Dissenting Statement of Commissioner Peter N. Kirsanow**

COMMISSIONER KIRSANOW: I just have a couple of questions for all of the witnesses, if you have this information. I looked through the material that was provided by all witnesses, not just this panel, to see if this information was there and I didn't see it, maybe I missed it.

Are you aware of any data, studies, or other evidence that show that designating a crime a hate crime deters, prevents, or reduces that crime?

Second, whether designating a crime a federal hate crime reduces, deters, or prevents incidents of that crime?

Then, one other question, are you aware of any databases, study, or other evidence that shows that designating a crime a hate crime, whether municipal, state, or federal hate crime, assists in the resolution of that crime or the apprehension of the perpetrator?<sup>1</sup>

None of the witnesses had any such information.

One witness spoke in general terms about the increased likelihood of apprehending a perpetrator if he can enlist the FBI due to a hate crime designation.<sup>2</sup> That is a resources issue. If you didn't designate the crime a hate crime and still brought the FBI in to assist, there is no reason to think you wouldn't get the same result. He also stated that the longer sentence would have a greater deterrent effect, but presented no evidence to support this claim.<sup>3</sup>

The report also repeatedly attempts to ascribe the alleged rise in hate crimes to rising white supremacy<sup>4</sup> and the election of President Trump.<sup>5</sup> There have undoubtedly been horrifying crimes committed by white supremacists. The report cites the murders on the Portland train, the Emanuel AME murders, the murder of Heather Heyer, the El Paso Wal-Mart shooting, the murder of James Byrd, the murder of Srinivas Kuchibhotla and wounding of Alok Madasani and Ian Grillot, the murders at the Tree of Life synagogue, the Oak Creek Sikh temple murders, bananas hanging from trees at American University and racist trolling of the university's first black student body president, and a bicycle and two nooses hanging in a tree at the University of Southern Alabama. The report also mentions some individuals who are believed to have ties to white supremacist groups, but were charged with crimes unrelated to hate crimes, such as "conspiracy to riot." These are all terrible crimes. However, they took place between 1998 (the murder of James Byrd) and September 2019 – more than a twenty-year span. There may well be an increase in hate crimes

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<sup>1</sup> Briefing Transcript at 88-89, 289-290, <https://www.usccr.gov/calendar/2018/05-11-Hate-Crimes-Briefing-Transcript.pdf>.

<sup>2</sup> Briefing Transcript at 295-296.

<sup>3</sup> Briefing Transcript at 295.

<sup>4</sup> *See, e.g.*, report at n. 18 ("The Hate Crimes Coalition . . . contends that many hate crimes are the result of perpetrators holding white supremacy ideologies,"); report at n. 553 ("Aryeh Tuchman . . . argues that 'racists and white supremacists and other anti-Semites have felt more free to speak out and voice their hatred for minorities, including Jews.'").

<sup>5</sup> Report at n. 414-421; Report at n. 551-555; Report at n. 595-613;

motivated by white supremacy (and they should all be prosecuted), but the report does not establish that.

Nor are hate crimes only, or even disproportionately, committed by whites. According to the FBI's hate crimes statistics, in 2017, 50.7% of hate crime offenders were white, and 21.3% were black.<sup>6</sup> At first glance, this might seem to confirm the majority's view that white supremacy is rampant throughout the land. When you compare the percentage of hate crime offenders to percentage of the population, though, it is a different story. According to the Census Bureau, whites are 76.5% of the population – but they are only 50.7% of hate crime offenders.<sup>7</sup> Blacks are 13.4% of the population, but are 21.3% of hate crime offenders.<sup>8</sup> Similarly, New York City, which does not report hate crimes statistics to the FBI, arrested 150 people for hate crimes in 2018. 77 individuals were non-Hispanic white and 67 were black.<sup>9</sup> This means that 51% of those arrested were white, and 45% of those arrested were black. Non-Hispanic whites comprise 32.1% of the population of New York City, and blacks comprise 24.3%.<sup>10</sup> Both groups are overrepresented relative to their share of the population, but blacks more so than whites. When I asked the panelists about this at the hearing, they simply stared at me as if I had suddenly descended from the planet Mongo.<sup>11</sup>

### Miscellany

The report cites a study that found that counties where Trump rallies were held experienced a “226 percent increase in reported hate crimes over comparable counties that did not host such a rally.”<sup>12</sup> The not-so-subtle implication, of course, is that something about Trump rallies inspires deplorably racist Trump supporters to commit hate crimes. A subsequent examination of data by two economics doctoral students at Harvard found that, yes, hate crimes increased in counties that held a Trump rally – but they increased *even more* in counties that hosted a Clinton rally. More importantly, “adding a simple statistical control for county population to the original analysis causes the estimated effect of Trump rallies on reported hate incidents to become statistically indistinguishable from zero.”<sup>13</sup>

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<sup>6</sup> Offenders, 2017 Hate Crimes Statistics, FBI, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/offenders>.

<sup>7</sup> U.S. Census Bureau, QuickFacts, July 1, 2018, <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

<sup>8</sup> *Id.*

<sup>9</sup> *Arrest Statistics by Bias Motivation*, Annual 2018, NYPD, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/hate-crimes.page>.

<sup>10</sup> U.S. Census Bureau, QuickFacts, New York, New York, July 1, 2018, <https://www.census.gov/quickfacts/newyorkcitynewyork>.

<sup>11</sup> Briefing Transcript at 151-152.

<sup>12</sup> Report at n. 424.

<sup>13</sup> Matthew Lilley and Brian Wheaton, No, Trump Rallies Didn't Increase Hate Crimes by 226 Percent, Reason, Sept. 6, 2019, <https://reason.com/2019/09/06/no-trump-rallies-didnt-increase-hate-crimes-by-226-percent/>.

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## Appendices

### Appendix A

#### Legislative Timeline of Shepard-Byrd Jr. Hate Crimes Prevention Act

##### 1989

February 22, 1989 | 101st Congress - The Hate Crimes Statistics Act, H.R. 1048, 101<sup>st</sup> Cong. (1<sup>st</sup> Sess. 1989), is reintroduced in the U.S. House of Representatives. It was also introduced in the 99th and 100th congresses. It would require the Department of Justice to collect and publish data about hate crimes on the basis of race, religion, ethnicity, and sexual orientation.

June 27, 1989 | House passes the Hate Crimes Statistics Act by a 368-47 vote. “The Hate Crimes Statistics Act” Congressional Record 135:87 (June 27, 1989)

##### 1990

February 8, 1990 | The U.S. Senate passes the Hate Crimes Statistics Act by a 92-4 vote. “The Hate Crimes Statistics Act” Congressional Record 136:87 (Feb. 8, 1990).

April 23, 1990 | President George H.W. Bush signs the bill into law. H.R. 1048, 101<sup>st</sup> Cong. (1<sup>st</sup> Sess. 1989)

##### 1993

March 1, 1993 | 103rd Congress - The Hate Crimes Sentencing Enhancement Act, H.R. 1152, 103<sup>rd</sup> Cong. (1<sup>st</sup> Sess. 1993), is reintroduced in the House (it was also introduced in the 102nd Congress). It would allow judges to impose harsher penalties for hate crimes, including hate crimes based on gender, disability and sexual orientation that occur in national parks and on other federal property.

September 21, 1993 | House passes the Hate Crimes Sentencing Enhancement Act by a voice vote. H.R. 1152, 103<sup>rd</sup> Cong. (1<sup>st</sup> Sess. 1993)

October 6, 1993 | The Hate Crimes Sentencing Enhancement Act, S. 1522, 103<sup>rd</sup> Cong. (1<sup>st</sup> Sess. 1993) is introduced in the Senate.

November 4, 1993 | The Hate Crimes Sentencing Enhancement Act is added as an amendment to the Violent Crime and Law Enforcement Act of 1994. It is later enacted. “Violent Crime Control And Law Enforcement Act Of 1993” Congressional Record 139 (Nov. 4, 1993).

##### 1997

November 13, 1997 | 105th Congress - The Hate Crimes Prevention Act, H.R. 3081, 105<sup>th</sup> Cong. (2<sup>nd</sup> Sess. 1997), S. 1529, 105<sup>th</sup> Cong. (2<sup>nd</sup> Sess. 1997) is introduced in the House and the Senate. The bill would extend the protection of the current federal hate crimes law to include those who are victimized because of their sexual orientation, gender or disability. It would also strengthen current law regarding hate crimes based on race, religion and national origin.

**1999**

January 1999 | President Clinton mentions the passage of the Hate Crimes Prevention Act among his priorities in his State of the Union address. President Clinton. “The State of the Union Address by the President of the United States.” Congressional Record 145:8 (January 19, 1999).

March 1999 | 106th Congress - The Hate Crimes Prevention Act, H.R. 1082, 106<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1999), S. 622, 106<sup>th</sup> Cong. (1<sup>st</sup> Sess. 1999) is reintroduced in the House and the Senate.

July 22, 1999 | The Senate passes the Hate Crimes Prevention Act after it is incorporated as an amendment to the Commerce, Justice and State appropriations bill. “Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2000.” Congressional Record 145:105 (July 22, 1999) p. [S8988](#).

**2001**

Spring 2001 | 107th Congress - The Local Law Enforcement Hate Crimes Prevention Act, H.R. 1343, 107<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2001) is introduced in the House and the Local Law Enforcement Enhancement Act, S. 625, 107<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2001), is introduced in the Senate. The legislation would provide federal assistance to states and local jurisdictions to prosecute hate crimes.

**2003**

April/May 2003 | 108th Congress - The Local Law Enforcement Hate Crimes Prevention Act, H.R. 4204, 108<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2003) is reintroduced in the House and the Local Law Enforcement Enhancement Act, S. 966, 108<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2003) is reintroduced in the Senate.

**2005**

May 26, 2005 | 109th Congress - The Local Law Enforcement Hate Crimes Prevention Act, H.R. 2662, 109<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2005) is reintroduced in the House and the Local Law Enforcement Enhancement Act, S. 1145, 109<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2005) is reintroduced in the Senate.

**2007**

March/April 2007 | 110th Congress - The Local Law Enforcement Hate Crimes Prevention Act, H.R. 1592, 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007) is introduced in the House, and the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act, S. 1105, 110<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2007) is introduced in the Senate.

May 3, 2007 | The House passes the Local Law Enforcement Hate Crimes Prevention Act by a floor vote of 237-180. “Local Law Enforcement Hate Crimes Prevention Act Of 2007” Congressional Record 153:72 (May 3, 2007)

September 27, 2007 | The Senate invokes cloture on the hate crimes legislation by a vote of 60-39. A voice vote adds the Matthew Shepard Local Law Enforcement Enhancement Act as an amendment to the Department of Defense Authorization Act. “National Defense Authorization Act For Fiscal Year 2008.” Congressional Record 153:144 (September 27, 2007). It is the first time that a transgender-inclusive piece of legislation passes both chambers of Congress.

Fall 2007 | President Bush issues a veto threat for the Defense authorization bill if hate crimes legislation is attached, ending consideration of the hate crimes bill in the 110th Congress. U.S.

White House, *Memorandum of Disapproval*, Dec. 2007, <https://georgewbush-whitehouse.archives.gov/news/releases/2007/12/20071228-5.html>.

December 6, 2007 | The hate crimes amendment is stripped from the Defense Department authorization legislation. “National Defense Authorization Act For Fiscal Year 2008.” Congressional Record 153:185 (December 6, 2007).

## 2009

April 2009 | 111th Congress - The Local Law Enforcement Hate Crimes Prevention Act, H.R. 1913, 111<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2009) is introduced in the House, and the Matthew Shepard Hate Crimes Prevention Act, S. 909, 111<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2009) is introduced in the Senate.

April 29, 2009 | The House passes the Local Law Enforcement Hate Crimes Prevention Act by a floor vote of 249-175. “Local Law Enforcement Hate Crimes Prevention Act Of 2009.” Congressional Record 155:64 (April 29, 2009).

July 16, 2009 | Senate cloture motion on the hate crimes bill passes by a 63-28 vote. The bill is added to the Defense Department Authorization bill. “National Defense Authorization Act For Fiscal Year 2010.” Congressional Record 155:107 (July 16, 2009).

July 23, 2009 | The Senate passes the Defense Department Authorization bill, on which the Matthew Shepard Hate Crimes Prevention Act is attached as an amendment. The bill goes to a conference committee to work out differences between the House and Senate versions of the legislation. “National Defense Authorization Act For Fiscal Year 2010.” Congressional Record 155:112 (July 23, 2009).

October 6, 2009 | The House fails to pass a motion, by a 178-234 vote, to instruct conferees to strip the hate crimes provision (now titled "Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act") from the Defense Dept. authorization bill conference report. H.R. Rep. 111-288 (2009) (Conf. Rep.).

October 8, 2009 | The House passes the conference report by a 281-146 vote. “Conference Report On H.R. 2647, National Defense Authorization Act For Fiscal Year 2010.” Congressional Record 155:144 (Oct. 8, 2009).

October 22, 2009 | October 22, 2009 - The Senate votes 68-29 to pass the Defense Department authorization bill that includes a provision for inclusive federal hate crimes legislation. “National Defense Authorization Act For Fiscal Year 2010--Conference Report.” Congressional Record 155:154 (Oct. 22, 2009).

October 28, 2009 | President Barack Obama signs the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law (as a provision of the National Defense Authorization Act). H.R. 2892, 111<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2009).

Source: Hate Crimes Legislation Timeline, <https://www.hrc.org/resources/hate-crimes-timeline>



## Appendix B

## State-by-State Hate Crime Laws

State	Penalty enhancements for crimes motivated by race or ethnicity	Penalty enhancements for crimes motivated by religion	Penalty enhancements for crimes motivated by sexual orientation	Penalty enhancements for crimes motivated by gender	Penalty enhancement for crimes motivated by gender identity	Penalty enhancements for crimes motivated by disability
Alabama  ALA. CODE § 13A-5-13 (1975)	X	X				X
Alaska  ALASKA STAT. ANN § 12.55.155 (West 1996)	X	X		X		X
Arizona  ARIZ. Rev. STAT. ANN. § 13-701 (West 2077)	X	X	X	X		X
Arkansas						
California  CAL. PENAL CODE §§ 422.55, 422.7,	X	X	X	X	X	X

422.75 (West 2005)						
Colorado  COLO. REV. STAT. ANN. § 18-9-121 (West 1988)	X	X	X		X	X
Connecticut  CONN. GEN. STAT. ANN. § 53a-40a (West 1990); CONN. GEN. STAT. ANN. § 53a-181j-k (West 2000)	X	X	X	X	X	X
Delaware  DEL. CODE ANN. tit. II § 1304 (West 1995)	X	X	X	X	X	X
District of Columbia  DC CODE ANN. § 22-3703 (West 1990)	X	X	X	X	X	X
Florida	X	X	X			X

FLA. STAT. ANN. § 775.085 (West 1989); FLA. STAT. ANN. § 775.0863 (West 2016)						
Georgia						
Hawaii  HAW. REV. STAT. ANN. § 706-662 (West 1972)	X	X	X	X	X	X
Idaho  IDAHO CODE ANN. §§ 18- 7902-3 (West 1983)	X	X				
Illinois  CH 720 ILL. COMP. STAT. ANN. act 5/12-7.1 (West 1983)	X	X	X	X	X	X
Indiana  Ind. Code Ann. § 35-38- 1-7.1 (West);	X	X	X			X

Ind. Code Ann. § 10-13- 3-1 (West)						
Iowa  IOWA CODE ANN. § 729A.2 (West 1992)	X	X	X	X		X
Kansas  KAN. STAT. ANN. § 21- 6815 (West 2011)	X	X	X			
Kentucky  KY. REV. STAT. ANN. § 532.031 (West 1998)	X	X	X			
Louisiana  LA. STAT. ANN. § 14:107.2 (1997)	X	X	X	X		X
Maine  ME. STAT. tit. 17-A § 1151 (1975)	X	X	X	X		X
Maryland	X	X	X	X	X	X

MD. CODE ANN., CRIM. LAW § 10- 306-307 (West 2002)						
Massachusetts  MASS. GEN. LAWS ANN. ch. 265 § 39 (West 1997)	X	X	X		X	X
Michigan  MICH. COMP. LAWS ANN. § 750.147b (West 1989)	X	X		X		
Minnesota  MINN. STAT. ANN. § 609.2231 (West 1989)	X	X	X	X	X	X
Mississippi  MISS. CODE ANN. § 99- 19-301 (West 1994)	X	X		X		
Missouri	X	X	X	X	X	X

MO. ANN. STAT. § 557.035 (West 1999)						
Montana  MONT. CODE ANN. § 45-5- 222 (West 1982)	X	X				
Nebraska  NEB. REV. STAT. ANN. § 28-111 (West 2009)	X	X	X	X		X
Nevada  NEV. REV. STAT. ANN. § 193.1675 (West 1997); NEV. REV. STAT. ANN. § 207.185 (West 1995)	X	X	X	X	X	X
New Hampshire  N.H. REV. STAT. ANN. § 651:6 (West 1995)	X	X	X	X		X

New Jersey  N.J. REV. STAT. ANN. § 2C:16-1 (West 2008)	X	X	X	X	X	X
New Mexico  N.M. STAT. ANN. § 31- 18B-3 (West 1978)	X	X	X	X	X	X
New York  N.Y. PENAL LAW §§ 485.05-10 (West 2000)	X	X	X	X		X
North Carolina  N.C. GEN. STAT. ANN. § 14-3 (West 1993); N.C. GEN. STAT. ANN. § 14-401.14 (West 1993); N.C. GEN. STAT. ANN. § 99D-1 (West 1993)	X	X		X		

North Dakota N.D. CENT. CODE. ANN. § 12.1-14-04 (West 1973)	X	X		X		
Ohio OHIO REV. CODE. ANN. § 2927.12 (West 1987)	X	X				
Oklahoma OKLA. STAT. ANN. tit. 21 § 850 (West 1992)	X	X				X
Oregon OR. REV. STAT. ANN. § 166.165 (West 2008)	X	X	X	X	X	X
Pennsylvania 18 PA. STAT. AND CONS. STAT. ANN. § 2710 (West 1982)	X	X				
Rhode Island	X	X	X	X		X



12 R.I. GEN. LAWS ANN. § 12-19-38 (West 1998)						
South Carolina						
South Dakota  S.D. CODIFIED LAWS § 22- 19B-1 (West 1993)	X	X				
Tennessee  TENN. CODE ANN. § 40-35- 114 (West 1989)	X	X	X	X		X
Texas  TEX. PENAL CODE ANN. § 12.47 (West 1993)	X	X	X	X		X
Utah  UTAH CODE ANN. § 76-3- 203.3 (West 2001)	X	X	X	X	X	X
Vermont	X	X	X	X	X	X

Vt. STAT. ANN. tit. 13, § 1455 (West 1990)						
Virginia  VA. CODE ANN. § 18.2- 57 (WEST 1975)	X	X				
Washington  WASH. REV. CODE ANN. § 9A.36.080 (WEST 1993)	X	X	X	X	X	X
West Virginia  W. VA. CODE ANN. § 61-6- 21 (WEST 1993)	X	X		X		
Wisconsin  WIS. STAT. ANN. § 939.645 (WEST 1996)	X	X	X			X
Wyoming						

Source: Anti-Defamation League (last updated April 18, 2019); for links to specific state laws, see ADL Hate Crime Map, <https://www.adl.org/adl-hate-crime-map>

## Appendix C

## Cities over 100,000 Reporting Zero and Did Not Report (DNR) to FBI (2017)

City	Population	2017 Incidents	2016 Incidents	2015 Incidents	2014 Incidents	2013 Incidents	2012 Incidents
Las Vegas Metro, NV	1,627,244	0	25	41	17	65	73
Honolulu, HI	990,384	DNR	DNR	DNR	DNR	DNR	DNR
Indianapolis, IN	870,788	DNR	28	26	19	43	DNR
Oklahoma City, OK	648,260	0	3	DNR	9	12	DNR
Miami, FL	463,009	0	DNR	DNR	0	0	0
Tulsa, OK	404,868	0	1	0	0	0	DNR
Corpus Christi, TX	329,256	0	0	1	6	1	DNR
Newark, NJ	283,679	0	3	0	5	3	0
Chula Vista, CA	271,109	0	5	3	3	4	4
St. Petersburg, FL	263,712	0	DNR	DNR	0	1	0
Laredo, TX	260,669	0	0	0	0	0	0
Mobile, AL	248,431	0	0	0	0	0	0
Winston-Salem, NC	244,278	0	0	0	0	0	1
Savannah-Chatham Metro, GA	242,971	0	0	0	0	0	0
North Las Vegas, NV	242,537	0	4	6	1	2	10
Irving, TX	242,062	0	0	0	0	0	0
Hialeah, FL	238,260	0	DNR	DNR	0	0	0
Garland, TX	236,243	0	0	0	0	2	0
Baton Rouge, LA	227,403	0	3	0	DNR	DNR	0
Des Moines, IA	217,277	0	3	0	1	0	0
Birmingham, AL	212,178	DNR	9	5	DNR	DNR	DNR
Glendale, AZ	202,381	0	1	8	9	7	8
Amarillo, TX	200,983	0	0	0	0	0	1
Little Rock, AR	199,314	0	1	0	0	0	0

<b>Montgomery, AL</b>	199,099	DNR	DNR	0	DNR	DNR	DNR
<b>Huntsville, AL</b>	195,173	DNR	DNR	DNR	DNR	0	DNR
<b>Grand Prairie, TX</b>	193,249	0	1	1	0	0	DNR
<b>Tallahassee, FL</b>	192,455	0	DNR	1	0	1	1
<b>Overland Park, KS</b>	191,566	0	4	6	1	DNR	DNR
<b>Tempe, AZ</b>	186,086	0	1	0	2	3	5
<b>Brownsville, TX</b>	185,216	0	0	0	0	0	0
<b>Cape Coral, FL</b>	184,346	0	1	DNR	DNR	0	1
<b>Rancho Cucamonga, CA</b>	178,308	0	4	4	2	0	0
<b>Pembroke Pines, FL</b>	170,923	0	DNR	2	0	1	0
<b>Springfield, MO</b>	168,654	0	0	3	5	3	1
<b>Jackson, MS</b>	168,397	DNR	DNR	DNR	0	0	DNR
<b>Fort Collins, CO</b>	167,633	0	2	4	3	0	2
<b>Cary, NC</b>	166,986	0	0	0	0	0	0
<b>Peoria, AZ</b>	165,889	0	0	0	0	0	DNR
<b>Lakewood, CO</b>	156,344	0	0	0	1	4	1
<b>Pasadena, TX</b>	154,000	0	0	0	0	1	0
<b>Kansas City, KS</b>	152,573	DNR	DNR	0	1	0	DNR
<b>Joliet, IL</b>	148,642	0	2	0	1	0	1
<b>Naperville, IL</b>	147,934	0	0	0	DNR	0	0
<b>Paterson, NJ</b>	147,690	0	0	0	0	0	0
<b>Killeen, TX</b>	145,912	0	0	0	1	0	0
<b>Mesquite, TX</b>	144,406	0	0	0	0	0	0
<b>McAllen, TX</b>	144,162	0	0	0	0	1	0
<b>Syracuse, NY</b>	143,069	0	0	0	0	0	0
<b>Fullerton, CA</b>	141,637	0	2	2	1	2	1
<b>Miramar, FL</b>	141,323	0	DNR	DNR	1	1	3
<b>Thornton, CO</b>	139,825	0	0	0	0	3	0
<b>Midland, TX</b>	138,954	0	0	0	0	0	0
<b>Olathe, KS</b>	137,070	0	0	0	0	0	DNR

<b>Waco, TX</b>	135,997	0	0	0	0	0	0
<b>Carrollton, TX</b>	135,823	0	0	1	0	0	0
<b>Surprise, AZ</b>	135,345	0	0	0	0	0	0
<b>Columbia, SC</b>	134,957	0	0	1	2	2	5
<b>Sterling Heights, MI</b>	132,882	0	0	0	0	0	4
<b>Cedar Rapids, IA</b>	131,878	0	0	1	1	0	0
<b>Coral Springs, FL</b>	131,558	0	DNR	1	0	0	0
<b>Lafayette, LA</b>	128,691	0	0	0	0	0	0
<b>Athens-Clark Co., GA</b>	124,903	0	0	1	DNR	DNR	0
<b>Vallejo, CA</b>	122,174	0	2	0	0	2	2
<b>Amherst Town, NY</b>	121,150	0	2	2	0	3	4
<b>Allentown, PA</b>	120,823	0	0	0	1	0	0
<b>Evansville, IN</b>	119,371	DNR	0	0	0	0	DNR
<b>Provo, UT</b>	117,540	0	0	0	0	1	2
<b>Richardson, TX</b>	115,824	0	0	0	2	0	DNR
<b>College Station, TX</b>	115,357	0	1	0	1	0	DNR
<b>Temecula, CA</b>	115,220	0	0	1	0	1	4
<b>Westminster, CO</b>	115,155	0	0	0	0	1	1
<b>Downey, CA</b>	113,511	0	1	0	0	0	1
<b>Elgin, IL</b>	112,767	0	0	1	0	0	0
<b>Billings, MT</b>	111,317	0	4	3	6	7	0
<b>Broken Arrow, OK</b>	108,823	0	0	0	0	1	DNR
<b>Clovis, CA</b>	108,419	0	1	2	0	4	2
<b>Lakeland, FL</b>	107,927	0	DNR	DNR	0	0	1
<b>Sandy Springs, GA</b>	107,740	0	0	0	0	0	0
<b>Santa Maria, CA</b>	107,424	0	0	0	0	1	1
<b>Lewisville, TX</b>	106,199	0	2	1	0	0	4
<b>Tyler, TX</b>	106,115	0	4	4	0	5	1
<b>Green Bay, WI</b>	105,331	0	1	1	0	2	0
<b>Jurupa Valley, CA</b>	104,922	0	1	1	0	1	DNR
<b>Wichita Falls, TX</b>	104,706	0	2	0	2	0	DNR

<b>Davenport, IA</b>	103,063	0	0	0	0	0	0
<b>Las Cruces, NM</b>	102,350	DNR	DNR	DNR	DNR	DNR	DNR
<b>Allen, TX</b>	101,779	0	0	0	0	0	DNR
<b>Tuscaloosa, AL</b>	101,124	0	0	0	DNR	1	DNR
<b>Clinton Township, MI</b>	100,999	0	1	3	2	4	16
<b>Roanoke, VA</b>	100,027	0	0	2	0	1	5

\*Source: ADL, FBI 2017 HCSA Did Not Report (DNR) and Zero Reporting