

A Local
Prosecutor's Guide
for Responding to

HATE
CRIMES

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Advisory group members who drafted portions of the resource guide:

Robert A. Honecker, Jr., Second Assistant Prosecutor, Monmouth County Prosecutor's Office, New Jersey and Co-Chair of the NDAA Bias Crime Committee;

Carla Arranaga, Deputy District Attorney, Hate Crimes Suppression Unit, Los Angeles County District Attorney's Office, California;

Renee Goldfarb, Supervisor, Criminal Appeals Division, Cook County State's Attorney's Office, Illinois;

Henry Valdez, District Attorney, 1st Judicial District, Santa Fe, New Mexico;

Michael Lieberman, Counsel, Anti-Defamation League, Washington, D.C.; and

Brian Levin, Criminal Justice Department, California State University, San Bernardino, California.

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Newman Flanagan
President
APRI

Kevin O'Brien
Chief Administrator
APRI

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1. INTRODUCTION

The United States has long been a “melting pot” society, to which people of different ethnic groups and races, from many diverse cultures and countries, have come. They and their children have become Americans, to form this unique and unified nation. Yet throughout our history these distinctions have fostered bias, prejudice, and hatred by some people—manifested in the form of harassment, intimidation, and bias-motivated crimes. Bias- or hate-motivated incidents and crimes can have a serious impact not only on the victim but also on those who share his or her characteristics because they have been singled out as a result of inherent characteristics and robbed of self-esteem.¹ The deep psychological impact of hate crimes causes terror among victims and victimized groups, distrust of the criminal justice system and its ability to protect against hate crimes, and the potential for retaliatory crimes against the offender or the group the offender represents.²

Criminologically, hate crimes are regarded by some as a more severe offense than non bias-motivated offenses. Compared to other crimes in general, bias-motivated crimes are more likely to:

- Be directed against persons as opposed to property;
- Involve injury to victims;
- Involve multiple offenders;
- Involve serial victimizations; and
- Go unsolved.³

For these reasons, hate crimes must be addressed in a manner that takes into account the seriousness of the offenses and their impact on victims/victimized groups and that serves to stop biased attitudes and beliefs from escalating into crimes.

1.1. Defining the Issue: The Impact of Hate Violence

All Americans have a stake in effective responses to hate violence. These crimes can intimidate the victim and members of the victim’s community and can leave them feeling isolated, vulnerable, and unprotected by the law. The pernicious emotional and psychological impact of these crimes can exacerbate racial, religious, and ethnic tensions, and sometimes lead to escalating reprisals.

¹ Ogawa, Brian. (1999). *Color of Justice: Culturally Sensitive Treatment of Minority Crime Victims*. Boston, MA: Allyn and Bacon.

² Bureau of Justice Assistance (BJA). (1997). *A Policymaker’s Guide to Hate Crimes*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs.

³ Levin, B. (1999). “Hate Crimes: Worse by Definition.” *Journal of Contemporary Criminal Justice*, 15(1), 14-17.

In recent years, a number of highly-publicized bias crimes have dramatically increased public awareness and concern about the problem of hate violence – and have sparked calls for more effective federal, state, and local responses. Police officials and prosecutors have come to appreciate the special consequences of these crimes and the benefits of responding to them in a priority fashion.

In its new guidebook for police on hate violence, *Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention*, the International Association of Chiefs of Police (IACP) describes the unique community impact of bias-motivated criminal activity:

"Hate crimes differ from other crimes in their effect on victims and on community stability:

- Hate crimes are often especially brutal or injurious.
- Victim(s) usually feel traumatized and terrified.
- Families of victims often feel frustrated and powerless.
- Others in the community who share the victim's characteristics may feel victimized and vulnerable.
- Hate incidents can escalate and prompt retaliatory action.
- Hate crimes and hate incidents create community-wide unrest.

A swift and strong response by law enforcement can help stabilize and calm the community as well as aid in a victim's recovery. Failure to respond to hate crimes within departmental guidelines may jeopardize public safety and leave officers and departments open to increased scrutiny and possible liability."⁴

Law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.⁵ In 1998, recognizing the explosive potential for community unrest and instability posed by hate violence, the National District Attorneys Association entered into a Memorandum of Understanding (MOU) with the U.S. Department of Justice designed to foster communication; facilitate coordination; and standardize response by state, local, and federal authorities to these "coordination-sensitive" criminal acts.⁶

In addition to the potential community unrest and instability, hate crimes pose other challenges for law enforcement, prosecutors, and policymakers. Studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to

⁴ International Association of Chiefs of Police (IACP). (1999). *Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention*. Alexandria, VA: IACP, pp. 4

⁵ As stated in the International Association of Chiefs of Police's National Policy Center's 1991 Concepts and Issues Paper on Hate Crime: "Swift and effective response to hate crimes helps to generate the degree of trust and goodwill between the community and its law enforcement agency that has long-term benefits for all concerned." (pp. 1)

⁶ The complete text of this MOU is contained in Appendix A.

the police.⁷ In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police – *especially* if they were in trouble.⁸ Gay and lesbian victims, facing hostility, discrimination, and, possibly, family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes.⁹ These issues present a critical challenge for improving the response of the criminal justice system to hate violence.

In conjunction with police efforts to identify and appropriately respond to these crimes, aggressive enforcement of hate crime statutes by prosecutors sends the clear message that hate violence is a law enforcement priority and that each hate crime – and each hate crime victim – is important.

The fundamental cause of bias-motivated violence in the United States is the persistence of racism, anti-Semitism, and other forms of bigotry. The attempt to eliminate these prejudices requires that Americans develop respect for differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. While bigotry cannot be outlawed, effective response by public officials and law enforcement authorities to hate violence can make a difference in deterring and preventing these crimes.

Policymakers and legislators have taken many steps to address prejudice and bias and to ensure the equal rights of all persons. In the past decade, tougher laws have been enacted at the state and federal levels to address hate-motivated crimes. Prosecutors, as the attorneys for the people, play a critical role in enforcing such laws, seeking punishment for offenders who commit bias-motivated crimes, and protecting citizens in their community from becoming victims of such crimes. While significant strides have been made to address hate crimes, vast differences in the treatment of hate crimes exist among criminal justice agencies and across the states.

These differences in responses to hate crimes exist in part because of differences in criminal legislation and tools available to criminal justice practitioners for handling hate crimes. To effectively address hate crimes in light of these differences, steps should be taken to ensure consistency within jurisdictions in the treatment of hate crimes—from law enforcement through adjudication.

In an effort to foster consistency in the criminal justice system for responding to hate crimes, the Bureau of Justice Assistance (BJA) awarded a grant to the American Prosecutors Research Institute (APRI) to develop a resource guide for local prosecutors. This resource

⁷ National Organization of Black Law Enforcement Executives (NOBLE). (1985). *Racial and Religious Violence: A Model Law Enforcement Response*, p. 36.

⁸ For a fine review of these issues, see 1998 Audit of Violence Against Asian Pacific Americans, National Asian Pacific American Legal Consortium, August, 1996 and Walk With Pride – Taking Steps to Address Anti-Asian Violence, Japanese American Citizens League, August, 1991. NAPALC has also noted that a lack of bilingual police officers can exacerbate community fears and mistrust – and may contribute to an inability to initially identify a hate crime incident and create difficulties in interviewing the victim and conducting an effective investigation.

⁹ Reporting rates for gay and lesbian hate crime victims is also likely affected by mistrust and fear of the police. For a particularly sobering review of these issues, see Anti-Lesbian, Gay, Bisexual and Transgendered Anti-Violence Programs (NCAVP), pp. 23.

guide for local prosecutors is intended to serve as a tool for prosecutors, law enforcement, and victim/witness assistance providers in formulating their approach to hate crimes, even for those in states without hate crime legislation.

1.2. Overview of the Resource Guide

The contents of the guide are based on the different approaches used by prosecutors across the country and with input from a national advisory group of local prosecutors; local, state, and federal law enforcement representatives; victim advocacy groups; civil rights groups; and experts in the field of hate crime. (See Appendix B for a list of advisory group members.) The guide is not intended to serve as a model or prescriptive approach to hate crimes for prosecutors because of the vast differences that exist in sizes of prosecutors' offices and jurisdictions, office organization and management, and funding sources.

Rather, the guide is designed to provide prosecutors with information to aid them in their prosecution of hate crimes, recognizing that every case is different and will require different approaches. In addition, the guide provides an overview of a range of approaches aimed at helping prosecutors fashion their own responses to hate crimes based on the unique characteristics and needs of their communities.

The resource guide is broken into seven major sections:

1. An introduction to hate crimes and their impact
2. An overview of hate crimes and hate crime legislation
3. Collaboration with other critical agencies to formulate responses to hate crimes
4. Case identification, screening, and investigation techniques
5. Case preparation
6. Trial preparation and strategies
7. Hate crime prevention efforts

Sample materials, general hate crime resources contact information, and other relevant materials are included in the Appendices.

2. HATE CRIMES AND HATE CRIME LEGISLATION

Hate crimes are not new phenomena; in fact, crimes committed because of hatred or prejudice toward a certain group of people have existed for centuries. What is new, however, is greater public awareness of and attention to hate crimes, our understanding of the profound effect such crimes have on communities, and the need for comprehensive and coordinated responses to addressing these crimes.

2.1. Hate Crime Statistics¹⁰

In 1990, Congress passed the Hate Crime Statistics Act in an effort to document the prevalence of bias-motivated crimes. In response, the Attorney General directed the Federal Bureau of Investigation (FBI) to begin collecting hate crimes data as part of the Uniform Crime Reporting (UCR) system. The FBI hate crimes data are based on voluntary reporting by law enforcement agencies of the number of offenses in which bias was the motivating factor, the nature of the offense, and the characteristics of victims and offenders. As defined by the FBI, bias motivation includes prejudice against a race, religion, sexual orientation, ethnicity/national origin, or disability.

Between 1991 and 1996, the number of hate crimes reported to law enforcement increased 92 percent (from 4,558 to 8,759).¹¹ Between 1996 and 1998, the number of hate crime incidents reported to the police decreased slightly to 7,775, as did the number of participating law enforcement agencies.¹² However, the number of violent hate crimes increased between 1996 and 1998. In 1998, 13 persons were murdered in hate-motivated incidents as compared with 8 persons in 1997. Similarly, the percentage of hate motivated simple assaults increased slightly from 16 percent in 1996 to 18 percent in 1998. The 7,775 incidents reported to law enforcement in 1998 involved 9,235 separate offenses, 9,722 victims, and 7,489 known offenders.

While the FBI statistics provide some understanding of the prevalence of hate crimes, the advent of the Internet and World Wide Web has created a whole new and alarmingly efficient means for the propagation of hatred and increased opportunity to threaten and harass potential victims. In September 1996, 62 Asian American students at the University of California at Irvine were welcomed to the new academic year with hateful email messages from "Asian Hater" that contained demeaning and derogatory claims about Asians. In March 1998, 42 Latino faculty members of California State University at Los Angeles received emailed threats against Latinos as did 25 Latino students at the Massachusetts Institute of

¹⁰ Hate crime statistics, collected by the Federal Bureau of Investigation (FBI), are based only on those criminal acts or offenses reported to law enforcement. Law enforcement reporting of this information to the FBI is voluntary.

¹¹ It should be noted that the number of law enforcement agencies that voluntarily reported hate crimes to the FBI also increased over the same time period (1991 to 1996), from 2,771 to 11,354 agencies.

¹² The number of participating law enforcement agencies that reported hate crimes statistics to the FBI in 1998 was 10,730 as compared with 11,354 in 1996.

Technology (MIT) and Latino employees, NASA, Xerox, Indiana University, the *Texas Hispanic Journal*, and the Internal Revenue Service.¹³ More recently, in 1999, the president of an African American student organization, along with other students at Howard University, also received racially-motivated, threatening email messages. Undoubtedly, countless others have been victimized by electronic threats and intimidation—many of which go unreported to law enforcement.

2.2. Hate Crimes and Offender Profiles

The majority of hate crimes in 1998 were crimes against persons (68 percent of all reported offenses), followed by crimes against property (31 percent) and crimes against society (1 percent). Intimidation was the most frequently reported hate crime (38 percent of all offenses). Destruction, damage, or vandalism of property accounted for 28 percent of all offenses. Other crimes reported included simple and aggravated assault.

Approximately 60 percent of the reported offenses were racially-motivated, 16 percent were religiously-motivated, 16 percent motivated by sexual orientation, 10 percent motivated by ethnicity/national origin, and less than 1 percent were motivated by disability. Among racially-motivated hate crimes, slightly more than two-thirds were anti-black, and anti-Semitism was the motivating factor in nearly 80 percent of religiously-motivated hate crimes.

In 1997, there were a documented 474 hate groups and group chapters involved in racist behavior.¹⁴ Emerging data reveals that individuals and small informal groups, not organized hate groups, commit most hate or bias-motivated crimes. Juveniles and young adults, in particular, commit most of the hate crimes.¹⁵ “The typical offender matches the following profile: male, between the ages of 14 and 24, with no prior record, neither impoverished nor chronically unemployed. Most perpetrators of hate crime are not otherwise involved with the criminal justice system and do not fit the profile of a so-called ‘career criminal.’”¹⁶

Technological advancements have helped to propagate the beliefs of hate groups. Through the use of the Internet, hate groups are able to reach more people than ever. Supporters of racist ideology recruit young adults by appealing to them through music, websites, video games, e-mail, and chatrooms. Using the computer as a recruiting medium has allowed hate organizers to increase their target range, from predominately working-class teenagers to teens from upper-middle class homes.

In an effort to keep up with the changing demographics among hate crime offenders, law enforcement has turned to academia to help them identify potential offenders. Jack Levin and Jack McDevitt of Northeastern University have identified three types of hate or bias-

¹³ Gennaco, Michael J. (September 14, 1999). Prepared Statement before the Committee on the Judiciary, United States Senate, Concerning Hate on the Internet.

¹⁴ The Southern Poverty Law Center. (Winter 1998). *Intelligence Report*.

¹⁵ Ogawa, (1999). *Color of Justice*, pp. 87.

¹⁶ Cook County State’s Attorney Office. (1998). *Hate Crime: A Prosecutor’s Guide*. Chicago, Illinois: Cook County State’s Attorney Office. pp. II-6.

motivated crime offenders: 1) thrill-seeking offenders, 2) reactive offenders, and 3) mission offenders.¹⁷

Thrill-seeking offenders are usually young people not associated with an organized hate group, but who commit such crimes in order to gain a psychological or social thrill, to be accepted by their peers, or to gain “bragging” rights by committing hate crimes. Oftentimes, thrill-seekers act as part of a group to avoid acknowledging the seriousness of the crime. The attacks are random acts of desecration and vandalism against a group or individual perceived as inferior. Because hatred of the victim is relatively superficial, offenders may be deterred from repeating the crimes if there is strong societal condemnation of the behavior.

Reactive offenders exhibit a sense of entitlement and superiority. They feel that they have rights and privileges that do not extend to their chosen victim(s). Reactive offenders perceive a threat to their way of life, community, place of work or privileges, and are motivated by their need to protect or defend their neighborhoods, schools, or places of work against outsiders. These outsiders may reside in the offender’s own neighborhood, attend school with the offender’s children, or work with the offender. Reactive offenders, like thrill-seekers, are also not generally associated with an organized hate group; however, they may request the assistance of an organized hate group in mitigating the perceived threat. Reactive offenders usually have no prior history of criminal behavior or overt bigotry and use fear and intimidation to “send a message” that their victim(s) are unwelcome. Reactive offenders feel justified in responding violently to what they perceive as a violation by the mere presence of their victim(s), so that if the perceived threat subsides, so will their offending criminal behavior.

The third type of hate or bias-motivated offender is the mission offender. Mission offenders are described as suffering from mental illness that may cause psychotic hallucinations, impaired ability to reason, withdrawal from other people and a perception that victim groups are evil, subhuman, and/or animals. This type of offender believes they have been instructed by a higher order (e.g., God, the Fuhrer, the Imperial Wizard, etc.) to rid the world of the evil that they believe different victims’ group perpetuate. Mission offenders are further motivated by their belief that victim groups have conspired to make them suffer for which the offender must get even. Mission offenders have a sense of urgency about their mission believing they must act before it’s too late. Their crimes are often violent in nature, and the mission often ends in the offender’s suicide.

2.3. Definitions

At present, a number of different terms and definitions are used to describe hate or bias-motivated acts. Definitions of hate crimes vary from state to state. For the purposes of this guide, a hate crime is defined as follows:

A hate crime is an offense committed against persons, property or institutions motivated, in whole or in part, by bias against a group or an individual’s actual or perceived inclusion in an identifiable group.

¹⁷ Levin, Jack and McDevitt, Jack. (1993). *Hate Crimes. The Rising Tide of Bigotry and Bloodshed*. New York: Plenum Press.

*Identified groups are defined by state or federal statute and may include race or ethnic/national origin, religion, sexual orientation, disability, gender, and age.*¹⁸

It is also important that hate attitudes and incidents be distinguished from hate crimes. Hate attitudes and incidents are behaviors motivated by bias against a victim's race, ethnic or national origin, religion, sexual orientation, disabilities, gender or age, but do not rise to the level of a crime. Hostile or hateful speech or other disrespectful behaviors are not illegal until such time that they incite perpetrators to commit criminal acts against a person or property.¹⁹ It is important, however, for law enforcement officers and prosecutors to be aware of hate incidents, document them to the extent possible, and enforce applicable laws when hate incidents rise to the level of criminal offenses.

2.4. Hate Crime Legislation

Hate crime laws come in various forms and target various kinds of activity. The two most broadly applicable types of hate crime laws are penalty enhancement provisions and stand-alone statutes. California's stand-alone criminal civil rights statute, Penal Code §422.6, prohibits interference with the civil rights of another on the basis of race, religion, sexual orientation and other status characteristics. Penalty enhancement provisions increase the punishment for an underlying offense when a victim is targeted on the basis of status characteristics such as race. Other state statutes outlaw cross burning, the desecration of houses of worship and cemeteries, and paramilitary exercises of the kind often undertaken by hate groups. Even in situations where a hate crime law is nonexistent or inapplicable, prosecutors have the option of introducing motive, such as bias motivation, at sentencing to influence sentencing.²⁰

2.5. U.S. Supreme Court Cases

The United States Supreme Court has directly addressed the constitutionality of hate crimes statutes twice. These rulings are the framework from which every recent hate crimes decision has been made. Analysis of other hate crime statutes frequently requires reference to these rulings.

Free speech challenges to a hate crime statute had not been evaluated until the *R.A.V.* case went before the United States Supreme Court. In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992), *R.A.V.* was charged under the City of St. Paul's Bias-Motivated Crime Ordinance for burning a cross in an African American family's yard. The ordinance stated that it was a misdemeanor to "place on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi

¹⁸ A summary of state statutes, prepared by the Anti-Defamation League, is provided in Appendix C. Readers should consult their state statute to identify which groups are enumerated in the legislation.

¹⁹ IACP. (1999). *Responding to Hate Crimes: A Police Officer's Guide to Investigation and Prevention.* Alexandria, Virginia: IACP.

²⁰ Levin, B. (1993). "A Dream Deferred: The Social and Legal Implications of Hate Crimes in the 1990's." *Journal of Intergroup Relations* 20(3): 4-6.

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.” St. Paul, Minn. Legis. Code § 292.02 (1990).

After the trial court dismissed the charges on the grounds that the ordinance violated the First Amendment, the Minnesota Supreme Court reversed the trial court's decision finding that the ordinance prohibited “fighting words,” which are not protected by the First Amendment. The Minnesota Supreme Court's ruling made it clear that the ordinance was tailored to serve the State's interests in protecting the community against bias-motivated threats to public safety and order.

The United States Supreme Court disagreed with the Minnesota Supreme Court's interpretation. In their ruling, the Supreme Court held that the City of St. Paul's ordinance was facially invalid because even assuming arguendo that all expression reached by this ordinance was proscribable under the “fighting words” doctrine established in *Chaplinsky v. New Hampshire*, 315, U.S. 568, 572, 62 S.Ct. 766, 769 (1942), the ordinance was content-based regulation of speech, and it failed the applicable strict scrutiny test. 112 S.Ct. at 2542, 2550.

After striking down the ordinance central to the *R.A.V.* case, during the next term the Supreme Court granted certiorari to another hate crime case. The Court recognized that the *R.A.V.* decision did not address the constitutionality of other types of hate crimes legislation such as penalty enhancement statutes. In *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S.Ct. 2194 (1993), the U.S. Supreme Court addressed the issue of the constitutionality of a Wisconsin statute that enhanced the penalty for criminal conduct motivated by prejudice.

The facts of *Mitchell* are simple. A group of young Black males were discussing a scene from the movie “Mississippi Burning,” which depicts White men beating a Black boy. After the discussion, the defendant asked the other boys if they were “hyped up to move on some White people.” Later, when a White person approached the group, the defendant encouraged the others in the group to attack the boy, stating “There goes a White boy; go get him.” The group beat the boy severely and stole his tennis shoes.

The defendant was convicted of aggravated battery by a jury that found that the victim was intentionally selected because of his race. The state of Wisconsin had enacted a statute providing for enhancement of a defendant's sentence whenever the victim was intentionally selected based on the victim's race. See Wisc. Stat. Ann. § 939.645(1)(b). Under this statute, the jury increased the maximum possible sentence from two to seven years. The defendant was sentenced to four years incarceration. The Wisconsin Court of Appeals affirmed the sentence and conviction. The Wisconsin Supreme Court held that the conviction should be reversed.

The United States Supreme Court reversed the judgment of the Wisconsin Supreme Court. The Court held that the statute did not violate the defendant's First Amendment right to freedom of speech because the ordinance was aimed at conduct that was not constitutionally protected. The Court rejected the defendant's argument that enhancing the penalty was unconstitutional because it punished the defendant's discriminatory motive, or reason for acting. In making this decision, the Court noted that courts may properly take into account a defendant's racial animosity toward his victim as an aggravating factor for sentencing purposes. 113 S.Ct at 2200. The Court further noted that state and federal anti-

discrimination laws that look to the motive of the actor in determining culpability have been upheld against constitutional challenges.

The Court appeared to reconcile the *Mitchell* decision with the *R.A.V.* decision from the previous term. Thus, while *R.A.V.* prohibits the criminalization of expression, the *Mitchell* decision allows the enhancement of punishment for otherwise criminal conduct that is bias motivated. The *Mitchell* decision forecloses further challenges to penalty enhancement statutes on the grounds that they violate the First Amendment.

The constitutionality of federal hate crimes legislation has also been addressed by the Federal Courts. In *United States v. Hartbarger*, 148 F.3d 777 (7th Cir. 1998), the defendants were charged with various crimes associated with the burning of a cross on the lawn of an interracial couple and their children. One of the counts charged the defendants with using fire to commit a felony in violation of 18 U.S.C. § 844(h)(1). This code provision requires an additional sentence of up to ten years for the use of fire or an explosive in the commission of a felony. The sentence is to be imposed in addition to any sentence required for the underlying felony. The defendants filed a motion to dismiss this count, stating that Congress did not intend the statute to apply to cross burning.

The appellate court looked to the plain language of the statute as well as the legislative history to hold that Congress intended to apply the additional penalty to all felonies that involve the use of fire, including cross burnings.

In *United States v. Stewart*, 65 F. 3d 918 (11 Cir.1995), the defendants objected to a Black family moving into a neighboring all-White enclave. To encourage them to leave a community in which they were not wanted, the defendants intended to burn a cross on their lawn. In order to secure an alibi, the three defendants attended a Ku Klux Klan rally that they slipped away from to go burn the cross. After hearing a noise outside, the homeowner retrieved his rifle. When the homeowner saw the men burning the cross, he began to shoot. The defendants then drove a second vehicle into the yard from which one of them fired at least three shots from a .22 caliber pistol.

The defendants were charged with conspiracy under 42 U.S.C. § 3631²¹, injuring or interfering with a homeowner's occupation of a dwelling, violation of 18 U.S.C. § 241²², and violation of 18 U.S.C. § 844(h), which imposes a five year mandatory sentence enhancement for using fire or explosives while committing a felony.

²¹ 42 U.S.C. § 3631 provides, in pertinent part:

Whoever...by force or threat of force willfully injure, intimidates or interferes with, or attempts to injure, intimidate or interfere with—(a) any person because of his race, color, religion, sex, handicap..., familial status..., or national origin and because he is or has been... purchasing, [or] occupying... any dwelling... shall be fined under this subchapter or imprisoned not more than one year, or both...

²² 18 U.S.C. § 241 provides, in pertinent part: If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States... They shall be fined under this title or imprisoned not more than ten years, or both...

The Eleventh Circuit Court of Appeals acknowledged that the decision in *Mitchell* “clearly limited the impact of *R.A.V.* on statutes like the ones at issue here, which are aimed at conduct as opposed to expression.” 65 F. 3d at 929. Additionally, the court held that the federal statutes “under which the defendants were prosecuted also target unprotected conduct—willful interference with housing rights, conspiracy, and the use of fire. So although [the statute] specifically prohibits intimidation based on race, because such intimidation itself is unprotected conduct, under *Mitchell*, the statute is not facially invalid.” *Id.*

In rejecting the contention that the federal statutes are unconstitutional, the *Stewart* Court agreed with the Eighth Circuit Court of Appeals in *United States v. McDermott*, 29 F.3d 404, 410 (8th Cir.1994) (holding § 241 not vague or overbroad); *United States v. J.H.H.*, 22 F.3d 821, 828 (8th Cir.1994) (holding §§ 241 and 3631 not vague) and the Ninth Circuit Court of Appeals in *United States v. Gilbert*, 813 F.2d 1523, 1530-31 (9th Cir.) (holding that § 3631 not vague or overbroad), cert. denied, 484 U.S. 860, 108 S. Ct. 173, (1987) in holding that the federal statutes survive scrutiny under the vagueness and overbreadth doctrines.

2.6. State Court Cases

While the United States Supreme Court was addressing the constitutional issues raised by hate crimes statutes, state courts were faced with the same issue. The State of California's Court of Appeals issued a ruling on the validity of the California statute soon after the *R.A.V.* ruling. The California Appellate Court was one of the first courts to use the same type of rationale as that used by the U.S. Supreme Court in the *Mitchell* decision.

In *In re Joshua H.*, 13 Cal. App. 4th 1734, 17 Cal. Rptr. 2d 291 (1993), a delinquency petition was filed against a juvenile for his role in a dispute with a neighbor over grass cuttings. When the tensions escalated, the defendant picked a fight with the neighbor while making statements about his sexual orientation. He was charged under California's hate crimes statute.

In an opinion delivered March 8, 1993,²³ the California Court of Appeals reviewed California's hate crimes statute to determine whether it violated the First Amendment. The Court acknowledged that after the United States Supreme Court decision in *R.A.V.* two states, Ohio and Wisconsin, had ruled that statutes similar to California's were unconstitutional. The California Appellate Court disagreed with those decisions and ruled that the California statute was constitutional.

In analyzing the California statute in conjunction with the *R.A.V.* decision, the California court held that “hate crimes statutes, in contrast, do not regulate speech; they regulate acts of violence intended to interfere with the victim's protected rights. There is a fundamental difference under the First Amendment between speech and conduct, especially violent conduct: ‘The First Amendment does not protect violence.’” 17 Cal. Rptr. 298, quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L.Ed.2d 1215 (1982). The Court made it clear that the California statute did not violate the First Amendment because it proscribes the conduct of selecting a victim based on their characteristics, but does not proscribe expression.

²³ This ruling was made after the *R.A.V.* decision, but prior to the *Mitchell* Supreme Court decision, and prior to the state of Ohio reversing the *Wyant* case on remand in 1994.

Since the United States Supreme Court decisions in *R.A.V.* and *Mitchell*, many state courts have considered the constitutionality of their own hate crimes legislation. In considering hate crimes legislation in light of the *Mitchell* and *R.A.V.* decisions, state courts have not had trouble reconciling the two opinions. Generally, state courts are upholding statutes that punish specific conduct that is motivated by bias as well as penalty enhancement statutes.

In *State v. Talley*, 122 Wash.2d 192, 858 P.2d 217 (1993), the defendant was charged with malicious harassment after burning a cross in the yard next door. The Washington State Supreme Court found that part of the malicious harassment statute was overbroad, however, the other subsection was deemed to withstand constitutional scrutiny because it was aimed at the criminal conduct and only incidentally affected speech. In their analysis, the Court found that other state courts had “agreed that the enhancement statutes in question were directed not at speech, but at conduct, and that they punished not thought or belief, but rather victim selection. This tight nexus between criminal conduct and the statutes sufficiently protected free speech guarantees.” *Id.* at 201.

In *State v. McKnight*, 511 N.W.2d 389 (Iowa 1994), *cert. denied*, 511 U.S. 1113, 114 S.Ct. 2116 (1994), the defendant was charged with violating the Iowa hate crime statute after being involved in a traffic accident with the victim and then proceeding to assault him while taunting him with racial slurs. In reviewing the *Mitchell* and *R.A.V.* decisions while analyzing the facts of *McKnight*, the Iowa State Supreme Court found that “[t]he difference between *R.A.V.* and *Mitchell II* boils down to this. Had McKnight limited his attack on Rone to mere words, the First Amendment would have protected his right to do so. He lost that protection when his racial bias toward Blacks drove him to couple those words with assaultive conduct toward Rone, who is Black. In these circumstances, the words and the assault are inextricably intertwined for First Amendment purposes.” 511 N.W.2d at 395.

The Court’s analysis of the statute led them to the conclusion that the Iowa statute and the Wisconsin statute were similar in nature allowing them to hold that the Iowa statute is “aimed at conduct unprotected by the First Amendment. We therefore conclude [the statute] does not violate McKnight’s First Amendment right of free speech.” *Id.* at 396.

The decision in *State v. Wyant*, 68 Ohio St. 3d 162, 624 N.E.2d 722, *cert. denied*, 513 U.S. 843, 115 S.Ct. 132 (1994), resulted from a remand from the United States Supreme Court calling upon the Ohio State Supreme Court to review its previous ruling for further consideration in light of the ruling in the *Mitchell* case. Recognizing that the previous ruling was in contradiction with the *Mitchell* ruling, the Ohio court reversed its earlier decision and upheld the constitutionality of the Ohio ethnic intimidation law.

In *State v. Vanatter*, 869 S.W.2d 754 (Mo. 1994), the defendant was charged under the Missouri ethnic intimidation statute with burning a cross on the front porch of a church. After analyzing the holdings in *Mitchell* and *R.A.V.*, the Supreme Court of Missouri held that the Missouri ethnic intimidation statutes “are a rational and legitimate means to deal with a serious societal problem.” 869 S.W.2d at 757. In so finding, the Court stated, “[w]hile [the statute] admittedly creates a new motive-based crime, its practical effect is to provide additional punishment for conduct that is illegal but is seen as especially harmful because it is motivated by group hatred. It is clear from *Mitchell* that enhanced punishment for criminal conduct on account of the defendant’s motives of bias or hatred toward a protected group is consistent with the United States Constitution.” *Id.*

In *Florida v. T.B.D.*, 656 So.2d 479 (Fla. 1995), *cert. denied*, 516 U.S. 1145, 1165 S. Ct. 1014 (1995), a minor was charged with burning a cross under the Florida anti-cross burning statute prohibiting such conduct. The trial court held that the statute was unconstitutional, and the district court affirmed that decision. The Florida Supreme Court reversed the decision finding that “[t]he present statute proscribes conduct that falls within the category of ‘threats of violence.’ An unauthorized cross-burning by intruders in one’s own yard constitutes a direct affront to one’s privacy and security and has been inextricably linked in this state’s history to sudden and precipitous violence—lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct.” *Id.* at 481. The Court also found that the banned conduct was “fighting words” due to the fear and intimidation of the victim and making it likely that further action would be taken on the part of the victim or intruder.

In reviewing the statute in light of the *R.A.V.* decision, the Court reasoned that “[t]he present statute comports with *R.A.V.* because the Florida prohibition is not limited to [any] favored topics, but rather cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender. The targeted activity is proscribed because it is one of the most virulent forms of threats of violence and fighting words and has a tremendous propensity to produce terror and violence. The statute is an even-handed and neutral ban on a manifestly damaging form of expressive activity.” *Id.* at 481.

In *In re Vladimir P.*, 283 Ill.App.3d 1068, 670 N.E.2d 839 (1996), the court followed the holding in the *Mitchell* case as well as a previous Illinois case, *People v. Johnston*, 267 Ill. App. 3d 526, 641 N.E.2d 898 (1994) (a case involving a prior version of the hate crime statute), in rejecting the defendant’s freedom of expression claims under the First Amendment and the Illinois state Constitution. The Court expressly stated that the Illinois hate crime statute “does not punish an individual for merely thinking hateful thoughts or expressing bigoted beliefs. Instead, section 12-7.1 punishes an offender’s criminal conduct in choosing a victim by reason of those beliefs or hatred, and then committing one of the criminal acts included in section 12-7.1.”

In *State v. Nye*, 283 Mont. 505, 943, P.2d 96 (1997), the defendant was charged with malicious harassment when he distributed numerous bumper stickers on property to protest participation in a popular church. He entered a plea of guilty, however, he reserved his right to appeal his claim that the statute violated his right to freedom of expression.

The Montana State Supreme Court upheld the constitutionality of the Montana malicious intimidation or harassment statute after a brief review of the *Mitchell* ruling. The Court found that “free speech does not include the right to cause substantial emotional distress by harassment or intimidation.” [citation omitted] “Activities which are intended to embarrass, annoy or harass, as was the case here, are not protected by the First Amendment. [citations omitted].” *Nye* lost his First Amendment protection when he coupled his message, that would have been permissible on his property, with the defacement of the property of others. The Court also found that the statute was neither vague or overbroad.

Previously, the United States Supreme Court has consistently denied review of these state court decisions. Recently, the Court decided to revisit the constitutionality of hate crime legislation by granting certiorari to the *Apprendi* case. In *Apprendi v. New Jersey*, 731 A.2d 485 (3d Cir.1997), *cert. granted*, 68 U.S.L.W.3352 (U.S. Nov. 29, 1999) (No. 99-478), the United States Supreme Court was asked to rule on the constitutionality of a state penalty enhancement law that punished bias-motivation as a sentencing factor that could be

established by a judge upon a showing by the preponderance of the evidence. Most states require their bias crime enhancement laws to be adjudicated by a trier-of-fact, using a standard of “preponderance of the evidence” that a criminal defendant acted with the necessary intent to commit a hate crime violates the defendant’s Fifth and Sixth Amendment rights of due process, notice, and jury trial.

A summary of individual state legislation and cases can be found in Appendix D.

3. WORKING WITH OTHER CRITICAL AGENCIES AND GROUPS

In recent years, the role of the prosecutor has expanded in many communities to include leadership in a host of activities including participation in state and local criminal justice committees, task forces, and coalitions. Prosecutors, like others in the criminal justice system, are required to handle more work without substantial increases in funding to support that work. As a result, coordination and collaboration among criminal justice agencies, other government agencies, service providers, and community-based organizations has become increasingly important, particularly on the issue of hate crime. Interagency coordination and collaboration can result in a broader range of remedies for victims and communities that have been targets of bias-motivated crimes.

The following sections describe different coordination efforts and provide examples of how some local prosecutors work with other critical agencies and groups.

3.1. Coordination with Local Law Enforcement Agencies

Local law enforcement agencies play a critical role in responses to hate crimes. As the responding agency to allegations of bias-motivated crimes, their officers and victim/witness personnel can document overt signs of hate motivation and set the tone with victims and witnesses that can impact their cooperation. Working with local law enforcement can help prosecutors fashion comprehensive approaches to hate crimes.

Coordination and collaboration with law enforcement is particularly important during the investigation of alleged hate crime offenses. Prosecutors can work with officers to ensure that hate motivation is documented thoroughly and relevant evidence is gathered early in the investigation. Across the country, prosecutors have used a number of tools to facilitate coordination with law enforcement. The Los Angeles County District Attorney's Office has designed field identification cards, which are similar to gang identification cards, for police officers to use as a checklist when responding to possible bias-motivated crimes. Other jurisdictions, like the Office of the State Attorney for the 15th Judicial Circuit (Palm Beach County) in Florida, have developed procedures that outline the general rules for law enforcement response to a hate crime, roles and responsibilities, and reporting procedures.

Some jurisdictions, such as Sacramento, California, have established multi-agency task forces to bring together representatives from local, state, and federal law enforcement to investigate hate crimes in the city.²⁴ The task force enjoys the support of both prosecutors and other elected officials. The Cook County, Illinois State's Attorney Office has established a Hate Crime Prosecution Council. The Council brings together representatives from the State's Attorney's Office, law enforcement, and the community to collaborate on approaches and strategies for addressing hate crimes. Specifically, the Council has been designed as a tool for organizing the community response to legislative and policy issues associated with the prosecution of hate crimes.²⁵

²⁴ Bureau of Justice Assistance (BJA). (1997). "Stopping Hate Crime: A Case History from the Sacramento Police Department." *BJA Fact Sheet*. Washington, D.C.: Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice.

²⁵ Cook County State's Attorney. (1998). *Hate Crime: A Prosecutor's Guide*.

Like multi-agency task forces, some prosecutors' offices have formed special joint hate crime or bias crime units, with attorneys and police officers staffing the unit. Such is the case in New Brunswick, New Jersey (Middlesex County). The prosecutor's office created a Bias Crime/Community Relations Unit with the New Brunswick Police Department. An officer from the police department supervises the work of the unit, whose staff includes an investigator, a bias incident officer, and an assistant prosecutor to serve as the legal advisor to the unit.

Task forces may also be multi-jurisdictional, involving several different local law enforcement agencies. In San Diego, California, the Police Chiefs' and Sheriffs' Associations worked with the District Attorney and City Attorney to develop a regional hate crimes policy protocol, adopted jointly by the California Highway Patrol, ten local law enforcement agencies, two university police departments, the county marshal's office, the county correctional facility, county probation, the district attorney, the city attorney, and the U.S. Attorney's Office.

Another tool that can be used to help foster coordination with law enforcement is joint training for both prosecutors and law enforcement officers. For example, the Commonwealth's Attorney's Office for the City of Richmond and the Monmouth County, New Jersey Prosecutor's Office sponsor a hate crime training program for both officers and prosecutors. Each training focuses on identification and investigation of hate crime cases, legal issues and legislation, victims' issues, and community relations. There are a number of training courses designed for both prosecutors and law enforcement. Information about these courses is located in the Resources section of the guide.

3.2. Coordination with Federal Agencies

Various federal programs and initiatives have been created to help respond to hate crimes, educate criminal justice practitioners, and rehabilitate communities after a hate crime occurs. Once a hate crime has occurred, prosecutors, who need assistance in responding to the crime, can request assistance from a number of federal agencies. Traditional sources of assistance, from the FBI and U.S. Attorneys' Offices, are of particular help for prosecutors in states that do not have hate crime laws or sentencing enhancements. In addition to the traditional sources, the United States Department of Justice (DOJ) and other federal agencies have a number of resources to assist local prosecutors in their efforts to prosecute and prevent hate crimes. These resources include:

- Community Relations Service (CRS), DOJ
- Office for Victims of Crime (OVC)
- U.S. Department of Housing and Urban Development (HUD)
- U.S. Department of Education (ED)

Community Relations Service

The CRS is a specialized Federal conciliation service that helps state and local officials to tailor locally-defined strategies to resolve and prevent racial and ethnic conflict, violence,

and civil disorder. The CRS staff work with local officials to define the sources of conflict and use crisis management and mediation practices to diffuse the problem and restore community stability. Specifically, the CRS can work on-site with prosecutors and other local officials and to provide the following services, as requested:

- Contribute expertise and guidance on methods and policies that calm racial tensions;
- Build strategies with state and local governments and community groups to prevent and respond to civil disorders;
- Improve lines of communication among federal, state, and local public officials, community leaders, and residents;
- Help establish programs to eliminate racial misconceptions and build multi-racial coalitions; and
- Assess community relations involving racial and ethnic tensions.²⁶

Examples of assistance provided by CRS in recent years to address hate crimes include:

- Coordinating with local government agencies to address racial distrust and conduct race relations training for community leaders and law enforcement in response to church burnings;
- Facilitating mediation and conciliation meetings between representatives of community groups and local government leaders;
- Assisting local officials and community leaders in the development of policies, practices, and procedures to respond to hate crimes;
- Conducting training workshops for law enforcement and residents on how to recognize a hate crime, to gain support of the community, to identify victims and witnesses to the crime, to prevent hate crimes, and to share information; and
- Providing assistance to prosecutors and local law enforcement in conducting public awareness and education programs for community members, school officials, and law enforcement on responses to hate crimes.

Contact information for the CRS headquarters and field offices is provided in the Resources section of this guide.

Office for Victims of Crime

The Office for Victims of Crime (OVC) was created by the U.S. Department of Justice in 1983 and formally established by Congress in 1988 through an amendment to the Victims of Crime Act of 1984 (VOCA). The OVC advocates for policy development across the country

²⁶ Community Relations Service, U.S. Department of Justice. (1997). *CRS Fact Sheet*. Washington, D.C.: Community Relations Service, U.S. Department of Justice.

for the fair treatment of victims and provides Federal funds to support victim assistance and compensation programs. OVC conducts training for professionals who work with victims, develops projects to enhance victims' rights and services, and undertakes public education and awareness activities on behalf of crime victims. In addition, the OVC administers the nation's Crime Victims' Fund, distributing these funds to states on an annual basis to support states' victims assistance and compensation programs.

The OVC can serve as a resource for local prosecutors in responding to hate crimes by providing information and referrals for services that can be used to help hate crime victims.

U.S. Department of Housing and Urban Development

The U.S. Department of Housing and Urban Development (HUD) has developed an initiative called "Make 'Em Pay." The initiative is designed to combat bias-motivated crimes that violate the Fair Housing Act by increasing the severity of punishments and other consequences. Specifically, HUD works with the Department of Justice, state and local prosecutors, and law enforcement to identify and prosecute hate acts involving housing discrimination. Under the initiative, HUD can assess fines of \$11,000 for first-time offenders, \$27,500 for second-time offenders, and \$55,000 for third-time offenders for each hate act. For hate acts that do not warrant criminal prosecution, HUD can opt to file civil charges under the Fair Housing Act. Local prosecutors can call upon HUD to assist in investigating and prosecuting housing-related hate activity.

U.S. Department of Education

The U.S. Department of Education (ED) has a number of educational programs and collaborative efforts with local schools. Curricula and educational materials are available through the ED and local schools that may be useful to prosecutors in preventing and responding to hate crimes. The ED also awards grants to local educational institutions to develop hate crime prevention curricula, conflict resolution skills, and training for teachers and administrators on identifying and addressing bias-motivated conflicts and crimes. Collaborative arrangements between local schools, community groups, law enforcement, and prosecutors on such grants can help build comprehensive approaches to hate crimes. Information on existing ED curricula can be found in the Resources section of the guide.

Examples of Local Prosecutors' Collaborative Efforts with Federal Agencies

Many local prosecutors have successfully collaborated with federal agencies to address hate crimes at the local level as described below.

State Attorney's Office for the 15th Judicial Circuit of Florida (Palm Beach County)

The State Attorney's Office (SAO) in Palm Beach County, Florida, works with the U.S. Attorney's Office and the Florida Attorney General's Office to prosecute hate crimes that occur in the county. An attorney in the Civil Rights Division of the SAO has been cross-designated as an Assistant U.S. Attorney and an Assistant Attorney General so that hate crimes can be jointly pursued by multiple agencies. This approach provides for a coordinated response at all levels of government.

San Francisco District Attorney's Office

The District Attorney in San Francisco, California entered into a protocol agreement with the U.S. HUD, Office of Fair Housing and Equal Opportunity (FHEO) to provide federal remedies for people who have been victims of hate crimes. The protocol calls for interagency cooperation on matters involving bias incidents and discrimination related to housing. Such matters are referred to the FHEO by the District Attorney's Office for initial review and then to the U.S. Department of Justice for prosecution or civil redress. In addition, the protocol states that no civil action will be taken when there is a pending criminal prosecution at the local level based on the same facts.

3.3. Working with Other Agencies and Groups

Prosecutors, working alone, cannot address hate crimes. Hate crimes have a serious and deep impact on victims and the communities in which they occur. As such, promising approaches to responding to hate crimes incorporate prevention, detection, enforcement, adjudication, and restoration of victims' and communities' sense of safety. As leaders in the community, prosecutors can bring together other agencies and groups to develop comprehensive strategies to address hate crimes before and after they occur.

In addition to law enforcement agencies, prosecutors can coordinate efforts with other governmental agencies, community-based service providers, and other community groups. Agencies and groups may include:

Other Governmental Agencies

- School Department
- Department of Social Services/Human Services
- Human Rights Commission
- Department of Health/Mental Health Services
- Department of Probation/Parole
- Department of Corrections

Community-Based Service Providers

- Inter-faith coalitions/churches
- Community health/mental health centers
- Victims' assistance service providers
- Victims' rights organizations

Other Community-Based Groups

- Tenant/resident associations
- Neighborhood watch/crime watch groups
- Victim advocacy groups and civil rights groups
- Minority or community media and newspapers

These agencies and groups can provide an array of services to aid prosecutors such as educational programs to help prevent hate crimes and direct services to help victims and communities recover. Forging relationships with other agencies and groups can also help prosecutors and law enforcement in identifying hate incidents and potential hate crimes and securing victim/witness support and cooperation. Working with such organizations,

prosecutors can help to increase public awareness about the criminal justice system and hate crimes, prompt proactive community responses to hate and prejudice, and empower victims and members of the victims' groups by demonstrating that justice can be achieved.²⁷

²⁷ Purvis, Robert D. (1993). *The Lawyer's Role in Combating Bias-Motivated Violence*. National Institute Against Prejudice & Violence.

4. CASE IDENTIFICATION, SCREENING, AND INVESTIGATION

As the “gatekeepers” to the court system, prosecutors play a critical role in screening potential cases. This role is particularly important for hate crime cases. Often it is unclear to victims and law enforcement that a criminal act was motivated by the perpetrator’s bias against a group or individual. Conversely, victims and communities may believe a criminal act should be classified as a hate crime even if the evidence does not support such a classification. Hate crimes, particularly those that are violent crimes against persons, may also be subject to widespread media attention. For these reasons, the screening of potential hate crime cases can be paramount to successful prosecution and community relations.

The following sections provide general guidance on the screening and investigation of hate crime cases. Recognizing that prosecutors’ offices generally have their own individualized screening processes, the information provided below is intended to give prosecutors additional tips and strategies for screening and investigating hate crime cases.

4.1. Identification of Hate Crime Cases

Police officers and investigators play important roles in responding to hate incidents and crimes since careful evidence collection and thoughtful treatment of victims and witnesses is crucial. By coordinating on a thorough investigation of and follow up on suspected hate crimes and incidents, police and prosecutors can enhance the likelihood of a successful prosecution. To ensure coordination, many law enforcement agencies have instituted policies and procedures for information sharing.

Some jurisdictions have appointed one person who acts as a liaison between the police and prosecutors, while others have established a chain-of-command for sharing information with other law enforcement agencies. For example, the Trial Division of the New York County District Attorney’s Office works closely with the New York City Police Department’s (NYPD) Bias Incident Investigating Unit in investigating and prosecuting bias-motivated cases. NYPD procedure requires that precinct officers submit reports of possible bias-motivated incidents and arrests to the NYPD Bias Unit. The Bias Unit in turn faxes a copy of those reports to the DA’s Office. Significant bias incidents are assigned to senior assistants for investigation and prosecution.

Similar to New York County’s procedures, the Cape & Islands District Attorney’s Office of Massachusetts has established a procedure whereby police reports and witness statements are forwarded to one assistant district attorney for case review and evaluation. Comments regarding past incidents and current or previous criminal records also are forwarded to be certain that all possible criminal charges associated with the crime are filed. The Cape & Islands office also coordinates with local prosecutors statewide, as well as the state police and Attorney General’s Office. Similar coordination is also pursued by the New Jersey Department of Law and Safety. These coordinated efforts help to ensure consistency in identifying, investigating, and reporting hate crimes.

In 1999, the International Association of Chiefs of Police (IACP) convened a working group of law enforcement officers, prosecutors, and others to develop investigative strategies for hate crimes. Based on the recommendations of the working group, IACP published the investigative strategies described below.²⁸

Responding police officers arriving at the crime scene should:

- Secure the scene and possible evidence;
- Record if the victim and offender were from different racial, religious, ethnic/national origin, sexual orientation or gender groups;
- Stabilize the victim(s) and request medical attention when necessary;
- Ensure the safety of victims and witnesses;
- Restore order and gain control of the situation;
- Preserve the crime scene, and collect and photograph physical evidence;
- Identify and photograph criminal evidence on the victim;
- Request the assistance of translators when needed; and
- Conduct a preliminary investigation recording information on the identity of perpetrator(s), identity of witnesses, prior occurrences, and gestures and statements made by the suspects.

Once the scene of the crime has been secured, there are a number of steps that may be taken to further investigate the crime and make determinations about possible bias-motivation. These steps include:

- Assigning one police officer to interview and help victim(s) in order to minimize trauma;
- Protecting the anonymity of victim(s) and witnesses;
- Explaining the likely sequence of events to the victim(s), including contact with investigators, prosecutors, and the media;
- Referring victims to support and outreach services in the community;
- Giving victim(s) police contact information so that he/she can obtain further information as the case develops;
- Reporting the hate crime to the supervisor on duty; and

²⁸ The full IACP Report entitled, "Hate Crime in America - Recommendations from the 1998 IACP Summit" (1999) may be obtained from IACP. Their contact information is located in Appendix E.

- Documenting the incident thoroughly on the department report forms, noting any particular hate crime indicators and quoting exact wording of statements made by perpetrators.

Once the initial investigation is complete and assigned to detectives or police officers for follow-up investigation, investigative strategies include:

- Interviewing victims and witnesses thoroughly;
- Securing evidence by taking photographs of offensive graffiti or other bias symbols;
- Documenting the circumstances and apparent motives surrounding the event;
- Reviewing other police records to find out if other bias motivated crimes have occurred in that area;
- Identifying if the victim was engaged in activities that promoted a certain racial, religious, ethnic/national, sexual orientation or gender group;
- Determining whether or not the incident coincided with a holiday;
- Determining if the offender was previously involved with a similar bias crime or organized hate group;
- Applying for search warrants to examine contents of the perpetrator's computer hard drive (if applicable) in order to determine if he/she is involved with hate groups;
- Appealing to witnesses to come forward with any information regarding the incident;
- Offering rewards for information leading to the capture and arrest of perpetrator(s);
- Coordinating with other law enforcement agencies and community groups to assess patterns of hate crimes and determine if organized hate groups were involved;
- Collaborating with the responding officer(s) to complete any written police report; and
- Notifying the FBI if further investigative assistance is needed.

One strategy used successfully in Los Angeles County, California is the use of field identification cards/indices. The Los Angeles County District Attorney's Office worked with local law enforcement agencies to develop a profiling and tracking system for hate crimes. Based on similar systems used for tracking gang membership, officers have been given field identification cards to help them document name, age, gang/hate group affiliation, tattoos, and known associates of suspects they stop on the street. This information can then be input into a computer database that can be searched when hate crimes occur. This database can be a valuable resource for investigating and screening hate crime cases as well as for establishing the hatred, bias, or prejudice of defendants in hate crime cases.

Hate crimes perpetrated over the World Wide Web or Internet present special challenges for investigation. At present, there has been very little legislation passed regulating communication in cyberspace, but despite views to the contrary, there is nothing unique

about holding the senders of hate threats accountable under current hate crime laws. Regardless of the mode of delivery, people can not target a individuals for threats or harassment because of actual or perceived inclusion in an identifiable group.²⁹ Additionally, in many cases, senders transmit hate mail or messages via webpages across state lines to victims throughout the country, creating jurisdictional issues and making it difficult to identify all victims. Nevertheless, it is important that law enforcement and prosecutors be equipped to investigate hate crimes committed via the World Wide Web, which requires certain skills and expertise. In his September 19, 1999 testimony before the Committee on the Judiciary, U.S. Senate, U.S. Attorney Michael Gennaco suggested the following issues for law enforcement and prosecutors to consider in the investigation and prosecution of hate on the Internet:

- Expertise in the investigation of computer crimes, including an understanding of computer hardware and software;
- Sufficient resources to allow investigative agencies to track the sender of electronic message and recapture any additional or similar messages sent by the sender; and
- Capability to subpoena Internet Service Providers (such as America Online, Prodigy, Erols, Mindspring, etc.) to obtain locator information about the sender and potential victims.

4.2. Case Initiation

Because of the sensitive nature of hate crimes, their impact on the victim and victimized community, and the challenges in establishing bias motive, some prosecutors' offices have established case processing policies. These policies, such as the one used in Cook County, Illinois, call for prompt notification and continuous reporting of hate crimes and case status to supervising attorneys, including informal (verbal) and formal (written) notification at various stages in the case processing continuum.

Many offices have established special units or designated attorneys to respond to hate crimes. The senior attorney in the special unit or the designated hate crime prosecutor is responsible for reviewing police reports or complaints and making a determination about whether or not the offense meets the filing requirements for a hate crime.

The Cook County (IL) State's Attorney, the San Diego County (CA) District Attorney, the Orange County (CA) District Attorney, the San Francisco County (CA) District Attorney, the Palm Beach County (FL) State's Attorney, the Westchester County (NY) District Attorney, the Suffolk County (MA) District Attorney, and the Maricopa County (AZ) Attorney have all designated a unit or person to review or provide guidance for initiating charges. Some offices, like Cook County, even have computerized tracking systems.

In Cook County, the Chief of the Felony Trial Division and the Chief of the Municipal Division work together to supervise the prosecution of all hate crimes. These prosecutors provide guidance to police investigators that will help build the case. Specifically:

²⁹ Gennaco, Michael J. September 14, 1999.

- Cases are presented to the Felony Review Unit for evaluation of potential charges;
- If the case is approved, the data collected at this point is coded to reflect the name of the defendant, the crimes, the hate-based motivation, the date the felony case was reviewed, and the arresting agency;
- Once the decision to charge the hate crime is made, the prosecutor assigned to evaluate the case uses a checklist of textbook indicators of hate crimes to assist in properly wording the charges to indicate the relationship between the hate crime and predicate offense (see Appendix F for a sample checklist of indicators);
- The assigned prosecutor must indicate the reason for approving the case for hate crimes prosecution and notify the appropriate supervisor of the case no later than the following day after a case is reviewed; and
- Thereafter, the assigned prosecutor is required to consult with their supervisors at each step in the case.

These procedures facilitate supervising prosecutors in their efforts to track trends and recognize repeat offenders who come through the felony system. As for misdemeanor hate crime charges, police officers do not need the approval of the State's Attorney's Office before they can charge. Thus, there is little likelihood that a prosecutor will be involved in the filing of charges or involved in case review until the first misdemeanor court date.

The Cape & Islands District Attorney's Office (MA), the New York County District Attorney's Office, and the Palm Beach (FL) State's Attorney's Office have also instituted procedures for notification and initiating a case. For example, in Florida, records personnel in the Florida Department of Law Enforcement ensure that a copy of all incidents are forwarded to the State's Attorney's Office. The screening unit of the State's Attorney's Office refers all hate-related cases to the Civil Rights Unit where the case is reviewed for filing charges.

While there are no special procedures for notification and initiation of a hate crime case in the 11th Judicial Circuit (Miami, Florida), the State's Attorney's Office has developed a memo used by the filing attorney to designate a hate crime case. The memo is placed with the charging folder and explains how to use the sentencing enhancement statute.

4.3. Case Dismissal or Decision Not to Prosecute as a Hate Crime

In weighing the decision to file hate crime charges, there are a number of issues that prosecutors may wish to consider. These include:

- Federal, state, or local definitions of what constitutes a hate crime and the presence of substantial bias motive;
- Careful analysis of the facts on a case-by-case basis of whether or not the bias, hatred, or prejudice should be a substantial basis for the motivation behind the crime when concurrent dual or multiple motives exist (e.g., the intent to commit a robbery and the intent to commit a hate crime); and

- Whether or not there is necessary proof to support a conviction beyond a reasonable doubt after considering the facts and analyzing and rejecting all legitimate defenses.

In addition to the issues listed above, prosecutors' offices may have established their own filing requirements for hate crimes based on their state's hate crime legislation. For example, the State's Attorney's Office in Cook County, Illinois enumerates 11 questions that prosecutors consider when determining whether or not to file hate crime charges:

1. Did the offender(s) use words, symbols, or acts that are or may be offensive to an identifiable group?
2. Are the victim and offender members of different racial or ethnic groups? If so, has there been past hostility or tension between these two groups? Has the victim's group been subject to prior similar criminal acts or harassment?
3. Is the victim the sole member of his or her group, or one of a small number of members living or present in the neighborhood where the crime occurred?
4. Has the victim recently moved to the area in which the incident took place?
5. Does the incident appear timed to coincide with any holiday or observance of significance to a certain group or community, such as religious holiday or ethnic celebration?
6. Has the victim or victim's group been involved in recent public or political activity that makes the individual a likely target for hate-motivated violence?
7. Does the offender appear to belong to or does the manner of the commission of the crime appear to involve an organized hate group such as the Ku Klux Klan or Neo-Nazi organization?
8. Does the defendant, in a post-arrest interview or in statements made before or during the commission of the crime, recognize the victim to be a member of a potential "target" group?
9. Has there been recent news coverage or media exposure of similar events?
10. Does the defendant have a prior history involving hate-motivated conduct?
11. Is the attack particularly vicious?³⁰

If the hate crime burden of proof is not met or cannot be established, the case should not be filed as a hate crime. There are instances where a hate-motivated crime has not been committed but a violation of criminal law still exists. These cases should be screened and filed appropriately according to individual office procedures. In addition, prosecutors may encounter many situations where an incident occurs based on bias, hatred, or prejudice but the incident does not rise to the level of a crime. Generally, this occurs when the suspect uses offensive language toward the victim. Although many times, the suspects' actions are

³⁰ Cook County State's Attorney Office. (1998). *Hate Crime: A Prosecutor's Guide*, pp. V-2.

highly offensive to the victim and the victim's community, prosecutors may decide not to file a hate crime charge.

Many prosecutors' offices work with victims throughout the case review period to keep them apprised of case progress. At a minimum, however, if the filing requirements for hate crime charges are not met, prosecutors should promptly notify victims about the decision and the basis for the decision. Depending on the nature of the case, prosecutors may wish to communicate with victims in person rather than by letter or telephone.

When and where applicable, prosecutors should notify victims of other forms of legal redress in lieu of criminal prosecution. The State's Attorney's Office in Cook County, Illinois notifies victims of their right to seek civil remedies. Conspiracy to deprive a person of their civil rights is the most commonly applicable federal claim that victims are notified they may file. (42 U.S.C. § 1985(3)). Moreover, the Illinois hate crime statute and institutional vandalism law provides victims the right to sue the perpetrators "for damages, injunction or other appropriate relief." (720 ILCS 5/12-7.1(c); 720 ILCS 5/21-1.2(c)). The civil provisions in the Illinois state statute has no limit on punitive damages and allows victims to bring these actions "independent of any criminal prosecution." (720 ILCS 5/12-7.1(c); 720 ILCS 5/21-1.2(c)). The Philadelphia District Attorney's Office also provides information to victims on other forms of help available besides criminal prosecution, including civil remedies and conflict resolution services.

Because of the variation in size of offices and office organization, prosecutors have different general procedures for case assignment and case processing. For hate crime cases, some offices have found it beneficial to use either special units designated to respond to hate crime cases only such as Cook County, Illinois; others designate specially trained attorneys to handle hate crime cases such as Palm Beach County, Florida; and others use vertical prosecution such as Los Angeles and San Diego Counties, California, and New York County, New York. The benefits of using special units/attorneys or vertical prosecution include:

- Expertise in identifying hate crimes;
- Assurance of proper handling of hate crimes;
- Continuity in case processing; and
- Central point of contact for communities and victims.

The District Attorneys of both Los Angeles and San Diego Counties have designated units and deputies to oversee and coordinate the prosecution of hate crimes. Although San Diego's policy is loosely based on LA County's policy, there are slight differences. For example, while LA County DA's Hate Crime Suppression Unit (HCSU) receives only *potential* felony hate crimes cases for filing consideration, the San Diego Special Operations Division receives all hate crime cases. Moreover, the Deputy-in-Charge of HCSU handles all felony hate crime cases, but allows filing deputies to handle any potential misdemeanor or juvenile case in accordance with the procedures outlined in the Legal Policies Manual.

In addition, many prosecutors note that it takes a special person to handle hate crime cases—specifically an attorney who wants to work on hate crimes and one with certain qualifications. Offices with experience in handling hate crime cases generally assign

prosecutors with senior status, trial experience, good communication skills, and good community relations skills to respond to hate crimes.

In smaller offices and offices in states without hate crime legislation, many chief prosecutors handle hate crime cases themselves or assign senior, experienced trial attorneys to prosecute hate crimes. For example, in Mobile, Alabama, hate crime cases are assigned to senior prosecutors. Likewise, the Office of the Prosecuting Attorney for the City and County of Honolulu, Hawaii assigns hate crime cases to the heads of various divisions and units in the Office, who in turn assign cases to prosecutors based on experience.

There are a number of training courses available for offices that wish to train attorneys how to handle hate crime cases. Prosecutors can contact the APRI, Anti-Defamation League, local bar associations, International Association of Chiefs of Police, National Association of Attorneys' General Bias Crime Task Force, National Organization of Black Law Enforcement Executives, The Southern Poverty Law Center, the Simon Wiesenthal Center, and the Community Relations Service at the U.S. Department of Justice. Contact information for these trainings is provided in Appendix E.

5. CASE PREPARATION

Preparing hate crime cases for adjudication can be a time-consuming and labor-intensive effort. Hate crime cases often require additional investigation, extensive work with victims and witnesses, and other significant pre-trial work. The following sections discuss strategies for case preparation and provide examples of how different prosecutors' offices prepare cases.

5.1. Victim/Witness Assistance, Cooperation, and Support

Hate crimes can be extremely traumatic for victims and victimized communities. Victims and witnesses are often afraid to cooperate with investigations because of the threat of retaliation or distrust of the system. Therefore, it is important that certain mechanisms are in place to ensure the appropriate assistance and support is provided to victims, which in turn may help facilitate their cooperation. Moreover, it is important to ensure that victims do not feel further "victimized" by the criminal justice system.

The first step in ensuring the appropriate assistance and support for victims is for prosecutors, law enforcement, victim/witness assistance personnel, and victim advocacy groups to be aware that there are certain special issues in working with hate crime victims. Each victimized group brings special needs, expectations and fears with them as their case goes through the criminal justice system. Likewise, those who are charged with rendering fair and objective assistance to these victims may have their own stereotypes as they perform their official duties. However, during the course of providing assistance, it is important that prosecutors and service providers sensitize themselves to some of the special needs of these victim groups.

The Cook County (IL) State's Attorney has drafted a list of general victim considerations that range from race/color, ethnicity/national origin and religion to sexual orientation, gender and disability issues which victims present. Similarly, San Diego (CA) County Police Chief's and Sheriff's Associations in conjunction with the district attorney have a policy on professional expectations. This policy requires that all members exhibit empathy for the victims and all members present a non-discriminatory demeanor when dealing with any alleged hate crime. Many other prosecutors' offices such as the Cape & Island District in Massachusetts; the Los Angeles County District Attorney's Office; the District Attorney for the 18th District (Fort Collins) in Colorado; the Jackson County, Michigan (Detroit) District Attorney; and the District Attorneys in New York County and Westchester County, New York, also have policies that stress working closely with victims to help restore the well-being of the individual and the community.

With these general considerations in mind, victim/witness assistance can be fashioned in a manner that will help to garner cooperation in the prosecution and help victims recover from the hate crimes. Additionally, victims' services and witness assistance programs should consider the impact that legal proceedings may have on the victim's recovery. Most prosecutors' offices nationwide either have in-house victim/witness advocates or designated

victim/witness staff (86% of offices)³¹ or access to law-enforcement or community-based programs to assist victims with recovery from their ordeal. Providing an effective response to victims of hate or bias-motivated crimes includes:

- Making a commitment to work with victims to obtain background information and input on how to proceed and dispose of the case;
- Initiating victim contact to establish rapport and assess victim needs;
- Responding sensitively to the feelings, needs, customs and mores of the victims' racial, ethnic, religious, cultural or social group;
- Referring victims to the agency's victim advocate or other victim assistance; and,
- Follow-up to assure the victim that law enforcement officials are doing everything possible to eliminate the fear factor and apprehend the suspect(s).

Both Los Angeles (CA) County's Hate Crime Suppression Unit and San Diego (CA) County's Special Operations Division have policies for interacting with victims. Their deputy district attorneys are charged with the task of using all available resources to help the victim overcome obstacles to participation in the criminal justice process that include, but are not limited to:

- Referring the victim to the victim assistance program or a victim advocate or agency within his or her community;
- Acting as liaison, providing information on the arrest of the suspect(s), and notifying the victim of all court dates and times;
- Assisting victims/witnesses with filing protective or restraining orders, relocating, or by providing surveillance and security.

The felony review prosecutor in the Cook County (IL) State's Attorney's Office also suggests interviewing reluctant victim(s) to determine the reasons for their reluctance or refusal to participate in the process. Perhaps this reluctance or refusal can be overcome by:

- Expressing appropriate concern for the victim(s);
- Providing reassurance that the criminal justice system can serve the victim's interests;
- Making arrangements to provide for the protection of the victim; and,
- Seeking the assistance of community groups as a resource to help reluctant victims through the process.³²

³¹ American Prosecutors Research Institute. (forthcoming). *Prosecutors Guide to Victim/Witness Assistance*. Washington, D.C.: Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice.

³² Cook County State's Attorney. 1998. *Hate Crimes: A Prosecutor's Guide*.

Hate crimes affect the community in which the crimes are committed and cause a great deal of concern and questions among its members. Most individuals turn to the police, prosecutors, or the media for information on what is being done to correct the impact of such crimes. Although apprehending the suspect(s) and bringing them to justice is paramount, it is also important to disseminate truthful, accurate, and necessary information that will facilitate healing. The Cook County (IL) State's Attorney's Office makes a priority of considering the comfort level of the victim(s) with public disclosure of their identities. Many victims may not want their names included in media coverage, thus prosecutors avoid releasing the addresses of hate crime victims to guard their safety and privacy.

Prosecutors can also work with local police departments to address victims' issues. For example, with a grant from the Bureau of Justice Assistance, the San Diego Police Department is organizing a comprehensive array of services that will address the effects of hate crimes on victims and witnesses. This program will provide services that assist victims with less tangible losses associated with hate crimes like emotional pain, confusion, and posttraumatic stress. The department will develop a community-based response, support and referral system specifically to address hate crimes victims and witnesses. Support programs such as this can help secure victim cooperation and trust in the criminal justice system.

In addition to the services and approaches described above, the National Victim Assistance Academy and the Office for Victims of Crime, U.S. Department of Justice outline a number of special services for victims of hate crimes:

- Let the victim express the intense feelings aroused by the hate crime.
- Provide information to the victim concerning the investigation and prosecution of their case, both about their case in particular and the system in general.
- Any hate crime victim who is reluctant or refuses to prosecute should be carefully interviewed to determine the reasons for the reluctance. Oftentimes, this reluctance can be overcome by a prosecutor who expresses appropriate concern for the victim, provides reassurance that the criminal justice system can serve the victim's interests, and arranges to protect the victim. Prosecutor programs can also turn to community groups as a resource to help support reluctant witnesses through the criminal justice system.
- Provide referrals for cross-cultural counseling for victims of hate crimes.
- Recognize the bias-motivated crime for what it is to the victim.
- Address the crisis of victimization as well as confront the obvious hate and prejudice exhibited in the crime.
- Assist the victim with completing and filing an application to the state's victim compensation fund, if applicable.

- Provide the victim with information about victim impact statements and their importance and use in the justice process; provide them with the appropriate impact form and offer whatever assistance they require in preparing their victim impact statement for court and/or for paroling authorities.
- If there is a conviction in the case, provide a referral for the victim to the victim liaison in the state department of corrections or the probation/parole department for a continuation of victim notification and services concerning their case and the status of the convicted defendant.
- If there is a conviction in the case, provide the victim with post-conviction appellate notification and services.
- Inform and educate the victim of hate crimes about the possibility of civil remedies for the crime committed against them. Refer them to the local bar association for referrals, or to any local or state nonprofit legal organizations that possibly represent hate crime victims.
- Be as non-judgmental as possible in dealing with victims of hate crimes.
- Improve outreach into the cultural and minority communities. Let community members know your program is willing and able to serve victims of bias crime.³³

5.2. Victim/Witness Preparation

It is important to provide on-going services to victims and witnesses of hate or bias-motivated crimes either through in-house victim advocates or via community service providers. During case preparation, it is significant from the victim's point-of-view that the prosecutor understand the impact of the crime on the victim. Therefore, the prosecutor's role in providing services by making early and frequent contact with the victim(s) is crucial. This contact reassures the victim of the importance of their case, assures the victim's interest and cooperation in prosecuting the defendant, and provides opportunities to discuss disposition of the case, including guilty pleas.

5.3. Bond Hearings and Bail Requests

Hate crimes range in severity from intimidation/threats to property damage to violent attacks. Regardless of the severity of the actual offense, it is important to ensure victims' and witnesses' safety. For this reason, bond hearings and bail requests are critical points in the case processing continuum.

There are a number of protective methods that prosecutors can use to help ensure the safety and cooperation of hate crime victims and witnesses. These methods include:

³³ These practices were excerpted from the National Victim Assistance Academy training module, "Hate and Bias Crimes," based on *Focus on the Future: Effective Service Delivery to Victims of Bias-Motivated Crimes*; sponsored by the U.S. Department of Justice, Office for Victims of Crime, 1994.

- Bail and bail deviation—This is the front line of protection available for victims and witnesses. Prosecutors should request the maximum bail permissible. Prosecutors should also keep in mind that many instances occur where a deputy is justified in requesting a deviation from the scheduled bail to a greater bail amount. Prosecutors can remind judges that although bail serves several functions, its primary function is *protection of the public*, not merely whether or not the defendant will return to court.
- Stay-away orders—Regardless of where in the proceedings a hate crime defendant will be released, prosecutors should request a stay-away order. As a condition of probation or release on bail, a stay-away order is a valuable tool that can be used to violate a defendant if he or she contacts or harasses victims or witnesses.
- Witness protection funds for relocations—Relocation funds are a tremendous resource in protecting victims. Often times, the relocation of a witness may mean the difference between a cooperative and an antagonistic witness. If your office has funding for protection or relocation of witnesses, prosecutors should familiarize themselves with the procedure for using the funds and use them when appropriate.
- Non-disclosure statutes—If your jurisdiction has non-disclosure statutes that prevent the release of the victims' name or address, make sure to inform your victims of the procedures. Victims and witnesses rely on the prosecutor for guidance and assurance so it's important for prosecutors to keep them informed of their rights and the process.
- Police or prosecutor investigators—Prosecutors should keep law enforcement officers aware of any actual or potential threats to victims or witnesses. Investigating officers and investigators in prosecutors' offices can be used to help protect witnesses. This can be as simple as providing a police escort to and from court, a routine drive-by of the witnesses' home by patrol units, or the placement of investigators at the witnesses' homes in extreme cases.
- Victim/witness advocates—If the office employs advocates to assist victims and witnesses through education and support, prosecutors should offer this service in hate crime cases. Advocates are an invaluable tool to aid in the flow of information about hate crimes in general and the criminal justice process.

The San Francisco (CA) District Attorney's Office protocol requires that the supervising assistant district attorney make bail recommendations and appear at all significant stages of the proceedings, including bail hearings. Most of the prosecutors' offices that provide victim advocacy also provide assistance in obtaining protective and restraining orders from the courts. This includes personal accompaniment to the court clerk or magistrate to obtain the proper forms, and escorting the victim(s) to court to show cause why the order should be in effect.

The Victims of Crime Act of 1984 established a Crime Victims Fund that is managed and distributed by the U.S. Department of Justice's Office for Victims of Crime. Most states in the U.S. have initiated programs that compensate crime victims for financial losses resulting from a crime. In states where such programs exist, the victim advocate can assist in seeking compensation, which includes funds for relocating due to fear of retaliation for reporting the crime to assure their security and physical well-being.

5.4. Preliminary Hearings/Grand Jury

Many states allow the option of commencing a prosecution through a preliminary hearing or Grand Jury. In those states, the choice can be critical to a successful prosecution. Given the nature and evidentiary concerns of hate crimes, there are many issues to be considered in making this decision. Both the Grand Jury and preliminary hearings have advantages and disadvantages in the prosecution of hate crime cases.

Preliminary Hearings

The primary advantages to a preliminary hearing are the preservation of evidence and the public nature of the proceeding. Since in many hate crime cases, the victims are chosen at random, identification of the defendant is often an issue. A preliminary hearing allows the victim to see the defendant before he or she makes drastic changes in his/her appearance (i.e., growing out hair, tattoo removal, etc.). With a preliminary hearing, the victim can make an in-court identification a few days or weeks after the crime as opposed to waiting many months until trial, by which time the defendant could have altered his or her physical appearance. This could make proving a critical piece of evidence, that is in-court identification, difficult.

Victims of hate crimes are often distrustful of the criminal justice system, and in certain parts of the country, they may be part of a migrant population. While they may agree to cooperate and prosecutors know their whereabouts at a preliminary hearing, that may not be the case at trial several months after the crime has occurred. The longer the process takes from the time of the crime to trial, the higher the risk is that victims will no longer be willing to cooperate. They may not wish to be involved in a high profile case because it may make them feel more at risk for being targeted for another crime. In addition, the victim may be vulnerable to threats and intimidation if sufficient protective strategies are not used, which can also influence their willingness to cooperate. Therefore, it may be advantageous for the prosecutor to initiate the case with a preliminary hearing. If the victim testifies at a preliminary hearing and then is unavailable for trial, their testimony can still be admitted.

Because a preliminary hearing is generally a public proceeding, the public is able to see what evidence the State has and does not have. This can be critical if there is going to be decisions on plea agreements with one or more of the defendants. The public process also shows the work that the police and the prosecutors' office have done in a hate crime case. This sends a message to the community that hate crimes are taken seriously by law enforcement, which can have a calming effect on the targeted/victimized community and a detrimental effect on hate groups.

Grand Jury

The primary advantage to proceeding by way of a Grand Jury is the secrecy. By using a Grand Jury to initiate a case, the prosecutor can ensure that the victim will not have to testify publicly until trial. This can be important given the trauma that victims often have following a hate crime. With the extra time to heal, victims may be in a much better position physically and mentally to withstand what could be an emotional testimony and vigorous cross-examination.

Another advantage to the Grand Jury is that the composition of a Grand Jury also allows the prosecutor to gauge what types of witnesses are involved in the case. Since Grand Jurors are lay persons, their reaction to witnesses is very similar to petit jurors. This allows the prosecutor to make any necessary adjustments in preparation for trial or to help to make decisions regarding any possible plea agreement. The secrecy of a Grand Jury proceeding can also help to convince reluctant witnesses to cooperate. With relaxed rules of evidence and no-cross examination, a witness is likely to be more comfortable in a Grand Jury setting than in an adversarial setting. Prosecutors can use this experience to build further trust and cooperation from reluctant witnesses.

Finally, the Grand Jury proceeding can be used to obtain evidence that may not otherwise be available. For instance, the Grand Jury's subpoena power can be used to subpoena phone records, bank records, or other information that a prosecutor may need but is not able to gather through other conventional methods. The subpoena power of the Grand Jury can also be a useful tool in cases in which the victim refuses to cooperate with authorities by bringing forward other witnesses, such as family and friends of the defendant. Getting these types of witnesses to testify under oath, before discovery has been sent out, can prove critical at trial.

The prosecutors' decision about whether to proceed by preliminary hearing or by Grand Jury can have a dramatic impact on the case. Careful consideration of common factors in all hate crimes and the unique factors in an individual case should govern this decision.

5.5. Plea Negotiations

The plea negotiations process available to prosecutors is an effective tool of the criminal justice system that demands great visibility to and comprehension by the general public. In addition to obtaining police and victim input, there are several factors that prosecutors consider prior to offering or accepting a plea:

- The degree and nature of the offense(s);
- Any possible mitigating circumstances;
- The age, background, and criminal history of the defendant;
- The attitude and mental state of the defendant at the time of the crime, the time of the arrest, and the time of the plea discussions;
- Sufficiency of admissible evidence to support a verdict;
- Possible deterrent value of prosecution;
- Any provisions for restitution;

- The age of the witness(es) and any undue hardship that testifying may cause; and,
- The extent of physical injury, economic loss, and emotional trauma suffered by the victim.

The time, available office manpower, financial resources, and the specific circumstances surrounding the defendant and the alleged crime, will help the prosecutor determine whether or not to negotiate a guilty plea.

6. TRIAL PREPARATION AND STRATEGIES

Hate crime cases can be difficult for prosecutors because of increased burden of proof for establishing bias motivation and numerous defense challenges. The following sections provide guidance for prosecutors on the issues they may face in hate crime trials and how different offices address these issues.

6.1. Pre-Trial Motions and Hearings

As discussed previously in section 2.4 of the resource guide, hate crime charges are often challenged and convictions are appealed on constitutional grounds. Below are some of the most common challenges that prosecutors are likely to face and strategies for handling these challenges. It is important, however, for prosecutors to review their state's hate crime laws and any decisions by their state's courts.

There are three primary challenges to hate crime statutes:

1. Violation of the First Amendment rights of the defendant;
2. Violation of the Due Process Clause because the statute is vague;
3. Violation of the Equal Protection Clause because it provides unconstitutional benefits to minorities or protected classes; and

A prosecutor's response to these challenges will depend on their jurisdiction's hate crime statutes and the facts of the specific case.

First Amendment Challenges

The First Amendment restricts the government's ability to enact laws that infringe upon an individual's rights to freedom of expression and freedom of speech. Opponents of hate crimes laws claim that they are "viewpoint discrimination" that punish an actor more severely for a crime committed based on their bias against a class of people. The response to this argument is based purely on the case facts. Examples of cases are provided below.

People v. MacKenzie, 40 Cal. Rptr. 2d 793 (1995)

The defendant was convicted of brandishing a firearm for the purposes of interfering with the civil rights of another person because of the other person's race, color, ancestry or national origin. The charges arose out of an incident where the defendant brandished a gun in front of his neighbors, an African-American family, while threatening them. The defendant claimed that this hate crimes statute violated his constitutional rights to free speech, due process, and equal protection.

The court did not accept the defendant's claim that the statute violated his First Amendment right to free speech by punishing the expression of unpopular but protected political beliefs

and ideas. The court based its rejection of the defendant's claim on *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

The defendant further alleged that the statute was void for vagueness because "it does not adequately inform anyone of what behavior is prohibited." *MacKenzie*, 40 Cal. Rptr. 2d at 798. The court found that this challenge was unwarranted because the statute provided adequate notice of what conduct is proscribed.

Due Process Challenges and Equal Protection Challenges

The Fourteenth Amendment to the United States Constitution provides, in part, that states shall not "deprive any person of life, liberty, or property, without due process of law." The Amendment further provides that states do not have the power to "deny to any person within its jurisdiction the equal protection of the laws." Both of these phrases are used in hate crime cases to argue that hate crime statutes are unconstitutional. In due process arguments, opponents argue that hate crime statutes violate the Due Process Clause because the statute is vague. In equal protection arguments, opponents take the position that the statute violates the Equal Protection Clause because the statute provides unconstitutional benefits to minorities or protected classes. A prosecutors' response to these challenges will depend on their jurisdiction's statutes, case law, and the facts of the specific case. Examples of cases in which these issues have been raised and decided are provided below.

State v. Plowman, 838 P.2d 558 (Ore. 1992)

The defendant was convicted under Oregon's hate crime statute, ORS 166.165(1)(a)(A). On appeal, the defendant challenged the statute, claiming that it violated the Due Process Clause because it was unconstitutionally vague. The defendant took issue with the phrase, "because of their perception of [the victim's] race, color, religion, national origin or sexual orientation." He claimed that the phrase was "inherently nebulous and imprecise." Further, he argued that the statute invites prosecution whenever the race of the assailants and the victim happen to differ. The court disagreed with the defendant, finding that the statute was "sufficiently clear and explicit in terms to apprise defendants and others of what conduct is prohibited." Moreover, the court concluded that the statute did not invite discriminatory prosecution, in that it requires "the state to prove a causal connection between the infliction of injury and the assailants' perception of the group to which the victim belongs."

State v. Beebe, 680 P.2d 11 (Ore. 1984)

The defendant was charged with harassing and subjecting the victim to offensive physical contact based on his race, and challenged the complaint on grounds that the statute violated the Equal Protection Clause. The court stated that question was more narrowly tailored, and found that the legislature may enhance the penalty for a racially motivated crime as long as the severity of the crime bears a rational relationship to a legitimate legislative purpose. It found that "the legislature may legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion, or national

origin is greater than the danger from such conduct under other circumstances.” Thus, the court found that it is permissible to increase punishment for a crime that is racially-motivated.

Other constitutional challenges include overbreadth challenges, right to fair trial challenges, and vagueness challenges. Examples are provided below.

State v. McKnight, 511 N.W.2d 389 (Iowa 1994)

The defendant argued that the Iowa statute was overbroad. Reasoning that the prosecution may use a defendant's prior speech or association to prove that the defendant intentionally selected the victim because of the victim's protected status, the defendant claimed that the statute impermissibly chilled free expression. The defendant's concern was that a person would have to curb their ideas or expression in order to escape an enhanced punishment if one should commit a future crime. The court rejected this notion, stating that criminal courts commonly admit into evidence a defendant's previous statements to prove motive or intent. The First Amendment does not prohibit the use of this kind of speech.

U.S. v. Greer, et al., 939 F.2d 1076 (5th Cir. 1991)

The defendants were a group of skinheads convicted of conspiracy to injure, oppress, threaten or intimidate black, Hispanic and Jewish citizens. On appeal, the defendants argued that they were denied the right to a fair trial because the court refused to exclude Jews, Hispanics or African-Americans from the jury. Moreover, the defendants argued that potential Jewish jurors should have had to identify themselves as part of the Jewish faith. The defendants also claimed that the court should have questioned the jurors about racial and ethnic bias. The court rejected these arguments, finding that not all Black, Hispanic and Jewish citizens were victims of this particular crime. Further, the court found that the trial court adequately questioned prospective jurors regarding bias. Finally, the court held that the trial court was correct in not requiring Jewish jurors to identify themselves. If the trial court had required this, the result would have been “to allow persons on trial for violent acts of anti-Semitism to conscript the presiding judge into a campaign to ferret out Jewish jurors merely because they are Jewish. Also, the court noted that “if the defendants had learned which prospective jurors were Jewish, they constitutionally could not have based their peremptory challenges upon this information.”

In re Vladimir P., 670 N.E.2d 839 (Ill. 1996)

The defendant, a minor, challenged his conviction on the grounds that the statute was unconstitutionally vague. Pointing at the language “by reason of,” the defendant argued that this language made it unclear, “whether a core characteristic listed in [the statute] must be the sole reason for choosing a victim or merely one of several reasons.” The court disagreed, finding that the statute was sufficiently clear to allow a person with “mixed motives” to be prosecuted.

6.2. Evidentiary Issues

There are a number of evidentiary issues that may need to be addressed in hate crime cases. These include issues of causation/mixed motive, establishing bias motivation, and accountability. The following sections describe these issues and offer strategies for addressing them.

Mixed Motive

It is important to understand that many hate crimes have dual motives, such as economic/hate and road rage/hate. Often, defense counsel will attempt to use the hate allegation against the prosecutor. Clever defense attorneys attempt to portray the defendant as the hapless soul of an overzealous prosecutor, who is turning a simple misunderstanding into a hate crime. Prosecutors should be prepared to explain the dual motivation and why it is not a legitimate defense.

Illinois and other state and federal courts interpreting general hate crime statutes have held that bias must be a motivating factor for a hate crime, but it need not be the sole factor. Although some defendants have argued that a “but for” relationship between the motive and the act is necessary to establish guilt, Illinois courts have consistently rejected such an argument. Thus, a hate crime can be charged even if the underlying offense resulted from a mixture of discriminatory and non-discriminatory motives.

If confronted with a mixed motive issue, prosecutors can direct the trial court to the statute itself. In construing a statute, courts should first and foremost look to the terms of the statute as the best means of ascertaining the intent of the legislature. For example, the Illinois hate crime statute reads in part:

“A person commits a hate crime, when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin...”
720 ILCS 5/12-7.1(a)

In construing this provision, the court in *People v. Nitz*, 285 Ill. App. 3d 364, 674 N.E.2d 802 (1996) stated: “In terms of common understanding, the phrase ‘by reason of’ means ‘because of.’ There is no requirement that the statute specify whether, for instance, racism must be the main motivation, or one motivation among many, for the statute to apply.” *Id.* at 370, 674 N.E.2d at 806. Similarly the court in *In re Vladimir P.*, 283 Ill. App.3d 1068, 670 N.E.2d 839 (1996), expressly stated, “We find nothing in the language of the statute that would prohibit a person with ‘mixed motives’ from being prosecuted under the statute.” *Id.* at 1075, 670 N.E.2d at 844. The *Vladimir P.* court further stated that “[t]he phrase ‘by reason of’ clearly indicates for police officers and offenders that there must be a causal connection between a victim’s race, religion, etc. and the offender’s reason for choosing that person as a victim.” *Id.*

Finally, in the case of *People v. Davis*, 285 Ill. App. 3d 875, 674 N.E.2d 895 (1996), the court considered the sufficiency of the evidence for the defendant’s conviction for hate crime. In *Davis*, the defendant, a Caucasian, physically attacked an African-American in the parking lot of a bar, severely injuring the victim. During the attack, the defendant made racial epithets. At trial, the defendant acknowledged that he made the statements, but argued that

the altercation was motivated by the victim's mocking comments and actions and not the victim's race. Thus, he argued that it was improper to transform this case "into a hate crime by reason of the spoken word 'nigger'" 285 Ill. App. 3d at 881, 674 N.E.2d at 898. In affirming the conviction, the court rejected this argument and noted that premeditation is not a requirement under the hate crime statute. *Id.* While not specifically using the language "mixed motive," Davis indicates that the "proof beyond a reasonable doubt" standard can be met even if there is evidence suggesting mixed motives.

In addition to these Illinois cases, the United States Supreme Court has applied the "mixed motives" theory in analogous employment discrimination cases under Title VII. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). In *Hopkins*, the Supreme Court concluded that Title VII intended to condemn even those decisions based on a mixture of legitimate and illegitimate considerations as long as race played a "motivating part" in an adverse employment decision.

In interpreting the wording of Title VII the Supreme Court stated, "[s]ince we know that words 'because of' do not mean 'solely because of' we also know that Title VII intended to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. It can certainly be argued that the 'by reason of' statutes intend to condemn offenses motivated by both discriminatory and nondiscriminatory factors and do not mean solely by reason of. To conclude otherwise is to ignore the complexities of human nature and the fact that people rarely act or react on the basis of one single factor."

In *Commonwealth v. Stephens*, 515 N.E. 2d 606 (Mass. 1987), the Massachusetts court held that a deprivation of civil rights under the statute did not have to be the predominant purpose of the defendant's actions in a case in which the defendant attacked Cambodians because of their ethnic origin but also possibly because of an earlier attack on a friend of the defendant. In Florida, a penalty enhancement state, the court held that when proof of the prejudice necessary under the statute was a "significant factor" in the commission of the crime, the enhanced penalty was appropriate regardless of whether another motive was also implicated. *State v. Hart*, 677 So. 2d 385 (Fl. 1996) And, in Oregon, in *State v. Hendrix*, 813 P.2d 1115 (Or. 1991), the Intimidation Law was held to create criminal liability when unlawful motive played any role in the proscribed conduct.

There are presently four states that do attempt, by statute, to deal specifically with a mixed motive scenario. However, none of the statutes have, to date, been interpreted by case law. The Kansas statute (Kan. Stat. Ann. § 21-471(b)(2)(C)) lists aggravating circumstances that may be considered by the court for sentencing. One of those factors is that "the offense was motivated *entirely or in part* by the race, color, religion, ethnicity, national origin, or sexual orientation of the victim."

Wisconsin's statute (Wis. Stat. Ann. § 939.645) is almost the same as Kansas. An enhanced penalty is provided for if the defendant intentionally selects the victim or the property "*in whole or in part* because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct." It should be noted that the Wisconsin statute that was before the United States Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194 (1993) did not include the "in whole or in part" language that presently exists.

The New Hampshire statute (N.H. Rev. Stat. Ann. § 651.6) provides for an enhanced penalty if the defendant “was substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation, national origin or sex.” The use of the word “substantially” presumably means that more than one motivation may be present.

In California, the statute was specifically amended in 1998 in response to two California Supreme Court opinions. See Cal. Penal Code § 422.75(i)(1). The California legislature added a subsection that defined the phrase “because of.” The statute now states that “because of means the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result.”

In *People v. Aishman*, 896 P.2d 1387 (Calif. 1995), the court examined a general intent offense which made it a crime, punishable as a felony, to interfere with another’s exercise or enjoyment of any right secured to him or her by federal or state law “because of” the other person’s specified characteristic. The Court held that the language “because of” means that the bias motivation must be a cause in fact of the offense, and when multiple concurrent causes exist, the bias motivation must be a “substantial factor” in bringing about the offense. See also *In re M.S. and A.G.*, 896 P.2d 1365 (Calif. 1995).

New Jersey had several statutes that enhanced the penalty if the person acted, at least in part with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity. The courts held that “ill will, hatred or bias toward” failed to communicate with sufficient clarity what the statute prohibits and thus was found to be impermissibly vague. See *State v. Mortimer*, 641 A.2d 257 (1994); *State v. Apprendi*, 698 A.2d 1265 731 A.2d 485 (3d Cir.1997), *cert. granted*, 68 U.S.L.W.3352 (U.S. Nov. 29, 1999) (No. 99-478). In response to these decisions, the New Jersey legislature eliminated the language in the statutes.

In sum, Oregon held that there was criminal liability when the bias motivation plays any part in the crime. Kansas and Wisconsin require by statute that the crime be motivated in whole or in part by bias. New Jersey had a provision that was found to be vague. California, New Hampshire and Florida require that the bias motivation be a substantial or significant factor and California requires that it must be a cause in fact. Massachusetts held that the bias motive does not have to be the predominant purpose, and Illinois held that there must be a causal connection between the bias motive and the crime, but mixed motive is acceptable for conviction.

Establishing Bias Motivation

In a hate crime case, it may be apparent that a crime has been committed, but proving the bias motivation for the crime can be difficult, particularly if mixed motive is raised as discussed in previous sections. Still the question remains, how much evidence is needed to establish that a crime was motivated in whole or in part by bias or hatred?

Often, the defense will argue that the defendant’s conduct was an anomaly and that the defendant was revealing his hatred or bias. To establish the bias motivation, prosecutors may focus on the defendant’s character, activities, and pronouncements. Prosecutors may

also decide to examine the defendant's beliefs and values, the publications he/she reads, music he/she listens to, websites frequented by the defendant, the defendant's membership in organizations, and the background of the defendant's friends.³⁴ There are a number of cases that establish precedent for the use of such evidence. See *People v. Aishman*, 19 Cal. Rep. 444 (1993); *Grimm v. Churchill*, 932 F.2d 674 (1991); and *People v. Lampkin*, 457 N.E.2d 50 (1983).

Prosecutors can also seek to use all prior hate crime convictions or hate acts, if permitted, to demonstrate motive, knowledge, intent, identity, or lack of mistake against the hate crime defendant. If admissible, prior bad acts or convictions can help refute the defense's arguments that the defendant's behavior was an isolated event.

6.3. Bench Trials

Trial strategies for both bench and jury trials will depend largely on the unique facts of each case, individual jurisdictions' trial courts, and prosecutors' individual trial preferences. However, there are a few items of guidance for prosecutors to consider. The first is involvement of the community in the trial to provide support for victims and to help educate the community on how the process works. This can be a very useful strategy to demonstrate the seriousness and the reaches of hate crime victimization to both judges and juries.

Another issue prosecutors may face in a hate crime cases is a judge's personal bias or prejudice against this specific type of case. When a prosecutor has reason to believe that a judge presiding over a hate crime prosecution may have such a bias, the prosecutor should not hesitate to seek to have the judge disqualified. This may be accomplished through a motion by the prosecution for recusal of the judge. In making a motion for recusal, the prosecutor should go on record indicating the reasons why the judge may have a personal bias or prejudice concerning the matter. This application is important in any criminal proceeding but gains added importance in a bench trial when the judge also is a finder of fact.

The prosecutor may utilize the Code of Judicial Conduct for support in the application. Canon in 3C(1) of the Code of Judicial Conduct reads as follows:

A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to incidences where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentially facts concerning the proceeding...

Although prosecutors may be hesitant in bringing this application in light of the fact they may have future matters with a particular judge, whenever a prosecutor reasonably believes that a fair and unbiased hearing may be precluded because of a judge's personal opinions, biases and/or prejudices, the application should be made.

³⁴ Jacobs, James B. and Potter, Kimberly A. (1997). "Hate Crimes: A Critical Perspective." In Michael Tonry (ed.) *Crime and Justice: A Review of the Research*. Chicago, Illinois: University of Chicago Press.

6.4. Jury Trials

In addition to general trial issues that prosecutors will face in handling hate crimes, there are many issues to be considered when presenting the case to a jury. These issues include pre-trial publicity, jury selection, jury instructions, and other trial issues and strategies.

Pre-Trial Publicity

The prosecutor should strive to protect both the rights of the individual accused of the crime and the interest of the public in knowing about criminal cases. The prosecutor should provide sufficient information so the public is aware that the alleged perpetrator of the crime has been arrested and there exists sufficient competent evidence with which to proceed with prosecution. The prosecutor should seek to maintain a relationship with the media that will facilitate the appropriate flow of information necessary to educate the public. Professional conduct is expected not only before trial and during the course of the trial, but at all times that the prosecution function is being executed.

Prosecutors should consult their state's rules of professional conduct for specific guidance on pre-trial publicity. In general, however, prosecutors should take care not to make statements or release information that would have an impact on the fairness of a judicial proceeding.

Information appropriate for media dissemination by prosecutors prior to and during a criminal trial may include:

- The name, age, residence, occupation, family status and citizenship of the accused;
- The substance or text of the charge such as complaint, indictment, information, and where appropriate, the identity of the complainant;
- The existence of probable cause to believe that the accused committed the offense charged;
- The identity of the investigating and arresting agency, the length and scope of the investigation, the thoroughness of the investigative procedures, and the diligence and professionalism of the law enforcement personnel in identifying and apprehending the accused;
- The circumstances immediately surrounding the arrest, including the time and place of arrest, the identity of the arresting officer or agency, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of the arrest or pursuant to a search warrant; and
- Matters which are of public record, the disclosure of which could serve the public interest, including correction and/or clarification of any misstatements, or misrepresentations of any record by other persons.

As noted above, specific information that a prosecutor gives to the media and rules for trial publicity will depend on the prosecutor's state rules of professional conduct.

Jury Selection

Jury selection is a critical stage in any trial, but particularly for hate crime cases. As such, the following information is provided as a guide to help prosecutors in this process.

Introductory Remarks

Introductory remarks can set the tone with potential jurors who will begin formulating opinions about the prosecution and defense even at this early stage. Thus, the introduction process can be critical. Listed below are some general remarks to be covered:

1. Greeting to court and jury panel
2. Introduce yourself
3. Explain the nature of case and charges
4. Explain the stage and the purpose of voir dire

Opening Questions to Panel

1. Knowledge of case?
2. Knowledge of defendant/victim?
3. Acquaintance with people's witnesses?
4. Prior jury service?
5. Prior court experience?
6. Knowledge of law and lawyers (studied law, worked in law office, or acquaintance with any lawyers)?
7. Ever been convicted of a crime?
8. Ever been charged with an offense, e.g. traffic ticket, etc.?
9. Acquaintance with peace officers – feeling about peace officers?
10. Membership with any pro- or anti-law enforcement/government organizations?

Individual Questions to Prospective Jurors

In selecting a jury for a hate crime case, prosecutors face a number of issues. The primary issue is how to determine if a prospective juror is biased against the victim's group, and if this bias will affect his or her ability to convict a defendant charged with a hate crime.³⁵ Possible questions that prosecutors may wish to use in voir dire for hate crime cases include the following:

³⁵ Jacobs, James B. and Potter, Kimberly, A. (1997). "Hate Crimes: A Critical Perspective." In Michael Tonry (ed.), *Crime and Justice: A Review of Research*. Chicago, Illinois: University of Chicago Press.

1. Residence – length – where raised – where lived?
2. Marital status – family – children?
3. Current job/occupation/profession – spouse's – adult children – past jobs?
4. Education and training?
5. Military service – government service?
6. Decision-making in life?
7. Organizational memberships?
8. Hobbies – sports – outside interests?
9. Any experience in life with protected class, e.g., relevant race, gender, age, religion, etc.?
10. Feelings toward protected class, e.g., relevant race, gender, age, religion, etc.
11. Any personal, religious, moral, philosophical, or political belief that would make it difficult for you to serve as juror in this case?

Concluding Questions to Panel

1. Duty to decide case – accept responsibility – find facts – follow law?
2. Any reason at this time, e.g. work, family, health, etc., why cannot serve as juror?
3. Know anything about yourself that the court and counsel should know that bear on your ability to serve as an impartial juror in this cases?
4. Any reason, e.g., personal beliefs, etc., why you would not want to serve as a juror?
5. Ready, willing and able to serve as a juror in this case?

Batson Challenges and Reverse Batson³⁶

Every prosecutor should know, understand, and follow the case law prohibiting racially discriminatory use of peremptory challenges as set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). To violate the dictates of *Batson* is illegal. Obviously, the impropriety of a *Batson* violation would be magnified in the context of a hate crime prosecution where the case itself is based on discrimination.

While prosecutors are used to living within the confines of *Batson*, defense attorneys may not be so accustomed. In the case of *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992), the United States Supreme Court extended the rationale of *Batson* to apply to the racially discriminatory exercise of peremptory challenges by defense attorneys. A prosecutor who detects racial discrimination by defense attorneys should be familiar with *McCollum* and be prepared to make a motion to prohibit this conduct. This would involve the People demonstrating a *prima facie* case of racial discrimination by the defendant's attorney. If successful, the burden would shift to defendant's lawyer to show the race-neutral reasons behind the peremptory challenges. If defense counsel fails to provide

³⁶ This section was excerpted from Cook County State's Attorney Office, *Hate Crime: A Prosecutor's Guide*, 1998, p. VI-8 and VI-9.

adequate race-neutral reasons for his or her challenge, the prosecutor should request that the judge disallow the challenge and seat the challenged *venire person* on the jury.

Under *Batson* and its progeny, any exclusion based on race or gender is prohibited. It no longer matters whether the races of the defendant and of the excluded juror are the same or even if the defendant is a member of the minority group.

6.5. Trial Issues and Strategies

The hate crime prosecution presents some very different tactical and evidentiary issues from the non hate-motivated crime. It is extremely important that trial attorneys appreciate these differences and proceed in trial appropriately. The following sections discuss the different tactical and evidentiary issues and provide information about how to handle these issues when they arise.

Cross-Racial Identification

One issue prosecutors may face in trial deals with cross-racial identification. When identification is a critical issue in a hate crimes prosecution and the victim and the defendant are from different races, prosecutors can expect a request by the defense to charge the jury on the issue of cross-racial identification. A cross-racial identification occurs when an eyewitness is asked to identify a person of another race.

Some empirical studies have concluded that eyewitnesses are superior at identifying persons of their own race and have difficulty identifying members of another race. See generally: Gary L. Wells and Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Perspectives 1* (1984); Elizabeth F. Loftus, *Eyewitness Testimony* (1979); and Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L.Rev. 934 (1984). Although a national review of the use of cross-racial identification jury instruction reveals that a number of jurisdictions have rejected the cross-racial jury instruction, several jurisdictions have embraced this issue. Both California, *People v. McDonald*, 37 Cal. 3b 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984) and New Jersey *State v. Cromedy*, 158 N.J. 112 (1999) require a cross-racial identification jury charge where an eyewitness cross-racial identification is not corroborated by other evidence. Consequently, prosecutors should expect defense attorneys to request a cross-racial identification jury instruction in these cases. Prosecutors may expect a jury charge similar to the following:

“You know that the identifying witness is of a different race than the defendant. When a witness, who is a member of one race, identifies a defendant, who is a member of another race, we say that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, when a cross-racial nature of the identification has effected the accuracy of the witness’s original perception and/or accuracy of the subsequent identification(s).”

Prosecutors should be mindful, when faced with requests by the defense for a cross-racial identification jury charge, that the request is not automatically granted. The simple fact pattern of a crime victim of one race and a defendant of another race would not automatically give rise to the need for a cross-racial identification charge. More is required. A cross-racial instruction should be given only when identification is a critical issue in the case, and an eyewitness’s cross-racial identification is not corroborated by other evidence

giving it independent reliability. *State v. Cromedy*, 158 N.J. 112 (1999). The most important factor is the level of corroboration of the identification. The more corroboration of the identification the less likely a cross-racial identification jury charge will be given.

Use of Experts

Prosecutors can seek the advice of law enforcement experts on hate crimes unique to the case facts. For example, federal agents can be an excellent source for information and testimony on certain types of hate/anti-civil rights groups, while local agencies may have in-depth intelligence on smaller, less national groups or community beliefs. These sources are invaluable and should be used as often as possible.

Expert testimony can give credence to the hate motive and the ideologies of hate groups. Such testimony can also explain how and why hate crimes occur and the significance of tattoos, symbols, and historic dates. There are many possible sources for expert testimony including:

- Local law enforcement;
- Local law enforcement gang details or units;
- Federal law enforcement agencies such as the FBI or ATF;
- Local groups or organizations such as the Museum of Tolerance (Los Angeles, California), NAACP, Anti-Defamation League, interfaith councils, and hate group watchdog organizations;
- Department of Corrections officers;
- University professors and academic centers; and
- Psychologists.

Note-Taking and Record Keeping

Trials for hate crime cases can be complex, with numerous defense motions and challenges, and often such cases are appealed. For this reason, prosecutors may find it useful to have an investigator or another attorney present for pre-trial and trial proceedings to take comprehensive notes. Such notes may prove useful should a conviction be appealed.

Prosecutors may also wish to develop a manual or computerized tracking database, such as that developed by the Los Angeles County District Attorney's Office (described earlier). A database will help prosecutors keep track of previous, alleged hate crimes and can be used to maintain notes from hate crime trials. Storing such information can help prosecutors document possible hate motivation in crimes for repeat offenders.

6.6. Sentencing and Dispositional Alternatives

The sentencing phase is important part of hate crime cases, particularly for victims. If allowed, victims of hate crimes and/or members of the victims' communities should be encouraged to make impact statements. Use of impact statements provides a method for victims of hate crimes to have direct input into the criminal justice system and their cases. Impact statements also can be therapeutic for victims and powerful tools in ensuring the convicted defendant receives the maximum penalty for his/her crime. The importance of impact statements is that it gives victims of hate crimes and victimized communities the opportunity to tell the court **and** the offender how the crime has affected their lives.

Some jurisdictions allow written statements to be read by the court prior to sentencing; others allow victims to orally present their statements on the day of sentencing. In general, statements can be made by the victim(s) of the crime themselves, close relatives of the victim if the victim is unable or unwilling to make a statement, or the community. Requirements for victim/community impact statements vary from state to state; however, in general the statement may:

- Identify the victim(s) or victimized community;
- Provide information on the nature of the offense;
- Provide information about the extent of physical or psychological injury suffered by the victim(s) or community as a result of the offense;
- Itemize any economic loss suffered by the victim(s) or community as a result of the offense; and
- Detail changes in the victim's personal lifestyle, familial, or community relationships as a result of the offense.

6.7. Sentencing Enhancements

Hate crime legislation often calls for specific sentencing enhancements or increased penalties for bias-motivated crimes. Hate crime laws that have sentencing enhancements do not raise the same evidentiary issues raised by laws based on substantive offenses.³⁷ Often, prosecutors are able to use hearsay evidence in sentencing hearings—which is not admissible during a trial.³⁸ See for example, *Barclay v. Florida*, 1983, p. 939; *Dawson v. Delaware*, 112 S. Ct. 1093 (1992); and *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). Prosecutors should consult their jurisdiction's statute to determine what sentencing guidelines exist.

³⁷ Jacobs, James B. and Potter, Kimberly A. (1997). "Hate Crimes: A Critical Perspective." In Michael Tonry (ed.) *Crime and Justice: A Review of the Research*. Chicago, Illinois: University of Chicago Press.

³⁸ *Ibid*, p. 38.

In addition, many prosecutors' offices have successfully implemented different and innovative sentencing and dispositional alternatives. Examples of different sentences and alternatives used by local prosecutors are provided in the sections below.

Alternatives for Juvenile Offenders

The Los Angeles County District Attorney's Office Hate Crimes Suppression Unit has created the Juvenile Offenders Learning Tolerance (JOLT) Program. This is a comprehensive program for, but not limited to juvenile offenders, that incorporates prevention, early intervention, and suppression for low-level offenses and hate incidents. The diversion component of the program includes anti-hate education and life skills training. Offenders referred to this program must fit the following criteria:

- Must be a first time, low-level hate crime offender;
- Must have committed a hate crime or school-related hate incident;
- Must have caused no serious bodily injuries;
- Must owe no restitution over \$2,000 per victim;
- Must have caused no serious damage, injury, or violent conduct; and
- Must have maintained satisfactory school attendance.

Each offender referred to the program is required to participate in anti-hate classes. These classes address cultural values, biases, stereotypes, prejudices, power dynamics and proactive approaches to address human relations issues. Each class lasts four hours and includes guided, interactive exercises, as well as focused discussions that enable participants to build skills and break down prejudices. Life skills training includes a 10-week parenting program and 6-week teen program of three hours in duration for each session. The training covers anger management, effective communication, and conflict resolution.

The J.O.L.T. program is advantageous to both the offender and the community at large. For juvenile offenders, the program offers:

- Immediate consequences and accountability;
- Quicker and more tailored responses than delinquency court;
- Increased monitoring (both in quality and quantity); and
- No criminal record in delinquency court.

If offenders decline to comply, they incur criminal charges in court and/or disciplinary proceedings in school. The victim(s) and community receive:

- Financial satisfaction through restitution;
- Emotional satisfaction through letters of apology from the offender;
- Faster resolution vs. delayed justice;
- Improved quality of life; and
- Peace of mind for all concerned.

The Anti-Defamation League operates a juvenile diversion program—Learning About Differences—which prosecutors may wish to consider for juvenile hate crime offenders. The program is a sentencing option for underage offenders in the New York City family courts. The idea that ignorance and poor self-esteem contribute to the commission of bias-related acts by juveniles is the basis for this program. Through a 20-hour educational program, offenders visit synagogues and churches, listen to guest speakers from other cultures, and hear stories from victims of bias crimes. The in-class curriculum involves a 9-week series for both parents and the offenders on civil rights law, racism, anti-Semitism, the Holocaust, and a short history outlining the legacy of discrimination against minorities in America. Program participants are given take-home assignments and weekly readings that vary with the nature of the offense. After in-class sessions are complete, offenders must complete 10 to 15 hours of community service in the community in which their crime(s) was committed.

Sentencing Options and Alternatives for Adult Offenders

The lead attorney in the Civil Rights Unit of the Palm Beach County, Florida State's Attorney's Office employs various sentencing alternatives designed to send a message. As a community-oriented office, they focus on deterrence as well as education and healing. Instead of simply sentencing an offender to jail, the recommendations of the assistant state's attorney are designed to make an impact on both the community and the offender. One example of their sentencing recommendations is that offenders take college-level classes on race relations at the local university. This alternative is designed to deter further hate-inspired violence by teaching offenders the effects of their actions.

Another diversionary program that can be used as a condition of probation is the STOPBIAS program in Suffolk County, New York. STOPBIAS is an educational program for bias crime offenders that is composed of two 2-hour sessions. Participants are recommended by the Suffolk County probation department or by judges as a sentencing alternative. Representatives of the Suffolk County Police Department's Bias Crimes Unit, members of the Suffolk County Anti-Bias Task Force, an assistant from the Suffolk County District Attorney's Office, and an experienced bias sensitivity facilitator assist offenders in examining their motives for committing bias crimes. Offenders meet with members of law enforcement, the clergy, and other individuals from the offended community to help the offender learn why bias crimes are offensive to the injured victim(s) and the community as a whole.

In Phoenix, Arizona, the County Attorney's Office has used intensive probation as a sentence for hate crimes, particularly in cases in which they have had trouble with the admissibility of certain types of evidence. By using intensive probation upon release for convicted hate crime offenders, the criminal justice system is able track repeat offenders which can be useful in establishing motive for enhanced sentencing.

Restorative Justice

In some cases, restorative justice may be a viable alternative to incarceration, particularly for low-level bias-motivated offenses and for juvenile offenders. The restorative justice model promotes involvement of the victim, the offender, and the community in the justice process and intervention that focuses on offender accountability, community protection, competency development, and balance.³⁹ In particular, restorative justice interventions help to restore victims' and communities' losses by holding offenders accountable for their actions by making reparations to victims. Such interventions also focus on changing the behavioral patterns of offenders so that they become productive and responsible citizens. The restorative justice model places emphasis on everyone affected by the crime—the community and the victim as well as the offender—to ensure that each gains tangible benefits from their interaction with the criminal justice system.⁴⁰

³⁹ Office of Juvenile Justice and Delinquency Prevention. (1994). *Balanced and Restorative Justice*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

⁴⁰ *Ibid.*, pp. 2.

7. OUTREACH AND HATE CRIME PREVENTION STRATEGIES

Hate crimes not only affect individual victims but also members of the targeted group or community. Prosecutors can provide leadership in fostering community outreach and preventing hate crimes from occurring. As the attorneys for the people, prosecutors often establish outreach and prevention efforts in the communities they serve to foster community relations. Through outreach and the establishment of prevention strategies, prosecutors can be better prepared to address hate crimes both before and after they occur.

Many prosecutors note that it is important to develop response plans prior to the occurrence of hate crimes to avoid the appearance of “sending the cavalry in,” after a crime has occurred. Response plans may include stepped up police patrols and the establishment of task forces or hate crime councils. It is important that response plans be developed as part of a community outreach effort to secure community support and participation.

7.1. Community Outreach Efforts

Key steps in reaching out to the community, building trust, and establishing long-term relationships include:

- Providing access to information—educating the public about hate crime laws and what constitutes a hate crime and keeping them informed of case progress (when appropriate);
- Maintaining open and honest lines of communication;
- Setting up issues forums with other local government agencies and community groups to discuss issues of concern with regard to hate crimes or hate incidents; and
- Involving the community in developing and implementing prevention programs.

Forging partnerships with interfaith, ethnic, civic, and other community-based agencies can also help to establish relationships with the community at-large. These groups and agencies can be valuable resources before and after hate crimes occur. In addition, many of them may have on-going efforts to address bias, hatred, or prejudice in which prosecutors can become involved. For example, the Interfaith Alliance Foundation sponsors a number of projects to provide a means by which people of faith can help their communities. Projects include voter education, calls for civility, and public forums on key issues facing the community. Other non-profit organizations such as the National Association for the Advancement of Colored People (NAACP) and the Anti-Defamation League (ADL) are actively involved in information dissemination, education efforts, and a myriad of anti-hate and anti-violence initiatives. (Contact information for the national/regional offices of relevant organizations are provided in the Resource section of the guide.)

In Pima County (Tucson) Arizona, city, county, and state law enforcement and prosecutorial agencies, local governments, schools districts, community organizations, and businesses have joined together to form the Tucson/Pima County Anti-Hate Crime Task Force. The

task force brings together these key stakeholders to encourage awareness and prevention of hate-motivated violence or intimidation. In addition, the task force serves as a clearinghouse for discussing ways to prevent hate crimes and to implement prevention programs to assure that the individual rights and liberties of all people in the community are protected.

Another viable outreach vehicle is the local media. The media can have a positive or negative impact on the prosecution of a hate crime. A coordinated effort with the media can assist prosecutors' offices in conveying the appropriate information to the community. For example, the Public Broadcasting System (PBS) joined The Working Group, an independent media group, to develop and broadcast the "Not in Our Town" campaign. The campaign consists of a documentary describing how a Billings, Montana, community responded to a number of hate crimes and the lessons learned that may be of use to other communities in responding to hate crimes. The goal of the campaign is to promote discussion in communities across the country about the threat and impact of prejudice and hate. PBS has made the documentary available to schools, libraries, and community groups. Information on how to obtain a copy of the documentary can be found in the Resources section of the guide.

Finally, many local prosecutors' offices have implemented outreach activities that are promising methods for mobilizing and communicating with the community following a hate crime. These include:

- Convening town hall meetings with various community groups;
- Devising and distributing brochures on hate crimes;
- Publishing information about hate crimes and where to report hate crimes on the prosecutor's web page;
- Participating in public speaking activities in the community, i.e., at schools, churches, etc.;
- Publishing public service announcements (PSAs) in local minority and community press;
- Establishing and convening contacts and networks to consult on hate crime issues; and
- Involving youth representatives to serve on task forces and participate in hate crime meetings.

In Monmouth County, New Jersey, the prosecutor's office has taken a proactive role in educating the community about hate crimes and the laws protecting people against such crimes. The prosecutor's office created an information brochure entitled, "Help Stop Hate: What is a Bias Hate Crime?" The brochure defines what bias/hate crimes are and the underlying causes of such crimes. The brochure also provides information on the victims of hate crimes, hate crime offenders, and the statutes governing hate crimes. Additional information includes the types of information needed when reporting a hate crime and who to contact in the event a hate crime occurs. Students from the Monmouth County

Vocational School District designed and printed the brochure. A copy of the brochure is included in Appendix G.

Many prosecutors' offices reach out to the community through the Internet. The prosecutors' offices in Philadelphia, Pennsylvania; Los Angeles County, California; and San Francisco, California are among the offices that have dedicated pages on their offices' website that provide general information about what constitutes a hate crime, what to do if a person believes he or she is a victim of a hate crime, listing of resources to help victims of hate crimes, and hate crime laws. (Sample web pages from the Philadelphia District Attorney's Office and the Los Angeles County District Attorney's Office are included in Appendix H.)

7.2. Hate Crime Prevention Strategies

In addition to community outreach, many local prosecutors have initiated or participate in prevention programs designed to address hate crimes by helping to change the climate that facilitates or allows hate and bias attitudes to burgeon into hostile or criminal acts. A variety of prevention strategies have been implemented on the Federal, State and local levels of government as well as in the private sector. Many of these are summarized below.

Focusing on hate crimes at the state and local levels is extremely important as these efforts have more direct and immediate impacts. For example, the Cook County State's Attorney's Office recently announced a multi-layered plan to combat hate crimes. Hate crimes are now handled under the auspices of the Community Prosecutions Unit and focus on the offender's motivation and bias by establishing partnerships with community groups. Community prosecutors attend community meetings and talk with citizens about issues of concern. By doing this, the State's Attorney's Office has been able to bolster good working relationships with the community and a better response to hate crimes.

The Los Angeles County District Attorney's Office's JOLT Program, which is used as a diversion program for juveniles charged with hate crimes, also includes an educational curriculum, designed and administered by the Simon Wiesenthal Museum of Tolerance, for school teachers and administrators. The curriculum is designed to educate school personnel about hate crimes, raise their awareness of the crimes, and increase cultural sensitivity. As a complement to the curriculum, the district attorney's office trains school personnel to develop and use age appropriate lesson plans in the classroom to educate children about civil rights, prejudice, and discrimination.

U.S. Department of Education Programs

Preventing Youth Hate Crime: A Manual for Schools and Communities

This manual is intended to assist educators, school board members, and community leaders in eliminating bias motivated crime and violence in their schools. It teaches discussion topics, immediate action agendas, and long-term responses to hate crime in schools. The content of this manual is designed to help teachers and administrators create a school climate that welcomes diverse viewpoints and beliefs. This publication also lists successful educational programs that target hate crimes, ethnic intimidation, and other bias motivated behavior throughout the United States.

Protecting Students from Harassment and Hate Crime: A Guide for Schools

This publication acts as a guide for developing policies and practices to prevent harassment and bias-motivated incidents in all types of educational institutions. The guidelines promote the creation of anti-harassment policies, the identification of and timely response to all incidents of harassment and violence and the implementation of formal complaint procedures. These types of policies cannot be successful if the school does not attempt to create an environment that supports racial, ethnic, cultural, and religious diversity. School officials must also work with community members and leaders to address and prevent hate crimes and civil rights violations in order to send a clear message to the students that discrimination will not be tolerated.

Office of Juvenile Justice and Delinquency Prevention Programs

Healing the Hate: A National Bias Crime Prevention Curriculum for Middle Schools

This curriculum is aimed at middle school students because many hate crime victims and perpetrators are young people. Unfortunately, the majority of educators and administrators are not equipped with the proper tools to reduce bias-motivated incidents in their schools. The curriculum also discusses the repercussions of recent hate crimes and institutionalized racism in our society. The curriculum was developed by OJJDP through a grant to the Education Development Center.

8. CONCLUSION

Throughout the preparation of the *Resource Guide*, APRI solicited input from many prosecutors' offices across the country. The central theme iterated by these prosecutors, and reflected throughout the *Guide*, is the importance of coordinating law enforcement and prosecutor response to hate crimes. In order to establish coordinated responses, many felt it was important to have uniform, universal hate crime policies throughout law enforcement agencies. While the establishment of uniform and universal policies is largely dependent on the individual jurisdiction, the needs of the community, office structure and management, and availability of resources, prosecutors have offered the following general suggestions to aid others in formulating their response to hate crimes:

- Designate one or several attorneys to serve as the hate crime prosecutor or establish a hate crime unit;
- Ensure that prosecutors have some basic level of understanding of hate crimes, their impact on the victim and the victim's community, and special issues associated with the handling of hate crime cases;
- Establish points of contact on hate crimes in other states for technical assistance in hate crime cases;
- Obtain literature on hate crimes and training for attorneys; and
- Participate or establish multi-agency task forces to address hate crimes.

The information provided in this *Guide* is intended to help improve prosecutors' understanding of hate crime cases and how to handle such cases. As always, how prosecutors' offices respond to hate crimes will vary based on the unique nature of each crime. It is hoped that these materials will prove useful in making those determinations about how to proceed with hate crime cases.

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