



NEW YORK STATE  
BAR ASSOCIATION

# Report and Recommendations of the New York State Bar Association **Task Force on Combating Antisemitism and Anti-Asian Hate**

January 2024

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**Report and Recommendations of the New York State Bar  
Association Task Force on Combating Antisemitism and Anti-Asian  
Hate**

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It has been an honor and a pleasure to work with all of you.

Vincent T. Chang, Esq. and Brian S. Cohen, Esq.  
Co-Chairs, NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate

## **Section 1. Introduction**

*"Hate crimes . . . leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself. . . ."*

President Clinton made the foregoing speech 16 years ago. Today, the situation has only worsened with antisemitic hate crimes spiking on the heels of years of increased anti-Asian hate crimes. In October 2023, the FBI released data that shows hate crimes in the U.S. at their highest since data collection began in 1991. The Anti-Defamation League reported 2,000 antisemitic incidents in the U.S. through July 2023 and a 337% uptick in incidents after Hamas' October 7th attack on Israel.<sup>1</sup> Similarly, from 2020–21, anti-Asian hate crimes spiked 339%.<sup>2</sup> Almost daily, the headlines are filled with stories like the gunfire in front of an Albany synagogue in December 2023.

Despite these dire statistics and reports, bar associations have not systematically studied this problem, a void which led NYSBA President Richard Lewis to convene this task force to examine the problem of hate crimes with a focus on those directed at the Asian American and Jewish communities. As President Lewis stated: "Antisemitic and anti-Asian bias in America is overt and disturbing, and it is increasing exponentially. . . We have launched this task force because we are at a crossroads, and left unchecked, we can only expect that crimes against these two vulnerable groups will continue to spiral out of control." The task force has been grappling with the scourge of hate crimes, which present a clear and present danger to many, but most strikingly to New Yorkers.

The members of our task force worked hard to put these recommendations together in the last several months. We held dozens of meetings, scoured the available literature, and met with prominent officials in the law enforcement and educational sectors. The dedication and talent of the task force has enabled us to put together the concrete recommendations contained in this report.

Like bar associations, society as a whole has devoted insufficient attention to hate crimes despite the gravity of the problem. As a result, the statutory framework governing hate crimes contains gaps in the definition of hate crimes and in the coverage of the hate crime statute – deficiencies that are addressed in our report. Equally problematic are the mechanisms for reporting hate

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<sup>1</sup> Toni Morales Pinales, *How Reports of Hate Crimes in the U.S. Were Already at Record Highs, in 4 Charts*, CNN, Oct. 29, 2023, <https://www.cnn.com/2023/10/29/us/hate-crimes-antisemitism-anti-muslim-dg/index.html>.

<sup>2</sup> Kimmy Yam, *Anti-Asian Hate Crimes Increased 339 Percent Last Year, Report Says*, NBC News, Jan. 31, 2022, <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-339-percent-nationwide-last-year-repo-rcna14282>.

crimes, including the lack of a requirement that law enforcement in New York report hate crimes to a central state authority.

We did not write this report to languish on a shelf. Instead, we provide concrete solutions carefully elicited from the universe of potential proposals. We intend this report to provide guideposts for the legislature and regulators in devising solutions to these problems. And we intend to follow up on this report with efforts to advance the proposals contained herein.

To be sure, we have no illusions that our task force alone can solve the problem of hate crimes. In this larger war against bigotry, as a bar association, all hands must be on deck. We believe that we are not alone and that all stakeholders will come together and take a stand to combat all forms of hate.

## **Section 2. Executive Summary**

Our report follows the commendable work of the 2020 NYSBA task force on Domestic Terrorism and Hate Crimes. This groundbreaking report was focused on federal laws addressing acts of domestic terrorism.<sup>3</sup> Not long after its publication, the wave of hate crimes against Asian Americans and the spike in antisemitic hate crimes ensued, necessitating our task force and this report.

This report begins with analyses of antisemitic and anti-Asian hate crimes, including the history of antisemitism and anti-Asian hate – two forms of bias that have deep and disturbing roots. Far from a new phenomenon, antisemitism is as old as civilization itself. And anti-Asian hate crimes in the U.S. span the history of our country. *See* pages 9-10 below.

Our report focuses on the recent waves of hate crimes ignited by exogenous catalysts: the COVID-19 pandemic in the case of anti-Asian hate crimes and the Hamas attacks of October 2023 in the case of antisemitic hate crimes. Our report addresses the disturbing increases in the rates of hate crimes during these recent troubled times.

Our task force has already condemned antisemitic hate and praised Governor Hochul’s efforts to address the problem. In October 2023, our task force released this statement:

The NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate is saddened and dismayed by what can only be termed hate speech in our own backyard in New York City and in certain colleges and universities on the part of pro-Hamas demonstrators. These individuals have held up swastikas and praised the massacre of innocent civilians

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<sup>3</sup> <https://nysba.org/app/uploads/2020/07/Final-Report-Task-Force-on-Domestic-Terrorism-Hate-Crimes.pdf>.

in Israel. New York Gov. Kathy Hochul called these demonstrations “abhorrent” and “morally repugnant.” Mayor Eric Adams told the protesters: “Do not use our streets to spread your hate.”<sup>4</sup>

The leaders of our task force also participated in a later statement:

The chants and slogans of the supporters of Hamas are no different from the words of the Ku Klux Klan or the Nazis,” Lewis added. “They are a deviation from our American values, and protecting our citizens is part of preserving our democracy. The New York State Bar Association joins Gov. Hochul in condemning these deplorable acts.”<sup>5</sup>

Looking ahead, our report turns to proposals to address the scourge of hate crimes, building upon constructive proposals already pending in the New York State Legislature. We focus on the following areas:

- **Proposed Statutory Changes.** We urge certain statutory changes that we believe will make the New York hate crimes law easier to enforce:
  - The current Hate Crimes Act, NY Penal Law, Section 485.05, provides a lengthy list of crimes that can be subject to enhancement as a hate crime, but leaves out certain offenses like graffiti, criminal obstruction of breathing and rape in the third degree. We urge that all offenses be predicate acts for hate crime. As a first step, we urge adoption of the proposed Hate Crimes Modernization Act pending in the New York state legislature which would add to the list of predicate acts in the hate crime statute (Senate Bill S7737), and to support similar bills that accomplish this purpose.
  - New York law only provides “negative guidance” by defining what is not a hate crime. We advocate changing the law, or issuing model jury instructions, to permit jurors to consider the totality of the circumstances or to provide more examples in the statute of what constitutes a hate crime, including the actions of a defendant before and during an attack.
  - The Hate Crimes Act of 2000 currently covers only crimes that were committed in “substantial” part because of the presence of the forbidden animus. We urge deletion of the word “substantial” so that any crime that is committed because of that animus can be considered a hate crime if that animus played any role in causing the offense to occur.

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<sup>4</sup> Susan DeSantis, *New York State Bar Association Decries Hate Speech Supporting Repugnant Attacks*, N.Y. St. Bar. Assoc., Oct. 11, 2023, <https://nysba.org/new-york-state-bar-association-decries-hate-speech-supporting-repugnant-attacks>.

<sup>5</sup> Susan DeSantis, *New York State Bar Association President Decries Rise in Antisemitic Incidents, Thanks Governor for Combating Hate Crimes*, N.Y. St. Bar. Assoc., Oct. 11, 2023, <https://nysba.org/new-york-state-bar-association-president-decries-rise-in-antisemitic-incidents-thanks-governor-for-combating-hate-crimes>.

- **Addressing Internet Hate Speech.** To address Internet hate speech, we urge the passage of the Stop Hiding Hate Act (S895/A06789) – legislation that has passed the New York Senate and is pending in the Assembly, and to support similar bills that accomplish this purpose. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in California.
- **Improving Hate Crime Reporting.** The current situation is a patchwork of inconsistent laws that result in severe underreporting of hate crime in some states. New York’s reporting system has made substantial strides, but we urge adoption of some elements of the reporting requirements of Oregon and New Jersey.<sup>6</sup> Oregon’s law, for example, requires all police agencies to document reports of alleged hate crimes – whether or not they result in arrest – and share information with the state criminal justice division. District Attorneys must track their hate crime caseloads and report on outcomes, sentences, and recidivism.
- **Enforcing the Dignity for All Students Act.** We advocate measures to stop hate before it begins through education, especially in schools. We support measures to increase compliance with New York State’s Dignity for All Students Act, which aspires to provide the state’s public elementary and secondary school students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment and bullying on school property, a school bus and/or at a school function.

We regard these proposals as a starting point for what must be a sweeping attack on the problem of hate crimes. To be sure, some of these measures are untested and, if adopted, they need to be constantly reevaluated. These concrete and achievable proposals are a first step and build upon the earlier work of the 2020 task force on domestic terrorism and hate crimes.

### **Section 3. Background**

#### **A. Antisemitism**

##### ***Antisemitism and Hate Crimes: A Stain Throughout History and a Current Crisis Sweeping the Country***

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<sup>6</sup> See O.R.S. 137.676, 678. The New Jersey reporting regime was ordered by former New Jersey Attorney General Gurbir Grewal. [https://www.nj.gov/oag/dcj/agguide/Bias-Invest-Standards\\_040519.pdf](https://www.nj.gov/oag/dcj/agguide/Bias-Invest-Standards_040519.pdf)

We recount here in detail the terrorist acts that took place on October 7<sup>th</sup> and thereafter in Israel. These acts formed the backdrop for the wave of antisemitic hate crimes that followed in the U.S. and abroad.

The missions of the Nazis in the early 20th century and the terrorist group Hamas today are the same: extinguish all Jews. In 2019, Fathi Hamad, a senior member of Hamas, encouraged Palestinians across the world to kill Jews: “Seven million Palestinians outside, enough warming up, you have Jews with you in every place. You should attack every Jew possible in all the world and kill them.”<sup>7</sup>

On Oct. 7, Hamas terrorists heeded that call when they slaughtered as many as 1,200 Jews, the deadliest day for Jewish people since the Holocaust, and kidnapped more than 200 women and children, including the elderly and Holocaust survivors. On that dark day, among other inhumane acts:

- Hamas raped, mutilated, and tortured women and young girls, just because they thought they were Jewish.<sup>8</sup>
- Hamas burned people of all ages alive – including infants - just because they thought they were Jewish.
- Hamas murdered over 300 people attending a concert celebration, just because they thought they were Jewish.

That day, a Hamas terrorist boasted to his parents about killing 10 Jews as he spoke to them on one of his victims’ phones: “Look how many I killed with my own hands! Your son killed Jews!”<sup>9</sup>

### ***Antisemitic Hate Crimes Following the Hamas Attacks***

Making matters much worse, these barbaric and unthinkable acts of evil and depravity are being celebrated worldwide, including in New York, which has the largest Jewish population outside of Israel, and throughout America, including by certain antisemitic members of Congress.

Even before this year, in 2021, 817 antisemitic hate crimes were reported to the FBI by law enforcement agencies. From 2020 to 2021, reports of antisemitic hate crimes increased by 20%, according to the same data.

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<sup>7</sup> *Hamas Official Condemned After Calling on Palestinians to Kill Jews*, VOA, July 15, 2019, [https://www.voanews.com/a/middle-east\\_hamas-official-condemned-after-calling-palestinians-kill-jews/6171870.html](https://www.voanews.com/a/middle-east_hamas-official-condemned-after-calling-palestinians-kill-jews/6171870.html).

<sup>8</sup> . <https://www.nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html>

<sup>9</sup> Alyssa Guzman, *Hamas Terrorist Brags About Killing Jews While Talking to Parents on Victim’s Phone: ‘Killed 10 With My Own Hands!’*, N.Y. Post, Oct. 24, 2023, <https://nypost.com/2023/10/24/news/hamas-terrorist-brags-to-parents-about-killing-jews>.

But the numbers this year are far worse. According to data released by the Anti-Defamation League (ADL), in the month following Hamas' terror attack on Israel, antisemitic incidents in the U.S. increased by 316% compared with the same time period last year. In addition, in the one-month period between October 7 and November 7, 2023, the ADL documented 832 antisemitic incidents of assault, vandalism, and harassment across the U.S., an average of nearly 28 incidents a day.<sup>10</sup>

Sadly, while Jews account for only 2.4% of the U.S. population, they are the victims of at least 63% of reported religiously motivated hate crimes. And recent polling conducted by the Louis D. Brandeis Center for Human Rights Under Law found that 65% of college students active in Jewish organizations felt unsafe on campus because of physical or verbal attacks, and half felt the need to conceal their Jewish identity or support for Israel for the sake of their safety.

But the recent situation is far worse. This fall for example, at New York University, a student held up a sign that read: "Keep the world clean" of Jews.<sup>11</sup> A recent study found that 73% of Jewish college students and 44% of non-Jewish students have experienced or witnessed antisemitism since the start of the 2023–2024 school year.<sup>12</sup> The dark cloud of antisemitism that has hovered over the Jewish people consistently throughout history is surging -- and combating this growing, violent hate must be prioritized as a fundamental human rights issue, backed with the greatest sense of urgency.

### ***The Jewish People and Antisemitism: A Brief History***

"As a Jew I carry with me the tears and sufferings of my grandparents and theirs through the generations. The story of my people is a narrative of centuries of exiles and expulsions, persecutions and pogroms . . . . Jews knew that they or their children risked being murdered simply because they were Jews. Those tears are written into the very fabric of Jewish memory, which is to say, Jewish identity." – Rabbi Jonathan Sacks, "The Dignity of Difference"

The Jewish people have always lived in the land of Israel, but over many years, they dispersed throughout the Middle East and beyond. In Rome and Greece, their loyalty was questioned

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<sup>10</sup> *One Month Following Hamas Massacre, ADL Documents Dramatic Surge in Antisemitic Incidents in the U.S.*, ADL, Nov. 13, 2023, <https://www.adl.org/resources/press-release/one-month-following-hamas-massacre-adl-documents-dramatic-surge-antisemitic>.

<sup>11</sup> Jen Smith, *NYU Investigating 'Repugnant' Students Who Held Antisemitic 'Keep the World Clean' Signs at Washington Square Park Protest*, Daily Mail, Oct. 25, 2023, <https://www.dailymail.co.uk/news/article-12672281/NYU-investigating-repugnant-students-held-anti-Semitic-world-clean-signs-Washington-Square-Park-protest.html>.

<sup>12</sup> *Campus Antisemitism: A Study of Campus Climate Before and After the Hamas Terrorist Attacks*, ADL, Nov. 29, 2023, <https://www.adl.org/resources/report/campus-antisemitism-study-campus-climate-and-after-hamas-terrorist-attacks>.

because they rejected polytheism, which engendered antisemitic rhetoric. Later, a genocide in Alexandria wiped out the Jewish population of Egypt. Jews were also wrongfully blamed for the crucifixion of Jesus Christ.

During the Middle Ages, antisemitism and the persecution of Jews continued. Jews were blamed for the Black Death and accused of killing Christian children and using their blood for Passover rituals. Several countries created Jewish ghettos to separate Jews from society, and Jews were expelled from many countries, including England (1290), France (1306), and Spain (1492). More recently, in 1894, a serious injustice known as the Dreyfus Affair led to an irreversible wave of antisemitism in France, with people calling for the death of Jews.

All of these waves of antisemitism culminated in Hitler's deadly regime. While the systematic extermination of the Jewish population in Europe is well known, perhaps the greatest atrocity in human history, but the smaller atrocities, those which led inexorably to the death camps, cannot be forgotten or bypassed. To prevent current events from cascading into something even more horrific, the lesson must be that addressing the smaller, interim horrors in real time is essential. Only in this way – relentlessly addressing antisemitic acts when they happen - can this steroidal wave of antisemitism be stanchied.

By way of example, in Nazi Germany, the terror began with such steps as the boycotting of Jewish businesses, the public burning of Jewish-authored books and Kristallnacht (the “Night of Broken Glass”), one of the largest pogroms in Jewish history, resulting in the destruction of 200 synagogues and 7,500 Jewish shops. Jewish children were prohibited from returning to school, all Jewish businesses had to be handed over to the German government and Jews were required to wear armbands or Jewish stars for identification. These measures preceded Hitler's deportation of millions of Jews to concentration camps. The disturbing images of emaciated Jews in striped uniforms, and piles of corpses in mass graves, have been seared in the world's consciousness.

Jews are still too often scapegoated for problems throughout the world and, since the Holocaust, many of the same hateful antisemitic narratives and tropes persist, such as that Jews are greedy and deceive others to get ahead. But today, such vitriol is much easier to promote on social media by influencers with hundreds of thousands, if not millions, of followers. Notably, certain conspiracy theories, like “the Jews control Hollywood,” came about after Jews immigrated to the U.S. and were forced to become entrepreneurial and create opportunities for themselves in

certain industries, like entertainment, and professions, like law and medicine, in which they were denied employment.<sup>13</sup>

***The Working Definition of Antisemitism: An Important  
and Useful Tool for Guidance and Education***

The International Holocaust Remembrance Alliance is the only intergovernmental organization mandated to focus solely on Holocaust-related issues. The alliance’s Committee on Antisemitism and Holocaust Denial built international consensus around the following non-legally binding working definition of antisemitism, which many institutions and organizations worldwide have endorsed and adopted:

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”<sup>14</sup>

Per the alliance, “antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for ‘why things go wrong.’” In addition, antisemitism “is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.”<sup>15</sup>

The alliance also provides 11 examples of contemporary antisemitism “in public life, the media, schools, the workplace, and in the religious sphere” including, among others: calling for, aiding or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion; making mendacious, dehumanizing, demonizing or stereotypical allegations about the power of Jews as a collective, such as the Jews controlling the media, economy, government or other societal institutions; accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews; denying the Holocaust; or holding Jews collectively responsible for the actions of the state of Israel.<sup>16</sup>

As explained by the ADL, the world’s leading organization fighting antisemitism and hate in all forms, “these examples are important, because while certain longstanding myths animating

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<sup>13</sup> Jay Michaelson, *There Are a Lot of Jews in Hollywood. Let a Rabbi Explain Why*, Rolling Stone, Dec. 11, 2022, <https://www.rollingstone.com/tv-movies/tv-movie-features/jews-in-hollywood-kanye-west-dave-chappelle-rabbi-explains-1234645366/>.

<sup>14</sup> *What Is Antisemitism?*, International Holocaust Remembrance Alliance, <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

antisemitism have stood the test of millennia, manifestations of antisemitism do change, sometimes significantly, over time and place. It is important to provide guidance built on the knowledge of experts in the field, as well as the lived experience of large segments of the Jewish population.”<sup>17</sup>

In addition, the alliance’s definition is intended to be utilized by various government and non-government agencies and institutions, such as college administrators, law enforcement and others, as an important tool for education and guidance on antisemitism. As the ADL further explained: “As antisemitic incidents have increased worldwide, governments and civil society have sought ways to speak out against antisemitism and ensure that there is awareness of its real-life manifestations and impact. The definition should not be viewed as a substitute or replacement for existing laws, and it is not a ‘charging authority,’ but [n]onetheless, it is critical as guidance...to better enable [institutions and organizations] to identify antisemitism and gather and analyze relevant data.”<sup>18</sup>

Finally, according to the alliance, “antisemitic acts are criminal when they are so defined by law...” and “criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews.”<sup>19</sup>

## **B. Anti-Asian Hate**

### ***Hate Crimes Against Asian-Americans Before, During and After the COVID-19 Pandemic***

For decades, the dominant narrative about Asian-Americans has been that they are a “model minority,” not subject to the same discrimination and other tribulations to which other diverse groups are subject.<sup>20</sup> This oversimplified stereotype was shattered during the pandemic when hate crimes against Asian-Americans soared by 800% in 2020-2021.<sup>21</sup> As a result, the U.S. Congress stated: “Following the spread of COVID-19 in 2020, there has been a dramatic

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<sup>17</sup><https://www.adl.org/resources/backgroundunder/about-ihra-working-definition-antisemitism>

<sup>18</sup> *About the IHRA Working Definition of Antisemitism*, ADL, Feb. 19, 2021, <https://www.adl.org/resources/backgroundunder/about-ihra-working-definition-antisemitism>.

<sup>19</sup> *What is Antisemitism*, *supra* note 20.

<sup>20</sup> “Though sometimes understood as a positive preconception, the model minority stereotype erases lived experiences and collapses members of heterogeneous groups into an inauthentic, Pan-Asian caricature.” U.S. Commission on Civil Rights, *The Federal Response to Anti-Asian Racism in the United States* (Sept 2023), citing Robert G. Lee, *Orientalism: Asian Americans in Popular Culture*, Philadelphia: Temple University Press (1999); *see also*, Yuko Kawai, *Stereotyping Asian Americans: The Dialectic of the Model Minority and the Yellow Peril*, *Howard Journal of Communications*, vol. 16, no. 2, 2005.

<sup>21</sup> *Rep. Grace Meng: How to Stop the Hate*, Clinton Foundation Podcast, Mar. 18, 2021, <https://www.clintonfoundation.org/podcast/rep-grace-meng-how-to-stop-the-hate/>.

increase in hate crimes and violence against Asian Americans and Pacific Islander....[An] alarming surge in anti-Asian hate.”<sup>22</sup>

### *The History of Anti-Asian Hate Crimes*

The 2021 legislation followed centuries of inattention to hate crimes against Asian-Americans.

As Second Circuit Senior Judge Denny Chin and Kathy Hirata Chin emphasized: “This is nothing new, for there is a long history of hostility and violence against Asian Americans in this country, a history that is not well known.”<sup>23</sup> Harvard’s Courtney Sato explained that Asians have often been scapegoated during times of national distress: “This is really not an exceptional moment by any means...But it’s really part of a much longer genealogy of anti-Asian violence that reaches as far back as the 19th century.”<sup>24</sup> As Judge Chin and Kathy Chin documented,<sup>25</sup> anti-Asian hate crimes took such forms as:

- The Oct. 24, 1871, lynching of at least 18 Chinese Americans (10% of the Chinese American population of Los Angeles at the time) by a mob of hundreds.
- The murders of 28 Chinese coal miners on September 2, 1885, in Rock Springs, in what was then the Wyoming territory.
- The 1887 massacre in Hells Canyon, Oregon, in which at least 31 Chinese miners were murdered, their gold stolen, their camps burned, and their bodies thrown into the Snake River.
- The brutal murder of Vincent Chin in 1982 in Detroit at a time when American auto companies in Detroit were threatened by competition from Asian companies.

### *Specific Instances of Recent Anti-Asian Hate Crimes*

The foregoing instances of anti-Asian hate are not often taught in our nation’s classrooms. Before the pandemic, hate crimes against Asian Americans were generally underreported and under-recognized. However, recent hate crimes perpetrated against Asian Americans have been so widespread and so brutal that they have been impossible to ignore. From New York to San Francisco, hate crimes against Asians erupted nationwide, accompanied by denunciations of

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<sup>22</sup> S. 937 – COVID-19 Hate Crimes Act, <https://www.congress.gov/bill/117th-congress/senate-bill/937/text>.

<sup>23</sup> Hon. Denny Chin and Kathy Hirata Chin, “*Kung Flu*”: *A History of Hostility and Violence Against Asian Americans*, 90 *Fordham L. Rev.* 1889 (2022), [https://fordhamlawreview.org/wp-content/uploads/2022/04/Chin\\_April.pdf](https://fordhamlawreview.org/wp-content/uploads/2022/04/Chin_April.pdf). See also Gillian Brockell, *The Long, Ugly History of Anti-Asian Racism And Violence in the U.S.*, Wash. Post, Mar. 18, 2021, <https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/>.

<sup>24</sup> Liz Mineo, *The Scapegoating of Asian Americans*, *Harvard Gazette*, Mar. 24, 2021, <https://news.harvard.edu/gazette/story/2021/03/a-long-history-of-bigotry-against-asian-americans>.

<sup>25</sup> Chin and Chin, *supra* note 28.

Asians as responsible for the COVID-19 pandemic.<sup>26</sup> And anti-Asian hate crimes did not stop when the pandemic did. The following is a small sampling of some of the most brutal, and/or most recent, anti-Asian hate crimes in New York City alone over roughly the last two years (Over 40% of the anti-Asian hate crimes in large cities nationwide took place in New York City in 2021.<sup>27</sup>)

- On October 19, 2023, Jasmer Singh, an Indian American Sikh man, was beaten to death in a New York road rage attack. His family seeks hate crime charges against the killer.<sup>28</sup>
- On September 2, 2023, a crime suspect caught on camera in Prospect Park, Brooklyn, yelled anti-Asian remarks at a man, then hit him with a stick repeatedly before running off.<sup>29</sup>
- On August 7, 2023, an Asian woman from Nevada was punched repeatedly as “anti-ethnic remarks” were directed toward her on a Manhattan subway train.<sup>30</sup>
- On March 2, 2023, an 18-year-old woman grabbed Cecile Lai, pulled her to the ground and punched and kicked her, according to the district attorney’s office.<sup>31</sup>
- On February 27, 2022, during a three-hour period, seven Asian American Pacific Islander women were attacked in seven separate incidents in midtown Manhattan.<sup>32</sup>
- On February 22, 2022, GuiYing Ma died from her injuries after she was smashed in the head with a rock in Queens.<sup>33</sup>
- In February 2022, Christina Yuna Lee was followed and then stabbed more than 40 times in her apartment in Manhattan’s Chinatown.<sup>34</sup>

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<sup>26</sup> According to the Bureau of Justice Assistance (BJA), anti-Asian hate crimes rose 164% in 16 of the largest cities and counties in the first quarter of 2021 compared to the same period in 2020. Bureau of Justice Assistance, Dep’t of Justice, *Interrogatory Responses to the U.S. Commission on Civil Rights*, Mar. 16, 2023, at 5.

<sup>27</sup> Forty-seven of the anti-Asian hate crimes in the first quarter of 2021 out of a total of 110 in the nation’s largest cities took place in New York City. [https://www.csusb.edu/sites/default/files/A-API%20City%20Chart\\_As%20of%20May%2028%202021%205%20PM.docx](https://www.csusb.edu/sites/default/files/A-API%20City%20Chart_As%20of%20May%2028%202021%205%20PM.docx).

<sup>28</sup> Amanda Woods, *Sikh Man, 66, Beaten to Death in Road Rage Attack; Family Calls for Hate Crime Charges*, N.Y. Post, Oct. 23, 2023, <https://nypost.com/2023/10/23/metro/sikh-man-66-beaten-to-death-in-nyc-road-rage-attack-cops>.

<sup>29</sup> *Hate Crime Suspect Caught on Camera in Prospect Park, Brooklyn*, KION, Sept. 6, 2023, <https://kion546.com/cnn-regional/2023/09/06/hate-crime-suspect-caught-on-camera-in-prospect-park-brooklyn>.

<sup>30</sup> Allie Griffin, *Teen Girl Allegedly Slugs Asian Woman, Attacks Witness in Possible Hate Crime on NYC Subway*, N.Y. Post, Aug. 7, 2023, <https://nypost.com/2023/08/07/teen-girl-allegedly-slugs-asian-woman-in-possible-hate-crime-on-nyc-subway>.

<sup>31</sup> Peter C. Mastro Simone, *Two Arrests Made in Anti-Asian Attack*, Queens Chronicle, Mar. 16, 2023, [https://www.qchron.com/editions/queenswide/two-arrests-made-in-anti-asian-attack/article\\_f6d97b2c-b916-509d-a4de-233a801312d6.html](https://www.qchron.com/editions/queenswide/two-arrests-made-in-anti-asian-attack/article_f6d97b2c-b916-509d-a4de-233a801312d6.html).

<sup>32</sup> Marlene Lenthang and Tim Fitzsimons, *NYPD Arrests Suspect in 7 Attacks Against Asian Women on Same Day*, NBC News, Mar. 9, 2022, <https://www.nbcnews.com/news/asian-america/man-wanted-7-attacks-asian-women-1-day-nypd-says-rcna18247>.

<sup>33</sup> Amir Vera and Liam Reilly, *Asian Woman Attacked Last Year in New York by Man With Rock Has Died, Family Says*, CNN, Feb. 28, 2022, <https://www.cnn.com/2022/02/28/us/guiying-ma-death-new-york-asian-hate-crime/index.html>.

<sup>34</sup> Stef Manisero, *NYPD: Man Charged With Murder in Stabbing Death of Woman in Chinatown*, NY1, Feb. 13, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/02/13/woman-fatally-stabbed-chinatown>.

- On January 15, 2022, Michelle Go died when she was shoved to her death in front of a moving subway train.<sup>35</sup>
- In July 2021, Than Than Htwe died from head injuries after an attempted robbery caused her to fall down subway stairs.<sup>36</sup>
- On April 23, 2021, Yao Pan Ma was stomped on the head and killed in Harlem.<sup>37</sup>

The foregoing list is, unfortunately, far from exhaustive. Scores of other hate crimes took place before, during, and after the roughly two-year time period covered above.<sup>38</sup>

### *Statistical Analysis of Recent Anti-Asian Hate Crimes*

While hate crimes and hate incidents are notoriously underreported, particularly when committed against Asian Americans,<sup>39</sup> statistical evidence further demonstrates the magnitude of the problem.

One group studied internet activity and reported a rise of 1,662% in anti-Asian hate speech in 2020 compared with 2019. This peaked with the announcement of the COVID-19 pandemic.<sup>40</sup>

At the most basic level, public opinion poll data sheds light on the statistical scope of the hate crime problem, showing that 1 out of 4 Asians has experienced a hate incident.<sup>41</sup> Stop AAPI

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<sup>35</sup> Myles Miller, *Asian Woman Pushed to Her Death in Front of Oncoming Train at Times Square Station*, NBC News, Jan. 15, 2022, <https://www.nbcnewyork.com/news/local/crime-and-courts/woman-killed-after-being-pushed-onto-tracks-at-times-square-subway-station/3497589>.

<sup>36</sup> *Than Than Htwe Dies After Being Critically Injured in Subway Robbery Attempt*, CBS News, July 28, 2021, <https://www.cbsnews.com/amp/newyork/news/family-says-than-than-htwe-woman-critically-injured-in-subway-robbery-attempt-wont-make-it-out-of-this>.

<sup>37</sup> Artemis Moshtaghian, *An Asian Man Injured in an Unprovoked Attack in New York Last April Has Died, Officials Say*, CNN, Jan. 9, 2022, <https://www.cnn.com/2022/01/09/us/asian-man-new-york-attack-death/index.html>.

<sup>38</sup> This list is confined to New York City and thus does not cover crimes such as the 2022 Atlanta spa murders. Alexis Stevens, *Spa Shootings: A Timeline of Events That Left 8 Dead in Metro Atlanta*, Atlanta Journal-Constitution, Mar. 15, 2022, <https://www.ajc.com/news/spa-shootings-a-timeline-of-events-that-left-8-dead-in-metro-atlanta/UH5ZJVXV3FCY3LUPW4T6CUCSC4>.

<sup>39</sup> In 2020, nearly 25% of large cities did not report any hate crimes. This likely reflects an issue with reporting, as it is “a statistical near-impossibility” that none of those cities experienced a single hate crime in that year. *The Federal Response to Anti-Asian Racism in the United States*, U.S. Commission on Civil Rights, at 9 (Sept. 2023). Only about half of states have laws that require the state to collect and analyze data on hate crimes via mandatory reporting from law enforcement agencies. The problem of underreporting is more severe in Asian communities. See Catherine Thorbecke, *Why Anti-Asian Hate Incidents Often Go Unreported and How To Help*, ABC News, Mar. 18, 2021, <https://abcnews.go.com/US/anti-asian-hate-incidents-unreported/story?id=76509072>. The Asian American Bar Association discussed the problem of underreporting of hate crimes in Asian American communities (AABANY Report).

<sup>40</sup> Emma Woollacott, *Anti-Asian Hate Speech Rocketed 1,662% Last Year*, Forbes, Nov. 15, 2021, <https://www.forbes.com/sites/emmawoollacott/2021/11/15/anti-asian-hate-speech-rocketed-1662-last-year>.

<sup>41</sup> *Poll: 1 out of 4 Asian Americans Has Experienced a Hate Incident*, Axios, Mar. 30, 2021, <https://www.axios.com/2021/03/30/poll-1-in-4-asian-americans-experience-hate-incident>.

Hate reported about 11,500 acts of hate between March 2020 and 2022.<sup>42</sup> More than half of Asian respondents report that they know someone who has been victimized.<sup>43</sup>

And these statistics carry over into 2023. Over 2 in 10 Asian Americans and Pacific Islanders (23%) say they were verbally harassed or abused in the last year, and 22% have been called a racial or ethnic slur.<sup>44</sup>

The foregoing data relates to hate incidents, which are not necessarily hate crimes, but the statistics on hate crimes are equally alarming. In 2021, 746 anti-Asian hate crimes were reported to the FBI by law enforcement agencies. Reports of hate crimes against Asian Americans jumped 342% from 2020 to 2021, after an increase of 124% between 2019 and 2020.<sup>45</sup>

The Asian American Bar Association of New York, including our task force members, Professor Elaine Chiu, and Chris Kwok, performed perhaps the most extensive statistical analysis of anti-Asian hate crimes, thoroughly reviewing over 200 New York City cases. Notably, the study found that assault was the most common offense – 58% of all incidents – indicating that hate crimes are generally serious violent crimes. But the study found that prosecution of hate crimes remains difficult. Out of the 64 criminal prosecutions the group studied, only seven resulted in hate crime convictions. At the time, 20 other prosecutions were still pending.<sup>46</sup>

### ***The Profound Effect of Hate Crimes on Asian American Communities***

The surge in hate crimes has resulted in fear and isolation in Asian American communities:

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<sup>42</sup> Data from Momentum and AAPI Data found 10% of AAPIs reported being a victim of a hate crime or hate incident in the March 2021 survey. Their March 2022 survey shows that 15% of AAPI adults had reported the same experience. [aapidata.com/blog/discrimination-survey-2022](https://aapidata.com/blog/discrimination-survey-2022).

<sup>43</sup> Brendan Lantz and Marin R. Wenger, *Anti-Asian Xenophobia, Hate Crime Victimization, and Fear of Victimization During the COVID-19 Pandemic*, Nat'l Library of Medicine, May 11, 2022. Similarly, approximately 30% reported fear or worry about being the victim of a hate incident. Neil G. Ruiz, Khadijah Edwards and Mark Hugo Lopez, *One-Third of Asian Americans Fear Threats, Physical Attacks and Most Say Violence Against Them Is Rising*, Pew Research Center, Apr. 21, 2021, <https://www.pewresearch.org/short-reads/2021/04/21/one-third-of-asian-americans-fear-threats-physical-attacks-and-most-say-violence-against-them-is-rising/>. About 75% of Asians believe that the United States has become more dangerous for their racial/ethnic group (AA & NHPI COVID-19 Needs Assessment Project).

<sup>44</sup> Terry Tang and Linley Sanders, *1 in 3 U.S. Asians and Pacific Islanders Faced Racial Abuse This Year*, AP-NORC/AAPI Data Poll Shows, WNCT, Nov. 14, 2023, <https://www.wnct.com/news/politics/ap-1-in-3-us-asians-and-pacific-islanders-faced-racial-abuse-this-year-ap-norc-aapi-data-poll-shows>.

<sup>45</sup> Rachel Tillman, *Hate Crimes Rose 44% Last Year in Study of Major Cities*, NY1, Feb. 14, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/02/14/hate-crime-increase-2021-asian-american->. See also Kimmy Yam, *NYPD Reports 361 Percent Increase in Anti-Asian Hate Crimes Since Last Year*, NBC News, Dec. 10, 2021, <https://www.nbcnews.com/news/asian-america/nypd-reports-361-percent-increase-anti-asian-hate-crimes-last-year-rcna8427>.

<sup>46</sup> AABANY Report at 5.

“For the Asian American communities that are experiencing this, it just feels like an all-out assault,” said William Ming Liu, PhD, a counseling psychologist and chair of the Department of Counseling, Higher Education, and Special Education at the University of Maryland.

Early research has linked the uptick in anti-Asian discrimination to increases in anxiety, depressive symptoms, and sleep problems among those who are targeted.<sup>47</sup>

A recent study showed that “having experienced or witnessed a hate crime incident was associated with higher levels of serious psychological distress . . . [and] having had to forgo necessary care . . .”<sup>48</sup> As a result of the fear and stress arising from anti-Asian hate, many AAPI persons changed their behavior in response to bias-motivated attacks and harassment, including closing shops early, avoiding community events or public transportation.<sup>49</sup> A nationally representative survey of Asian Americans and Pacific Islanders found that 45% indicated discrimination negatively changed their sense of belonging, and 31% stated that discrimination impacted their behavior, such as causing them to switch schools, jobs or where they shop.<sup>50</sup>

### *Conclusion*

Although the hate crime epidemic of 2020–22 against Asian Americans has subsided somewhat, hate crimes persist, and we should continue to push for measures to address the scourge of hate crimes. As President Biden has stated:

*For centuries, Asian Americans, Native Hawaiians, Pacific Islanders . . . have helped build this nation only to be often stepped over, forgotten, or ignored . . . [they have] lived here for generations, but still considered, by some, the “other” . . . It’s wrong . . . it’s simply un-American.*<sup>51</sup>

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<sup>47</sup> Zara Abrams, *The Mental Health Impact of Anti-Asian Racism*, APA, July 1, 2021, <https://www.apa.org/monitor/2021/07/impact-anti-asian-racism>.

<sup>48</sup> *Id.*

<sup>49</sup> AABANY Report at 12.

<sup>50</sup> *Barriers to Justice: Asian Americans and Pacific Islanders Want Greater Protection of Their Civil Rights*, NORC, May 2023, [https://norc.org/content/dam/norc-org/pdfs/AAPI\\_Civil\\_Rights\\_Report\\_FINAL.pdf](https://norc.org/content/dam/norc-org/pdfs/AAPI_Civil_Rights_Report_FINAL.pdf).

<sup>51</sup> <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/20/remarks-by-president-biden-at-signing-of-the-covid-19-hate-crimes-act/>

## C. The History of Hate Crimes Legislation and Lessons From the Passage of Hate Crimes Legislation in 2021

### *Early Hate Crimes Laws*

The earliest hate crime laws were passed following the Civil War to address racist violence in the years after the war. The first modern federal hate crime law was passed in 1968,<sup>52</sup> and federal law has been expanded and modified many times since.

- In 1968, Congress also made it a crime to use, or threaten to use, force to interfere with housing rights because of the victim's race, color, religion, sex, or national origin.
- In 1988, protections based on familial status and disability were added.
- In 1996, Congress passed the Church Arson Prevention Act, 18 U.S.C. § 247. Under this Act, it is a crime to deface, damage or destroy religious real property, or interfere with a person's religious practice, in situations affecting interstate commerce.
- In 2009, the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act expanded the federal definition of hate crimes.

At the state level today, 46 states, the District of Columbia, and two territories (Puerto Rico and the U.S. Virgin Islands) have hate crime laws,<sup>53</sup> though they also vary in many ways.<sup>54</sup>

### *COVID-19 Hate Crimes Act*

After the March 2021 Atlanta spa murders, in which six Asian spa workers were murdered,<sup>55</sup> on March 18, 2021, for the first time in more than 30 years, a congressional hearing on hate crimes against Asians was held.<sup>56</sup> On May 20, 2021, President Biden signed the COVID-19 Hate Crimes Act in recognition of the dramatic increase in hate crimes against Asian Americans. The

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<sup>52</sup> The 1968 statute made it a crime to use, or threaten to use, force to willfully interfere with any person because of race, color, religion, or national origin and because the person is participating in a federally protected activity, such as public education, employment, jury service, travel, or the enjoyment of public accommodations, or helping another person to do so. In 1968, Congress also made it a crime to use, or threaten to use, force to interfere with housing rights because of the victim's race, color, religion, sex, or national origin; in 1988, protections on the basis of familial status and disability were added.

<sup>53</sup> *Policy Spotlight: Hate Crime Laws*, Movement Advancement Project (2021), <https://www.lgbtmap.org/file/2021-report-hate-crime-laws.pdf>.

<sup>54</sup> Jordan Williams, *Hate Crime Laws Across US Inconsistent, Civil Rights Groups Say*, The Hill, July 28, 2021, <https://thehill.com/blogs/blog-briefing-room/news/565226-hate-crime-laws-across-us-inconsistent-civil-rights-groups-say/>

<sup>55</sup> Nicole Chavez and Natasha Chen, *Assaulted. Harassed. This Is the Reality for Asian Americans a Year After the Atlanta Spa Shootings*, CNN, Mar. 16, 2022, <https://www.cnn.com/2022/03/16/us/atlanta-spa-shootings-anniversary/index.html>.

<sup>56</sup> Lisa Desjardins and Patty Gorena Morales, *Congress Holds First Hearing on Asian American Violence in Decades Amid 'Crisis Point,'* PBS, Mar. 18, 2021, <https://www.pbs.org/newshour/show/congress-holds-first-hearing-on-asian-american-violence-in-decades-amid-crisis-point>.

legislation, introduced by U.S. Rep. Grace Meng and Sen. Mazie Hirono, improved reporting of hate crimes, expedited the review of hate crimes related to COVID-19 and authorized grants to state and local governments to conduct hate crime-reduction programs.<sup>57</sup>

As President Biden remarked, the legislation represented “a significant break” in an otherwise hyper-partisan political climate.<sup>58</sup> The COVID-19 Hate Crimes Act has been described as “the single most significant piece of legislation to improve federal hate crime data since the Hate Crimes Statistics Act of 1990.”<sup>59</sup>

The passage of the COVID-19 hate crimes law provides guidance for bar associations and other organizations, particularly regarding how we might achieve the legislative objectives outlined in later sections of this report. The 2021 hate crimes law, a genuinely bipartisan measure, resulted from the work of a coalition of many diverse groups. Numerous public officials issued statements supporting the Asian American community.<sup>60</sup> In particular, Congresswoman Grace Meng focused on the Atlanta murders, noting “we saw the terrible news about the six Asian women who were shot and killed in the Atlanta area. Our community is bleeding, we are in pain, and for the last year, we’ve been screaming out for help.”<sup>61</sup>

For our purposes, an important lesson is the role of bar associations. Numerous bar associations added their voices in support of the Asian American community. Before the passage of the 2021 legislation, the National Asian Pacific Bar Association and the Asian American Bar Association of New York, the American Bar Association,<sup>62</sup> and the New York County Lawyers Association,<sup>63</sup> as well as a coalition of diverse bar associations,<sup>64</sup> condemned the rise of anti-Asian hate crimes. Notably, the National Asian Bar sponsored a historic resolution in the ABA

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<sup>57</sup> S. 937 – COVID-19 Hate Crimes Bill, <https://apps.npr.org/documents/document.html?id=20784480-bills-117s9>.

<sup>58</sup> Libby Cathey, Biden Signs Anti-Asian Hate Crime Bill Marking ‘Significant Break’ in Partisanship, ABC News, May 20, 2021, <https://abcnews.go.com/Politics/biden-sign-anti-asian-hate-crime-bill-law/story?id=77801857>.

<sup>59</sup> Rhonda Sonnenberg, *One Year Later: COVID-19 Hate Crimes Act a Promising Work in Progress*, SPL Center, May 20, 2022, <https://www.splcenter.org/news/2022/05/20/one-year-later-covid-19-hate-crimes-act-promising-work-progress>.

<sup>60</sup> *A Rising Tide of Hate and Violence Against Asian Americans in New York During Covid-19: Impact, Causes, Solutions*, Asian Am. Bar Ass’n of N.Y. & Paul Weiss (2021) (hereinafter AABANY REPORT), [https://www.aabany.org/resource/resmgr/press\\_releases/2021/A\\_Rising\\_Tide\\_of\\_Hate\\_and\\_Vi.pdf](https://www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf), at 9.

<sup>61</sup> House Hearing on Discrimination and Violence Against Asian Americans Transcript, March 18.

<sup>62</sup> *Statement of ABA President Patricia Lee Refo Re: Bias and Hate Crimes Against Asian Americans*, ABA, Mar. 13, 2021, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/03/statement-of-aba-president-patricia-lee-refo-re-bias-and-hate-c/>.

<sup>63</sup> *NYCLA Statement on Violence Against Asian Americans*, NYCLA, Aug. 1, 2022, <https://www.nycla.org/resource/statement-letter/nycla-statement-on-violence-against-asian-americans/>.

<sup>64</sup> *National Diverse Bars Condemn Recent Acts of Anti-Asian Hate*, Nat’l Native American Bar Assoc., Apr. 2021, <https://www.nativeamericanbar.org/wp-content/uploads/2021/04/20210401-National-Diverse-Bars-Condemn-Recent-Acts-of-Anti-Asian-Hate.pdf>.

House of Delegates urging action on Asian hate crimes.<sup>65</sup> The New York State Bar Association convened this task force partially in response to the rise in anti-Asian hate crimes.

The success of the 2021 effort gives us hope that further measures to address hate crimes will be considered at the state and federal level. Our proposals are set out below.

#### **D. Constitutionality of Hate Crimes Laws**

The Supreme Court has upheld hate crimes laws against First Amendment attacks.<sup>66</sup> Moreover, federal hate crimes statutes have been held to be a proper exercise of the Commerce power.<sup>67</sup> And courts have rejected the argument that hate crime laws are unconstitutionally vague.<sup>68</sup>

#### **Section 4. Proposals**

##### **I. Proposed Changes to New York’s Hate Crimes Statute, the Hate Crimes Act of 2000, Article 485 of the New York Penal Law**

The existing set of hate crime laws is an inconsistent patchwork of laws that vary widely from state to state. The following are our task force’s recommendations for changes in New York’s hate crimes law, the principal statute of which is The Hate Crimes Act of 2000 (HCA), codified in Article 485 of the New York Penal Law (NYPL).

One of our recommendations below is partially contained in legislation proposed by Senator Brad Hoylman and Assembly Member Grace Lee.<sup>69</sup> The bill, which will formally be introduced in early 2024, dubbed the Hate Crime Modernization Act, and intends to expand what offenses are deemed hate crimes, namely by increasing the total range of eligible charges from 66 to 97. We support this proposal as a first step. In addition, as set out below, the task force recommends an even more expansive addition to the scope of the predicate acts covered by New York’s hate crimes law. We also recommend other proposals that are not addressed in the Hate Crime Modernization Act.

As Senator Hoylman said in introducing the Hate Crime Modernization Act: “As we witness an unprecedented rise in bias-motivated crimes against Jewish, Muslim, Asian American and

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<sup>65</sup> NAPABA Co-Sponsors Resolution on Hate Crimes Adopted by the ABA in Historic First, NAPABA, Aug. 10, 2021, <https://www.napaba.org/news/583940/NAPABA-Co-Sponsors-Resolution-on-Hate-Crimes-Adopted-by-the-ABA-in-Historic-First.htm>.

<sup>66</sup> See *Wisconsin v. Mitchell*, 508 U.S. 47 (1993).

<sup>67</sup> See *U.S. v. Hill*, 927 F.3d 188 (4th Cir. 2019).

<sup>68</sup> See *People v. Fox*, 17 Misc. 3d 281 (Sup. Ct., Kings Co. 2007), citing *People v. Amadeo*, 2001 N.Y. Slip Op. 40190(U) (Sup. Ct., Queens Co. 2001); *People v. Diaz*, 188 Misc. 2d 341 (Sup. Ct., N.Y. Co. 2001); *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992), cert denied, 508 U.S. 974 (1993); *State v. Mitchell*, 163 Wis 2d 652, 473 NW2d 1 (Ct. App 1991).

<sup>69</sup> Lisa Rozner, *Manhattan DA Alvin Bragg, New York Lawmakers Introduce Hate Crime Modernization Act to Close Loopholes*, CBS News, Nov. 9, 2023, <https://www.cbsnews.com/newyork/news/hate-crime-modernization-act-alvin-bragg-new-york-close-loopholes-antisemitism/?s=03>.

LGBTQ people, it's of utmost importance that New York closes the dozens of loopholes in our hate crime statute to send the urgent message that hatred won't be tolerated in our state."

The task force's recommendations look to close the loophole upon which Senator Hoylman focused, but also advocate for more comprehensive changes to the law. It is our hope that New York's enactment of Senator Hoylman's bill and some or all of the recommendations below will serve as a model for other states.<sup>70</sup>

We advocate three principal statutory changes:<sup>71</sup>

First, we support an expansion of the crimes that can be predicate acts for the HCA. We urge that all offenses be listed as predicate acts.

Second, the HCA provides only negative guidance as to what a hate crime is not. We urge the addition of affirmative guidance of circumstances from which hate crimes can be inferred.

Third, the HCA currently covers only crimes that were committed in "substantial" part because of the presence of the forbidden animus. We urge deletion of the word "substantial" so that any crime that is committed because of that animus can be considered a hate crime if that animus played any role in causing the offense to occur.

A markup containing our proposed changes to the HCA is contained at Appendix A.

#### **A. Definition of Hate Crime**

Rather than defining what a hate crime is, New York Penal Law § 485.05(2) only provides negative guidance, defining what it is not a hate crime: "Proof of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim *does not*, by itself, constitute legally sufficient evidence satisfying the people's burden..." (emphasis added).

The task force recommends amending the statute to provide affirmative guidance and examples of what a hate crime *is*.

The task force recommends the following amendment of the HCA to include affirmative guidance regarding certain categories of evidence that support a hate crime prosecution:

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<sup>70</sup> Thanks to the Asian Bar Association of New York and to our task force members Elaine Chiu and Chris Kwok and AABANY executive director Yang Chen for their work on some of these legislative proposals several years ago. Many of the legislative/ proposals in this report are contained in the Asian Bar's report ("AABANY Report") [https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless Tide Report 2022 FIN.pdf](https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless_Tide_Report_2022_FIN.pdf).

<sup>71</sup> In NYSBA'S 2020 report on domestic terrorism and hate crimes the task force rejected proposals to create rebuttable presumptions that hate crime defendants would have to rebut. The current task force adheres to this recommendation. <https://nysba.org/app/uploads/2020/07/Final-Report-Task-Force-on-Domestic-Terrorism-Hate-Crimes.pdf>.

- Evidence of expressions from the perpetrator that include well-settled slurs, hostile language, or gestures offensive to the protected group, such as references to foreignness, that occur close in time to the conduct, or in explanation of the conduct, should be presumptively legally sufficient evidence that satisfies the People’s burden.<sup>72</sup>
- Evidence that the events preceding the incident drew attention to the victim’s race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation immediately prior to or during the perpetrator’s conduct.<sup>73</sup>
- Evidence that the defendant selected victim(s) due to the defendant’s belief that the victim(s) belonged to a protected group that was more likely to have valuables, less likely to report the crime or other stereotypes.<sup>74</sup>
- Evidence that the defendant was part of a hate group or had a history or pattern making bias-related statements or engaging in bias-related conduct.<sup>75</sup>

In addition to (or possibly in lieu of the statutory changes discussed above), we recommend the use of jury instructions incorporating some or all the above points. We also recommend the use of the following four jury instructions for which we believe no statutory change is necessary:

- That hate crimes can be established by circumstantial evidence considering the totality of the circumstances.<sup>76</sup>

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<sup>72</sup> *E.g.*, *People v. Marino*, 35 A.D.3d 292, 293, 826 N.Y.S.2d 68 (1st Dep’t 2006) (“Defendant’s guilt of menacing as a hate crime was established by evidence that he approached two African-American men for no apparent reason and brandished a box cutter, after his friend had been using racial epithets toward these men, which defendant personally repeated); *People v. Spratley*, 152 A.D.3d 195, 59 N.Y.S.3d 495 (3d Dep’t 2017); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988); *People v. Dinan*, 118 Misc. 2d 857, 461 N.Y.S.2d 724 (N.Y. City Ct. 1983); *People v. Moorjaney*, No. 2098/04, 2006 N.Y. Misc. LEXIS 791, at \*4 (Sup. Ct. Mar. 24, 2006) (“[T]here was sufficient evidence for the Grand Jury to conclude that the writer of the offensive words was motivated by a perception of the person or persons who used the third floor female bathroom; that would include, among others, all the people in the school, all the female people in the school, [and] all the black female people . . . .”); *U.S. v. Magleby*, 241 F.3d 1306, 56 Fed. R. Evid. Serv. 951 (10th Cir. 2001) (court properly admitted lyrics to song defendant played shortly before the cross burning).

<sup>73</sup> *People v. Ortiz*, 48 A.D.3d 1112, 851 N.Y.S.2d 784, 784–85 (4th Dep’t 2008) (grand jury evidence established, inter alia, that defendants began to beat the victims after inquiring about the victims’ gay relationship).

<sup>74</sup> *People v. Fox*, 844 N.Y.S.2d 627 (Sup. Ct. 2007) (selection and killing of gay victim because, inter alia, they believed that he would not fight back and would be reluctant to go to the police).

<sup>75</sup> *People v. Alas*, 44 A.D.3d 534, 534–35, 843 N.Y.S.2d 628, 628 (1st Dep’t 2007) (The court properly exercised its discretion in admitting evidence of prior acts of hostility and racial animosity that “evinced” defendant’s intent to focus his aggression because such evidence was highly relevant to hate crimes charge); *People v. Latimer*, 24 A.D.3d 807, 809, 804 N.Y.S.2d 493, 495 (2d Dep’t 2005) (People were entitled to attempt to show defendant’s reason for selecting a store clerk who appeared Indian or Middle Eastern through proof that three of the four clerks involved in these robberies appeared to have that similar ethnic background and that defendant pleaded guilty to the October 2001 robbery as a hate crime); *State v. Davidson*, 225 N.J. Super. 1, 541 A.2d 700, 705–06 (App. Div. 1988) (where defendant being prosecuted for defacing property with racist graffiti, evidence of other similar acts directed at victims relevant to show defendant’s intent and state of mind in targeting the victims).

<sup>76</sup> The biased intent of all Defendants can be inferred from circumstantial evidence. *Kurd v. Republic of Turkey*, 374 F. Supp. 3d 37, 59 (D.D.C. 2019)(citing *Mori v. Dep’t of Navy*, 917 F.Supp.2d 60, 65 (D.D.C. 2013) (explaining that “circumstantial evidence is particularly important in bias” cases); cf. *Brzonkala v. Virginia Polytechnic & State University*, 935 F.Supp. 772 (W.D. Va. 1996) (under the Violence Against Women Act “[j]udges and juries will

- That the prosecution need not show hatred towards an entire racial group but need only show that the perpetrator or perpetrators targeted an individual because of his or her race or religion.<sup>77</sup>
- That hate crimes can be supported by evidence that the victim was in or near an area commonly associated or frequented by members of a particular protected victim class.
- That hate crimes can be supported by evidence of the apparent lack of provocation or non-bias-related “reason for” the offense.<sup>78</sup>

## **B. Removing the “Specified Offenses” Requirement**

The HCA should also be revised to cover all criminal offenses. Currently, the hate crimes statute applies to only offenders who commit a narrow list of “specified offenses.” This list of “specified offenses” is narrow and arbitrary and the official legislative findings under NYPL § 485.00 provide no justification for this list.<sup>79</sup> The list appears at Appendix A as parts of the HCA as to which we urge amendment.

Senator Hoylman’s proposed Hate Crime Modernization Act attempts to address this problem by adding about 30 offenses to the list of offenses eligible for hate crimes prosecution. For reasons set out below, the task force recommends that all offenses be listed as predicate acts for HCA purposes. However, the addition of 30 offenses is a good start. As Manhattan DA Bragg pointed out: “The current list of eligible offenses . . . contain glaring omissions and they do not comport with our practice, what we’re seeing day in and day out.” For instance, “rape in the first degree can be charged as a hate crime, but other sexual assaults like forcible touching cannot,” Bragg said. “That too must be changed.”<sup>80</sup>

That the statute is arbitrarily restrictive can be seen from the case law holding that criminal use of a firearm in the first degree could not properly be charged as a hate crime, as that offense was

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determine ‘motivation’ from the ‘totality of the circumstances’ surrounding the event““Bias, in short, can be proven by circumstantial as well as indirect evidence.””).

<sup>77</sup> *People v. Fox*, 2007 NY Slip Op.27317 (Sup. Ct. Kings Cty, Aug. 2, 2007).

<sup>78</sup> *See, e.g., People v. Ortiz*, 48 A.D.3d 1112, 851 N.Y.S.2d 784, 784–85 (4th Dep’t 2008) (grand jury evidence established, inter alia, that defendants were strangers to the victims; the crime was unprovoked by the victim); *State v. Colella*, 298 N.J. Super. 668, 690 A.2d 156 (App. Div. 1997); *People v. Pirozzi*, 237 A.D.2d 628, 656 N.Y.S.2d 42 (2d Dep’t 1997). *See also* Hate Crime Laws: A Practical Guide 55 (“a court may consider the fact that an attack was unprovoked, that there was no prior history of hostility between the parties and that derogatory or insulting comments were made).

<sup>79</sup> AABANY Report at 49.

<sup>80</sup> Haley Brown, Ben Kochman, Carl Campanile and Jorge Fitz-Gibbon, *Pols, DA Bragg Pitch New Law To Expand NY Hate Crimes Statute and Enhance Sentences*, N.Y. Post, Nov. 6, 2023, <https://nypost.com/2023/11/06/metro/proposed-new-law-would-greatly-expand-nys-hate-crimes-statute>.

not listed as a specified offense in the hate crime statute.<sup>81</sup> Yet, at the same time, the less serious offense of crimes against buildings is included within the purview of the HCA.<sup>82</sup>

Similarly, Rape in the First Degree (NYPL § 130.35) can be a hate crime, but Rape in the Third Degree (NYPL § 130.25(3)) cannot. Notably, the criminal prohibition against graffiti (NYPL § 145.60) cannot be a hate crime even if the graffiti expresses racial slurs. Other excluded offenses include: Criminal Obstruction of Breathing (N.Y. Law Penal § 121.11), Endangering the Welfare of a Child (N.Y. Penal § 260.10), Endangering the Welfare of an Incompetent or Physically Disabled Person (N.Y. Penal § 260.24), Unlawful Dissemination of an Intimate Image (N.Y. Penal § 245.15) or Forcible Touching (N.Y. Penal § 130.52).<sup>83</sup> These crimes could all be bias crimes and should be covered by the hate crime statute.

The proposed Hate Crime Modernization Act would expand the list of crimes eligible for hate crime enhancement. We support these additions. The task force would go further and urge the legislature to revise the HCA to apply to “all offenses” unless the offense is explicitly excluded. This revision will ensure that all crimes committed because of bias or hate are properly designated as hate crimes.

We do not see any reason to stop short of including virtually all offenses within the scope of the HCA. Even if a law is included within the coverage of the HCA, prosecutors must still prove the elements of the underlying covered offense and must prove the requirements for an HCA prosecution.

Including all offenses within the coverage of the HCA would align the New York statute with the federal statute, in which “[t]he hate crime enhancements are available for virtually any serious federal offense, even for violations of statutes generally not considered hate crime laws.”<sup>84</sup> Likewise, adding all offenses to the coverage of the hate crimes statute would put New York in line with the laws of most other states. “Under the majority of state hate crime laws, most or all criminal violations can be classified as hate crimes if they are determined to be motivated by bias or prejudice toward an individual or group of people on the basis of certain traits they possess or are perceived to possess.”<sup>85</sup>

**C. Elimination of the Current Requirement That Hate Crimes Must Be Motivated in “Substantial Part” Because of the Victims’ Protected Characteristics**

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<sup>81</sup> See, e.g., *People v. Spratley*, 152 A.D.3d 195 (3d Dep’t 2017).

<sup>82</sup> See *People v. Assi*, 63 A.D.3d 19 (1st Dep’t 2009), *lv. to appeal granted*, 12 N.Y.3d 912, *aff’d*, 14 N.Y.3d 335 (2010).

<sup>83</sup> AABANY Report at 49.

<sup>84</sup> <https://crsreports.congress.gov/product/pdf/R/R47060>

<sup>85</sup> Michael Shively, Study of Literature and Legislation on Hate Crime in America (June 2005) (federally funded study). The only offenses that may need to be excluded from the HCA would be the hate crimes contained presently in the Aggravated Harassment section of the Penal Law that predate the HCA and already have enhanced sentences.

The HCA enhances the punishment of certain crimes when they are committed with a bias motive. However, the provision is limited only to crimes that are committed in whole or in substantial part because of the bias forbidden by the hate crime statute. The task force recommends that the word “substantial” be removed so that a hate crime is committed if it is committed “in whole or in part” because of a person’s protected characteristic. As set out below, such a change would be supported by some of the case law interpreting the federal statute and by many cases and statutes in other areas of law.<sup>86</sup>

Most important, removing the word “substantial” would comport with the official legislative findings of the HCA itself.<sup>87</sup> Those findings specify that hate crimes are crimes where “victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation.” The legislative findings use an “in part” standard and do not mention the “substantial” factor standard. They suggest only that the forbidden motivation must “in part” cause the crime to occur.

In addition, the “FBI’s UCR Program defines hate crime as a committed criminal offense which is motivated, in whole or in part, by the offender’s bias(es) against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.” This definition uses the “in part” standard and also eschews the “substantial factor” limitation found in the HCA.

The HCA departs from the legislative findings and the FBI UCR definition. Under the current HCA, a crime may be charged as a hate crime when a person selects a victim or commits a specified crime when they are motivated “in whole or in substantial part” due to a belief or perception about a person’s race, color, national origin, or other protected classes. A charge “as a hate crime” elevates the level of, and the punishment for, the crime. The statute contains no definition of “substantial.” Webster’s Dictionary defines “substantial” in at least five different ways, including “considerable in quantity; significantly great” as well as “being largely but not wholly that which is specified.” In *People v. Fox*, the only case to discuss the definition of “substantial part” in the context of the HCA, the court consulted the dictionary meanings and held this term to mean “a considerable portion or amount.”<sup>88</sup>

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<sup>86</sup> A minority of our task force opposes elimination of the word “substantial” from the statute on the grounds that such a reduction in the standard could lead to over prosecution of hate crimes and possibly selective prosecution against disadvantaged groups. But as explained, hate crime statutes in other jurisdictions have not proved problematic because of the lack of the word “substantial” in the statutes. Additionally, prosecutors have historically been circumspect in their use of hate crimes statutes, likely because judges and juries demand compelling evidence of motive before prosecuting hate crimes. Kiara Alfonseca, Hate Crimes Are Hard to Prosecute, But Why? ABC News, April 13, 2021, <https://abcnews.go.com/US/hate-crimes-hard-prosecute/story?id=76926458>.

<sup>87</sup> <https://www.nysenate.gov/legislation/laws/PEN/485.00>.

<sup>88</sup> Hate Crime Laws: A Practical Guide 55 (“Given the difficulties of proving motive, and the reality that many offenders have multiple motives, hate crimes should allow for next motives. To require that bias be the sole motive would drastically limit the number of offenses that could be charged as hate crime or to which a hate crime penalty enhancement might apply”).

The lack of clarity about the term “in substantial part” creates confusion about when a hate crimes enhancement is chargeable or appropriate. The bright line test of permitting hate crimes enhancement whenever prohibited motivations play any part in the crime would give police and prosecutors more discretion to charge hate crimes in mixed motive situations. Many acts of violence have numerous motives, and hate crimes are no different. Because a defendant has multiple “reasons” to attack another person does not negate that the HCA was enacted to prevent one of them from being based on race, ethnicity, or any of the other protected classes. Cases applying the federal hate crimes statute have recognized that the “presence of other motives...does not make [a defendant’s] conduct any less a violation of 42 USC Section 1361.”<sup>89</sup>

Instead of focusing on whether there are other motives or trying to quantify each motive, this statute should focus simply on whether just one of those reasons is because of the victim’s protected class. Removing the word “substantial” accomplishes that goal. Indeed, the devastating impact of a hate crime is not diminished by the fact that the perpetrator might have other motives in addition to animus.

A test requiring only that the forbidden motivation be one reason for the crime is not unprecedented. The federal statute does not contain the word “substantial” and merely requires that the crime be “because of” the victim’s protected status. Some federal cases have explicitly held that racial animus needs to be only one factor.<sup>90</sup>

Moreover, a test requiring only that animus need be one motivation and not a “substantial” motivation comports with case law in other contexts, including U.S. Supreme Court precedent. Many of these cases involve proof of racial motivation in other settings such as employment

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<sup>89</sup> *United States v. Johns*, 615 F.2d 672, 670 (5th Cir. 1980). *Accord Univ. of Texas Sw. Med. Ctr. v. Nassar*, 00570 U.S. 338, 343, 133 S. Ct. 2517 (2013) (“An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”).

<sup>90</sup> *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012) (citing *United States v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007) (government was not required to prove that racial animus was defendant’s sole motivation but only that victim’s race or identity partially motivated the crimes); *United States v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) (compiling cases and adopting the any factor test).

discrimination.<sup>91</sup> Statutes and regulations in other contexts have also adopted similar standards.<sup>92</sup> However, it is notable that although the federal statute does not contain the word or concept of “substantial factor,” many federal cases have implied a “substantial factor” test to limit the breadth of the various federal hate crime statutes.<sup>93</sup>

Most state statutes contain limitations at least as stringent as the word “substantial,” but in several jurisdictions, the hate crime statute is triggered if the prohibited motive is “a factor,” rather than a “substantial factor.”<sup>94</sup>

We conclude this discussion with two overarching recommendations.

*First*, because of the disparities in the case law the task force recommends that an amendment of the statute to excise the word “substantial” be accompanied by legislative history explicitly stating the intent to permit hate crime prosecution even when the crime is motivated in any part “because of” the animus specified in the statute.

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<sup>91</sup> Cases in other areas of law have also adopted the “at least in part” or “a factor” test. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) (“An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”); *Nat’l Ass’n of African Am.-Owned Media v. Charter Commc’ns, Inc.*, 915 F.3d 617, 622, 626 (9th Cir. 2019) (though racial animus need not be the “but-for” cause. “If discriminatory intent plays any role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the same right as a white citizen . . . the most natural reading of § 1981.”) (citations and quotations omitted); *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir. 1997) (adopting an “at least in part” standard); *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir.2004) (motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant’s actions.”); *Mercado v. Caithness Long Island LLC*, 104 A.D.3d 576 (1st Dep’t 2013) (granting cross motion under Labor Law § 240(1) because plaintiff was only required to establish that his injuries were caused, “at least in part” by the absence of proper protection required by the statute); *Culver v. Gorman & Co.*, 416 F.3d 540, 545 (7th Cir. 2005) (“A causal link between the protected expression and an adverse employment action may be established by showing that the protected expression was ‘a factor that motivated the defendant’s actions.’”).

<sup>92</sup> The Victims of Gender Motivated Violence Protection Act provides a cause of action based on crimes of violence motivated by gender, defined as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” N.Y.C. Admin. Code § 8-901-05. Similarly, New York Labor Law § 249(1) requires only that injury was caused “at least in part” by the absence of proper protection.

<sup>93</sup> The principal federal hate crimes statute is 18 U.S.C. § 245. *See United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999) (“so long as racial animus is a substantial reason for a defendant’s conduct, other motivations are not factors to be considered”); *United States v. Maybee*, 687 F.3d 1026, 1032 (8th Cir. 2012) (requiring that race or national origin was a substantial motivating factor in attack under § 249); *United States v. McGee*, 173 F.3d 952, 957 (6th Cir. 1999) (interpreting causation under § 245 to require that “racial animus is a substantial reason for a defendant’s conduct”); *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984) (affirming trial court jury instructions that clearly implied that under § 245, the victim’s race must be a substantial motivating factor for the defendant’s conduct).

<sup>94</sup> *See, e.g., Commonwealth v. Sinnott*, 30 A.3d 1105, 1110 (Pa. 2011) (“[W]e hold § 2710’s intent element is satisfied if there is evidence that ethnic malice was a motivator for the defendant’s criminal act; it need not be the sole motivator.”); *Commonwealth v. Kelly*, 25 N.E.3d 288, 300 (Mass. 2015) (“[W]e do not construe the language in G.L. c. 265, § 39 (a), to mean that racial hostility must be the ‘sole’ reason or a ‘substantial’ reason for a defendant’s unlawful conduct. . . . All that is required is proof beyond a reasonable doubt that a defendant acted with the specific intent to intimidate a person ‘because of’ race, notwithstanding the presence of any other motive.”),

*Second*, even if the word “substantial” is not removed from the statute, model jury instruction should provide that a “substantial” factor does not require that the crime have been committed exclusively or even mainly because of the prohibited animus.<sup>95</sup>

## **II. Addressing Deficiencies in the Reporting of Hate Crimes**

The current system for reporting hate crimes has drawn substantial criticism because of its lack of uniformity and because many jurisdictions do not collect data on hate crimes and/or do not report that data into the national database. This task force recommends the adoption of increased hate crime reporting along the lines of the measures adopted in Oregon and New Jersey. We also recommend mandatory reporting of hate crimes to the national database and the implementation of training and improved police procedures.

### **A. Deficiencies in National Hate Crime Reporting.**

As an initial matter, several jurisdictions do not collect hate crimes data. According to the FBI, generally, around 85% of law enforcement agencies said that no hate crimes occurred in their jurisdiction. And half of large agencies (100+ officers) reported no hate crimes investigations in 2018.<sup>96</sup>

Brian Levin, director of the Center for the Study of Hate & Extremism at the California State University, San Bernardino, said that the “[t]he FBI’s hate crime data release is so severely hampered by a decline in participating agencies.”<sup>97</sup>

The number of jurisdictions reporting no hate crimes or hate crime investigations likely represents severe underreporting and undercounting of hate crimes:

A representative sample of hate crime victimizations across the United States, collected from the National Crime Victimization Survey, revealed that only a small portion of all hate crimes find their way into official hate crime reporting. An annual average of 243,770 hate crime victimizations of persons 12 or older occurred between 2010 and 2019. In the same period, law enforcement agencies reported an annual average of 7,830

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<sup>95</sup> *In re M.S.*, 10 Cal. 4th 698, 718-20, 42 Cal. Rptr. 2d 355, 896 P.2d 1365 (1995); *People v. Superior Court (Aishman)*, 10 Cal. 4th 735, 741, 42 Cal. Rptr. 2d 377, 896 P.2d 1387 (1995). See generally Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 Yale L.J. 1106, 1170 (2018).

<sup>96</sup> Kaitlyn Sill and Paul A. Haskins, *Using Research To Improve Hate Crime Reporting and Identification*, Nat’l Inst. of Justice, Sept. 14, 2023, <https://nij.ojp.gov/topics/articles/using-research-improve-hate-crime-reporting-and-identification>

<sup>97</sup> Grace Hauk, *Over 7,000 Hate Crimes Were Reported to the FBI in 2021. Here’s Why That Data Is Flawed*, USA Today, Dec. 12, 2022, <https://www.usatoday.com/story/news/nation/2022/12/12/fbi-hate-crime-data-2021-flawed-report/10865550002>.

hate crimes to the FBI's Hate Crime Statistics program. Those figures suggest that roughly 1 of every 31 hate crimes is captured in U.S. federal statistics.<sup>98</sup>

## **B. The Reasons to Improve Hate Crime Reporting**

Enhanced reporting of hate crimes will improve the criminal justice system.

First, to address the problem, it is necessary to know the magnitude of it. "Because the data is so bad, it's hard to make any claims about hate crimes rising or falling," said Michael German, a fellow at NYU's Brennan Center for Justice. "We have such a little slice of the pie to look at, and that slice is changed by the different methodologies used to collect it, so the fact of the matter is we don't know."<sup>99</sup> Accurate data will allow law enforcement to respond to hate incidents and to examine trends in hate incidents and hate crimes, which can position officers to identify escalating offenders and incidents through tracking and analysis.<sup>100</sup>

Second, studies show that more comprehensive reporting can deter hate violence, because better data will assist in proper allocation of police resources and personnel.<sup>101</sup> For example, reporting can reveal the need for such measures as dedicated hate crimes officers or units, additional review procedures for hate crimes, written policy guidelines for hate crimes, and outreach efforts to communities. Research shows that such measures tend to increase and improve the level of reporting of hate crimes.<sup>102</sup>

Third, better reporting will also advance police-community relations. The current gap between the actual number of hate crime victims and the number of reported hate crimes threatens the relationship between law enforcement and targeted communities.<sup>103</sup> Reporting and publishing accurate data will demonstrate that reporting, investigating, and prosecuting hate crimes are high priorities.<sup>104</sup>

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<sup>98</sup> Kaitlyn Sill and Paul A. Haskins, *Using Research To Improve Hate Crime Reporting and Identification*, Police Chief Magazine, Sept. 23, 2023, <https://www.policechiefmagazine.org/using-research-improve-hate-crime-reporting-id>.

<sup>99</sup> Erin Mansfield and Rebecca Morin, *Biden Promised To Address Hate Crime Reporting. 20 Months Later, Here's What's Been Done*, USA Today, Feb. 2, 2023, [https://www.usatoday.com/story/news/politics/2023/02/02/biden-aapi-hate-crime-bill/11106448002\\_](https://www.usatoday.com/story/news/politics/2023/02/02/biden-aapi-hate-crime-bill/11106448002_)

<sup>100</sup> Elainar Rahrig, Arielle Schechtman, Meagan Kenner, Catherine Matous, *Hate Crime Regulation and Challenges*, 24 Geo. J. Gender & L. 573, 576 (2023).

<sup>101</sup> Michael Lieberman, *New FBI Hate Crime Report Sparks Concern, Prompts Action*, SPL Center, Oct. 24, 2023, <https://www.splcenter.org/news/2023/10/24/new-fbi-hate-crime-report-sparks-concern-prompts-action>.

<sup>102</sup> Lisa M. Jones, Kimberly J. Mitchell and Heather A. Turner, *U.S. Hate Crime Investigation Rates and Characteristics: Findings from the National Hate Crime Investigations Study*, Nat'l Institute of Justice, April 2022, <https://www.ojp.gov/pdffiles1/nij/grants/304531.pdf>.

<sup>103</sup> Sill and Haskins, *supra* note 101.

<sup>104</sup> *Id.*

### **C. Experience in New York and Other States**

Only about half of the states have laws that require the state to collect and analyze data on hate crimes via mandatory reporting from law enforcement agencies. An additional four jurisdictions, including New York and the District of Columbia, require the state to collect and analyze such data, but do not require law enforcement agencies to report or participate in this effort.<sup>105</sup>

New York requires only voluntary reporting from local law enforcement agencies but requires the state Division of Criminal Justice Services to collect and analyze statistical and all other information and data with respect to hate crimes reported by law enforcement through the Uniform Crime Reporting (UCR) Program.<sup>106</sup> Per New York State Executive Law § 837(4)(c), the Division of Criminal Justice Services (DCJS) is required to produce an annual report that details hate crime incidents that law enforcement agencies have reported to DCJS, including data on the number of incidents and type of bias reported.<sup>107</sup> One commentator has opined that the lack of mandatory local reporting in New York and other states “means any analysis is limited to voluntarily submitted data, which may not reflect the true scope of hate crime in a given state.”<sup>108</sup>

#### ***Oregon's Reporting System***

Perhaps the most comprehensive reporting system is the one recently adopted in Oregon. The Oregon Legislature passed, and Governor Kate Brown signed, Senate Bill 577. Section 9 of this bill, now codified in ORS 137.678, requires the Oregon Criminal Justice Commission (CJC) to review all data pertaining to bias crimes and non-criminal bias incidents and to report the results annually on July 1.<sup>109</sup> The statute requires law enforcement agencies (LEAs) to submit data on reported crime information motivated by bias against a victim’s actual or perceived protected class to the Oregon State Police (OSP).

Importantly, this statute required the Oregon Department of Justice (DOJ) to establish a staffed hate crimes telephone hotline dedicated to assisting victims, witnesses and other reporters of bias crimes and non-criminal bias incidents. The hotline opened on January 2, 2020 and provides a resource to victims of bias crimes and non-criminal bias incidents by responding to all reports

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<sup>105</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

<sup>106</sup> New York City is experiencing delays in making the transition from the UCR system to the more advanced National Incident Based Reporting System. The FBI has accepted reports that NYC has submitted under the UCR system but New York should expedite the transition to the new system. <https://www.ny.gov/programs/hate-crimes-task-force>; Ames Grawert, *Analyzing the FBI's National Crime Data of 2022—With an Eye Toward 2023 Trends*, Brennan Center for Justice, Oct. 18, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/analyzing-fbis-national-crime-data-2022-eye-toward-2023-trends>

<sup>107</sup> New York State Anti-Hate Crime Resource Guide, <https://www.ny.gov/hate-crimes-task-force/new-york-state-anti-hate-crime-resource-guide>.

<sup>108</sup> *Id.*

<sup>109</sup> *Bias Crimes (2022) Report*, Oregon Criminal Justice Commission, July 1, 2023, <https://www.oregon.gov/cjc/CJC%20Document%20Library/SB577ReportJuly2023.pdf>

received, providing assistance, assisting with safety planning and coordinating with organizations to provide support services. The bill also requires Oregon’s DOJ to provide data on reported bias crime and non-criminal bias incidents. Reports to the Hotline increased by 53% between 2020 and 2021, from 1,101 to 1,683. Bias crimes accounted for 28% of them.<sup>110</sup>

New York has a hotline, but it does not appear that New York devotes the same level of resources as Oregon does to the hotline.

### ***New Jersey Reporting System***

New Jersey is considered a “model state” because of its groundbreaking system for reporting of bias crimes.<sup>111</sup> Under former attorney general Gurbir Grewal, New Jersey created a Uniform Crime Reporting (UCR) System by every law. The system is operated by the State Police to track crime rates in New Jersey. By law, every state, county and local law enforcement agency must submit information to the UCR System on any suspected or confirmed bias incident reported to them.<sup>112</sup> New Jersey’s Electronic Uniform Crime Reporting (eUCR) system maintained by the New Jersey State Police allows for centralized and more accurate statistical reporting of bias incidents throughout the state. All County Prosecutors’ Offices in New Jersey must notify the NJ Attorney General’s Office when pursuing Bias Intimidation charges under N.J.S.A. 2C:16-1. This increases communication between the county prosecutor’s offices and the Attorney General regarding prosecution of these cases.<sup>113</sup>

### **D. Six Recommendations to Improve Reporting.**

*First*, New York should align itself with 26 states including Oregon and New Jersey and require mandatory local collection of hate crimes data and reporting of such data to the DCJS. To accomplish such reporting, the state could condition the receipt of certain state funds on local adherence to mandatory hate crime data and reporting standards.

*Second*, New York and other states should require local law enforcement agencies to collect and submit data and enroll in the FBI Uniform Crime Reporting Program. This could be accomplished by conditioning federal law enforcement funds on compliance with UCR standards. As the ADL has noted: “Especially at a time when our communities are feeling particularly vulnerable to hate crimes and extremist-fueled attacks, it is egregious that major cities and states across the country have failed to report comprehensive data... We urge Congress

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<sup>110</sup> *Id.*

<sup>111</sup> A Policymaker’s Guide to Hate Crimes, Bureau of Justice Assistance, <https://www.ojp.gov/pdffiles1/bja/162304.pdf>.

<sup>112</sup> *2021 Was a Record-High Year for Reported Bias Incidents in New Jersey*, Office of the Attorney General, April 1, 2022, <https://www.njoag.gov/2021-was-a-record-high-year-for-reported-bias-incidents-in-new-jersey/>

<sup>113</sup> *AG Grewal Issues Enhanced Law Enforcement Standards Establishing Best Practices for Investigating & Reporting Bias Incidents in New Jersey*, Office of the Attorney General, April 5, 2019, <https://www.njoag.gov/ag-grewal-issues-enhanced-law-enforcement-standards-establishing-best-practices-for-investigating-reporting-bias-incidents-in-new-jersey-ag-bias-incident-investigation-standards-last-update/>

to make it mandatory for state and local law enforcement agencies that receive federal funding to participate in the FBI's hate crime data collection efforts."<sup>114</sup> States and localities should be required to undergo data auditing for accuracy.<sup>115</sup>

*Third*, law enforcement training should be improved. Only one-third of states require training for law enforcement on how to properly identify, competently respond to and accurately collect and report data on hate crimes. In the absence of such training, law enforcement may fall short in their efforts to collect data and in connecting victims to needed resources.<sup>116</sup> Notably, New York is one of the states that requires hate crimes training.<sup>117</sup> Recently, Manhattan received a \$1.7 million grant from its City Council, part of which was used to improve hate crimes training in Manhattan. In April 2023, the Manhattan DA's office conducted two trainings for 85 rookie officers and 15 field training sergeants that included a review of the state's hate crimes law and approaches to identifying bias-related evidence when responding to potential hate crime incidents. Officials say this was the first time the office conducted formalized hate crimes training of this scale for officers across multiple precincts.<sup>118</sup> Manhattan should continue its training program, which provides a model for jurisdictions in New York and elsewhere.

New Jersey also has an exemplary training program. The state provides a continuing education for law enforcement on bias crimes and cultural sensitivity and requires updating of basic training for police recruits in these subject areas. The AG's Community-Law Enforcement Affirmative Relations (CLEAR) Institute has developed a mandatory course in Cultural Diversity, De-Escalation and Bias Crime Reporting. That course covers police interactions with various faiths and cultures, as well as recognizing and reporting bias crimes. The final section of the standards addresses the CLEAR Institute and academy training. It directs that the Division of Criminal Justice, and law enforcement and community stakeholders, regularly update the curriculum for these mandatory courses.<sup>119</sup>

*Fourth*, the creation of written law enforcement policies and procedures will help to increase law enforcement responsiveness and effectiveness.

Written policy can serve as a bridge between hate crime legislation and implementation of that law by providing officers with information and a standard that the agency expects them to follow. Research supports the positive impact of a written policy, with a study of

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<sup>114</sup> David Nakamura, *Latest FBI Data on Hate Crimes Plagued by Lack of Reporting Nationwide*, Wash. Post, Dec. 12, 2022, <https://www.washingtonpost.com/national-security/2022/12/12/us-hate-crimes/>

<sup>115</sup> <https://www.washingtonpost.com/national-security/2022/12/12/us-hate-crimes/>

<sup>116</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

<sup>117</sup> Training Modules for New York State Uniform Crime Reporting (UCR) Program, [https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/ucr\\_training.htm](https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/ucr_training.htm).

<sup>118</sup> Anna Lucente Sterling, *City Provides 'Historic' Funding for Manhattan DA Hate Crimes Unit*, NY1 News, Aug. 26, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/08/24/city-provides--historic--funding-for-manhattan-d-a--hate-crimes-unit>.

<sup>119</sup> AG Grewal *Issues Enhanced Law Enforcement Standards*, *supra* note 116.

California police agencies finding that the existence of a written policy on hate crime increased reporting by 38 percent. If made publicly available, written hate crime policies might also increase reporting from victims by communicating clearly that the department’s policy includes responding to and investigating these incidents.<sup>120</sup>

Notably, New York has a model policy to provide local guidance regarding hate crimes for local authorities.<sup>121</sup> New York jurisdictions should be required to train personnel on the guidance provided in the model policy and should adhere to the guidelines in that policy.<sup>122</sup>

*Fifth*, the implementation of hate crime hotlines along the lines of those provided in Oregon and New York. The recently enacted federal Jabara-Heyer NO HATE Act State-Run Hate Crime Reporting Hotlines program provides grants to state agencies for their implementation of hotlines to support victims who might be reluctant to report hate crimes to law enforcement authorities.<sup>123</sup>

*Sixth*, law enforcement authorities should give due consideration to reports of hate crimes from community organizations. In many cases, hate crime victims are reluctant to directly approach law enforcement authorities. Encouraging victims to report hate crimes to community organizations and encouraging those organizations to, in turn, report hate crimes to law enforcement authorities could help address the underreporting problem.

### **III. The Task Force Urges Enactment of the Stop Hiding Hate Act, Which Can Help Stop Hate Speech on the Internet**

Much of the world now communicates on social media, with nearly a third of the world’s population active on Facebook alone.<sup>124</sup> However, as the *New York Times* reported, “Antisemitic and Islamophobic hate speech has surged across the internet since the conflict between Israel and Hamas broke out. The increases have been at far greater levels than what academics and researchers who monitor social media say they have seen before, with millions of often explicitly violent posts on X, Facebook, Instagram and TikTok.”<sup>125</sup>

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<sup>120</sup> William Johnson, *The Importance and Structure of a Written Hate Crime Policy*, Police Chief Magazine, Dec. 2023, <https://www.policechiefmagazine.org/the-importance-and-structure-of-a-written-hate-crime-policy>.

<sup>121</sup> Investigation of Hate Crimes: Municipal Police Training Council Model Policy, <https://www.criminaljustice.ny.gov/crimnet/ojsa/standards/MPTC%20Model%20Policy-Hate%20Crimes%20September%202020.pdf>.

<sup>122</sup> Other model guidelines might also provide assistance. *Investigation of Hate Crimes*, IACP Law Enforcement Policy Center, March 2021, <https://www.theiacp.org/sites/default/files/2021-03/Hate%20Crimes%20Formatted%202021-03-23.pdf>.

<sup>123</sup> OVC FY 2023 Jabara-Heyer NO HATE Act State-Run Hate Crime Reporting Hotlines, <https://ovc.ojp.gov/funding/opportunities/o-ovc-2023-171708>.

<sup>124</sup> Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, Council on Foreign Relations, June 7, 2019, <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>.

<sup>125</sup> Sheera Frenkel and Steven Lee Myers, *Antisemitic and Anti-Muslim Hate Speech Surges Across the Internet*, N.Y. Times, Nov. 15, 2023, <https://www.nytimes.com/2023/11/15/technology/hate-speech-israel-gaza-internet.html>.

As a Washington Post article quoting the ADL showed, since October 7, antisemitic content has increased 900% on X, and there have been more than 1,000 incidents of real-world antisemitic attacks, vandalism, and harassment in America.<sup>126</sup> Memetica, a digital investigations firm, has documented 46,000 uses of the #Hitlerwasright hashtag on X since October 7, up from fewer than 5,000 uses per month.<sup>127</sup>

Both before and after this recent surge, internet platforms and political leaders have urged steps to address internet hate speech. The measures taken thus far have not proven entirely effective, but now there are new proposals in the New York State legislature, including the Stop Hiding Hate Act, that would require internet platforms to disclose the steps, if any, that they take to address hate speech. While opponents argue that attempts to regulate internet hate speech run afoul of the First Amendment's guarantee of free speech, the Stop the Hate Act seems to pass constitutional muster.

Adi Cohen, the chief operating officer of Memetic, stated that the rise in antisemitic posts reflected a convergence of goals by far-right and far-left activists.<sup>128</sup> "Some of them explicitly say this is an opportunity to gloat and celebrate the killing of Jews online... They are trying to lure an audience to their content, and this is a huge growth moment for them."<sup>129</sup>

As the popularity of internet platforms has increased, so has the hate speech on those platforms. The ADL recently reported in a survey across all population groups that:

- 33% of survey respondents reported identity-based harassment this year – not a statistically significant change from 35% last year.
- 28% of survey respondents reported race-based harassment, comparable to 25% recorded a year ago.<sup>130</sup>

#### **A. The Effect of Internet Hate Speech**

Over the last decade, research has shown that social media can increase actual hate crimes.<sup>131</sup> Researchers have shown that social media can lead to discriminatory attitudes and actual hate

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<sup>126</sup> *Id.*

<sup>127</sup> Elizabeth Dwoskin, Taylor Lorenz, Naomi Nix and Joseph Menn, *X, Israel-Gaza War Have Supercharged Antisemitism Online*, Wash. Post, Nov. 19, 2023, <https://www.washingtonpost.com/technology/2023/11/19/antisemiticism-internet-elon-musk-israel-war>.

<sup>128</sup> Frenkel and Myers, *supra* note 128.

<sup>129</sup> *Id.*

<sup>130</sup> *Online Hate and Harassment: The American Experience 2021*, ADL, 2021, <https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2021>.

<sup>131</sup> *In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes*, U.S. Commission on Civil Rights, Nov. 13, 2019, <https://www.usccr.gov/files/pubs/2019/11-13-In-the-Name-of-Hate.pdf>.

crimes against people in marginalized groups.<sup>132</sup> Cities with a higher incidence of a certain kind of racist tweets reported more actual hate crimes related to race, ethnicity and national origin.<sup>133</sup> Both online vicarious and individual discrimination were significantly associated with worse psychological well-being among adults of racial/ethnic minorities (e.g., Black Americans, [Latinx?] Americans, Asian Americans).<sup>134</sup>

## **B. Internet Platform Regulation of Hate Speech**

Under pressure from the ADL and other groups, internet platforms have voluntarily adopted measures to regulate hate speech. The ADL described some of the measures that have been taken:

Facebook prohibited Holocaust denial content, hired a vice president of civil rights, changed parts of its advertising platform to prohibit various forms of discrimination, expanded policies against content that undermined the legitimacy of the election and built a team to study and eliminate bias in artificial intelligence. Due to pressure from ADL and other civil rights organizations, Twitter banned linked content, URL links to content outside the platform that promotes violence and hateful conduct. Reddit added its first global hate policy, providing for the removal of subreddits and users that “promote hate based on identity or vulnerability.”<sup>135</sup>

Despite these efforts, one analysis showed that major social media platforms fail to take down more than 80% of antisemitic posts on their platforms. The Center for Countering Digital Hatred (CCDH) reported that 80% of 700 posts containing “anti-Jewish hatred,” which had collectively been viewed 7.3 million times, were not removed. The research covered Facebook, Instagram, TikTok, Twitter and YouTube. Facebook was said to have failed to act on 89% of posts.<sup>136</sup>

## **C. The Constitutionality of New York State Bills Calling for Transparency**

In an attempt to respond to internet hate speech, New York legislators have introduced the Stop Hiding Hate Act, legislation that has passed the New York Senate and is pending in the

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<sup>132</sup> Theresa Davidson and Lee Farquhar, *Prejudice and Social Media: Attitudes Towards Illegal Immigrants, Refugees, and Transgender People*, in D. Nicole Farris, D’Lane Compton, and Andrea Herrera, (eds.), *Gender, Sexuality and Race in the Digital Age*, Springer 2020. See also Nan Yu, Shuya Pan, Chia-chen Yang, Jiun-Yi Tsai, *Exploring the Role of Media Sources on COVID-19 Related Discrimination Experiences and Concerns Among Asian People in the United States: Cross-Sectional Survey Study*, J. Med. Internet Res., Nov. 2020, <https://www.jmir.org/2020/11/e21684/PDF>.

<sup>133</sup> *Hate Speech on Twitter Predicts Frequency of Real-Life Hate Crimes*, New York University News, Jun. 24, 2019, <https://www.nyu.edu/about/news-publications/news/2019/june/hate-speech-on-twitter-predicts-frequency-of-real-life-hate-crim.html>.

<sup>134</sup> Alyan Yang et al., *The Impacts of Social Media Use and Online Racial Discrimination on Asian American Mental Health: Cross-sectional Survey in the United States During COVID-19*, JMIR Form Res., Sep. 19, 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9488547/>.

<sup>135</sup> *Online Hate and Harassment*, *supra* note 133.

<sup>136</sup> *Anti-Semitic Social Posts ‘Not Taken Down’ in 80% of Cases*, BBC, Aug. 2, 2021, <https://www.bbc.com/news/technology-58058428>.

Assembly. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in effect in California.<sup>137</sup> The Stop Hiding Hate Act would require social media companies to disclose the steps they are taking to address hate speech on their platforms.

The Stop Hiding Hate Act presents difficult issues relating to the First Amendment. For reasons set out below, we believe that the act does not violate First Amendment principles as set out in the preponderance of case law. Legislation that establishes disclosure standards rather than content-based regulation generally survives First Amendment standards.

As set out above, internet platforms have adopted a variety of different measures to address the hate speech problem. Their approaches are divergent and often not transparent. Their sufficiency and effectiveness cannot be gauged by the public or by platform users in the absence of transparency-enhancing measures such as the Stop Hiding Hate Act.

As set out more fully below, disclosure regulations are not generally considered content-based and will likely survive First Amendment scrutiny. In a recent decision, discussed more fully below, the Eleventh Circuit has upheld the constitutionality of disclosure requirements directed at internet platforms.<sup>138</sup> And while it took a different approach to most forms of internet platform regulation, the Fifth Circuit also upheld the constitutionality of disclosure standards.<sup>139</sup> The issue may be headed to the U.S. Supreme Court, in that certiorari could be granted in one or both of the *NetChoice* cases. In that event, regardless of the outcome regarding other components of the laws at issue in the *NetChoice* cases, we are confident that the disclosure requirements at issue should survive First Amendment scrutiny.

It is settled that hate speech receives First Amendment protection.<sup>140</sup> And the Supreme Court has held that entities arguably analogous to internet platforms receive First Amendment protection. In *Smith v. California*, for example, the Court said that booksellers could not be strictly liable for obscene content in books they sell, because cautious booksellers would over-enforce, removing both legal and illegal books from the shelves. The resulting “censorship affecting the whole public” would be “hardly less virulent for being privately administered.”<sup>141</sup>

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<sup>137</sup> New Jersey has also worked “to hold social media companies accountable for their role in propagating hate, urging social media platforms like Facebook to adjust their recommendation algorithms that make it easier to share and promote extreme content—and stop providing community to bigots and violent conspiracy theorists.” Gurbir S. Grewal, *Celebrating Heritage and Confronting Hate*, American Constitution Society, May 17, 2021, <https://www.acslaw.org/expertforum/celebrating-heritage-and-confronting-hate>.

<sup>138</sup> *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196 (11th Cir. 2022).

<sup>139</sup> *NetChoice v. Paxton*, 27 F.4th 1119 (5th Cir. 2022).

<sup>140</sup> See *Matal v. Tam*, 137 S. Ct. 1744 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”).

<sup>141</sup> 361 U.S. 147, 154 (1959).

However, legislation like the Stop Hiding Hate Act would likely survive First Amendment scrutiny. The Stop Hiding Hate Act is not content-based and merely requires disclosure. The Supreme Court has opined that there are “material differences between disclosure requirements and outright prohibitions on speech.”<sup>142</sup>

A disclosure requirement like the Stop Hiding Hate Act does not prevent speech; it requires only that regulated parties “provide somewhat more information than they might otherwise be inclined to present.”<sup>143</sup> Thus, *Zauderer* has been applied to uphold disclosure requirements against First Amendment challenges in a variety of contexts.<sup>144</sup>

And apart from the *Zauderer* line of cases, in the election context, where First Amendment protections are at the highest level, disclosure requirements have been upheld against First Amendment attack.<sup>145</sup>

Against this backdrop, the courts have recently considered disclosure requirements analogous to the Stop Hiding Hate Act imposed on internet platforms and in two recent decisions have upheld those requirements.<sup>146</sup> As the *NetChoice* court wrote:

The State's interest here is in ensuring that users – consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum – are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies . . . So, these provisions aren't substantially likely to be unconstitutional.

The Fifth Circuit decided a similar case. While the court applied a dramatically different analysis from the Eleventh Circuit with respect to much of the statute in question, its analysis of the disclosure requirements of the statute was similar to that of the Eleventh Circuit. The Fifth

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<sup>142</sup> *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 650 (1985). *Cf. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“[t]he First Amendment presumptively places this sort of discrimination [content-based burden on speech] beyond the power of the government”).

<sup>143</sup> *Zauderer*, 471 U.S. at 650.

<sup>144</sup> *E.g., CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 850–52 (9th Cir. 2019) (disclosure of radiation levels). *Accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010) (applying *Zauderer* and upholding against First Amendment attack disclosures required of debt relief agencies because such disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like *Milavetz* from conveying any additional information). *See generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (identifying “numerous examples could be cited of communications that are regulated without offending the First Amendment,” including “the exchange of information about securities, and “corporate proxy statements”) (internal citations omitted).

<sup>145</sup> *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (upholding disclosure requirements because they further the state interests of “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering” laws).

<sup>146</sup> *See NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196 (11th Cir. 2022).

Circuit held that the disclosure requirement in question “easily passes muster under *Zauderer*.”<sup>147</sup> The court further explained:

Here, the Platforms do not explain how the one-and-done disclosure requirements – or even the prospect of litigation to enforce those requirements – could or would burden the Platforms’ protected speech...

\* \* \*

...the Platforms have not explained how tracking the other purportedly more difficult statistics would unduly burden their protected speech, as opposed to imposing technical, economic, or operational burdens. So the Platforms are not entitled to facial pre-enforcement relief.

#### **D. Conclusion**

The rise of internet hate speech sets up a potential clash between our country’s cherished values of free speech and the need to address the hate speech that has such a corrosive effect on our society. The legislation enacted in California and proposed as the Stop Hiding Hate Act in New York, would require internet platforms to disclose the measures they take to address hate speech. Under existing precedent, the Stop Hiding Hate Act is fully consistent with First Amendment principles.

#### **IV. New York Should Enforce the Dignity for All Students Act.**

##### ***By Creating a State-Level Dignity-for-All-Students-Act Support Team for School Districts, Bullying and Discrimination Can Be Better Addressed and Ultimately Reduced.***

In 2012, New York’s Legislature enacted the Dignity for All Students Act (the “Dignity Act”) to provide K-12 students with “a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying.”<sup>148</sup> The Dignity Act’s framework is excellent, requiring that school districts swiftly investigate and report suspected bullying, as well as attempt to remediate and create a safe school environment, and in combating Antisemitism and Anti-Asian hate – all hate, in fact – in education, K-12, the Dignity Act could be an outstanding tool.

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<sup>147</sup> *NetChoice v. Paxton*, 27 F.4th 1119 (5th Cir. 2022).

<sup>148</sup> <https://www.nysed.gov/content/dignity-all-students-act-dasa>. As State Education Commissioner Betty Rosa has stated, “[s]tudents cannot learn and develop socially and emotionally when they feel disconnected, intimidated, harassed, or discriminated against. We have a responsibility to remove the barriers that stand in the way of success for many students . . . [and] foster a safe, supportive environment where all New York State students feel included and welcome.” *Attorney General James and NYSED Commissioner Rosa Issue Guidance to Promote Diversity, Equity, and Inclusion in New York Public Schools*, NYS Educ. Dep’t, Aug. 9, 2023, <https://www.nysed.gov/news/2023/attorney-general-james-and-nysed-commissioner-rosa-issue-guidance-promote-diversity-equity>; *See also* Attorney General Leticia James’ statement: “Every student in New York is entitled to learn, grow, and discover in an environment free from discrimination or harassment.” *Id.*

But, for a number of reasons, including under-investigating, underreporting, and overall confusion, the Dignity Act has not achieved much of its hoped-for positive outcomes.<sup>149</sup>

Because of under-investigating and underreporting, only a small fraction of incidents is reported:

“For example, at the end of the 2012-2013 school year, when [the Dignity Act] was first implemented, a total of 18,735 reports in schools outside of New York City were logged into the state website. The number of incidents reported over the last decade has gone down each year, to now 2,710 across 2,883 public schools outside of New York City – or an average of less than one incident per school in the 2020-2021 school year. That’s an 85 percent decline.”<sup>150</sup>

Confusion and misunderstanding as to what the Dignity Act requires on the part of districts appear to partially drive the under-investigating and underreporting, such as denying incorrectly assuming that the Dignity Act applies only to multiple acts, and that a single action would not qualify, or that districts should not report unless a physical encounter occurred.<sup>151</sup>

Even more, the law itself can also be challenging for a lay person to understand and apply, having to answer whether a material incident of harassment, bullying and/or discrimination took place? And while explanatory regulations exist, the question is legal in nature, complex, and likely confusing for non-lawyers.<sup>152</sup>

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<sup>149</sup> Specifically, an incident must be written up within 48 hours of learning of it and must be promptly investigated. If the school’s Dignity Act Coordinator (a required appointment) determines that a material incident of bullying, harassment, or discrimination took place, then the Dignity Act requires that “prompt action” be taken, “reasonably calculated to end the harassment, bullying, and/or discrimination,” including, e.g., “creat[ing] a more positive school culture.” 8 N.Y.C.R.R. § 100.2kk(2)(iv). Districts must also annually report the number of material incidents to the State. 8 N.Y.C.R.R. 100.2kk(3)(i).

<sup>150</sup> Wendy Liberatore, *DASA Is Supposed to Track Student Bullying. It’s Questionable if it Does*, Times Union, June 15, 2023, <https://www.timesunion.com/news/article/fewer-bullying-incidents-self-reported-new-york-18090832.php>. As State Education Spokesperson JP O’Hare noted, Dignity Act “reporting has declined significantly since 2013, with many schools reporting zero incidents for several years in a row. In the 2021-22 school year, over 1,800 schools [out of 2,887] reported zero [Dignity Act] incidents.” Jim Roberts, *The State of Bullying: Don’t Ask, Don’t Tell*, River Journal, July 7, 2023, <https://riverjournalonline.com/schools/the-state-of-school-bullying-dont-ask-dont-tell/75624/>.

<sup>151</sup> See, e.g., Statement of NY Comptroller Thomas P. DiNapoli: “There seems to be confusion at the local level over what needs to be reported.” Sara Mosle, *Bullying in New York City Goes Undercounted Due to Confusion About What Incidents to Report, Audit Finds*, Chalkbeat, March 13, 2019, <https://ny.chalkbeat.org/2019/3/13/21107043/bullying-in-new-york-city-goes-undercounted-due-to-confusion-about-what-incidents-to-report-audit-fi>. In addition, a concern of attracting unwanted State attention should numbers be problematic may contribute to under-investigating. [add cite if available]

<sup>152</sup> As an example, the definition of “Harassment or bullying” involves legal terms (e.g., “reasonable,”) the nuances of which may not be known to the lay person: “the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying as defined in Education Law section 11(8), that either: (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (b) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her

When districts don't comply with the Dignity Act, they set students up for failure – too often the most vulnerable students – far beyond academic failure:

“bullying, according to the Center of Disease Control and Prevention, leads students to having low-self esteem, poor school performance, few friends in school and a negative view of school. It also causes students to feel physically ill with headaches, stomach aches and depression, suicidal thoughts and anxiety.”<sup>153</sup>

NY's Attorney General Leticia James recently reported that “despite promptly investigating incidents [alleging racism],” the Mamaroneck School District “failed to engage in necessary responses to limit this behavior in the future. Consequently, the inconsistent and ineffective approaches to the misconduct led to students continuing to be subjected to harassment and bullying from their peers. Students who were victims of this behavior experienced physical, mental, and emotional suffering that interfered with their ability to participate in social and educational activities within the classroom.”<sup>154</sup>

In the worst of news, just this past May, a 10-year-old Peekskill student took his own life because of what his parents say was a failure by the school to address repeated reported bullying of the child.<sup>155</sup>

Families concerned that either a district is not investigating pursuant to the Dignity Act or that the outcome was wrongly decided have little recourse, except to file an appeal with the Commissioner of Education.<sup>156</sup> This appeal process is detailed and can be confusing and daunting, especially to an unrepresented parent or a parent unfamiliar with the legal system or the English language. Appeals to the Commissioner are routinely dismissed due to a failure to properly serve parties, a lack of appropriate affidavits<sup>157</sup> and/or a failure to file within a strict 30-day window.<sup>158</sup> For the vast bulk of families, this practically and effectively means that there is no appeal or resource for help.

To improve the Dignity Act, the task force makes four recommendations:

### **Recommendation 1: Create a Review/Help Board Within NYSED.**

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physical safety. . . (e) Emotional harm that takes place in the context of harassment or bullying means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.” 8 N.Y.C.R.R. § 100.2jj(1)(viii).

<sup>153</sup> Mosle, *supra* note 154.

<sup>154</sup> Jeff Edwards, *AG Makes Deal with Mamaroneck Schools on Discrimination, Bullying*, Patch, July 19, 2023, <https://patch.com/new-york/larchmont/ag-makes-deal-mamaroneck-schools-discrimination-bullying>.

<sup>155</sup> Roberts, *supra* note 130.

<sup>156</sup> <https://www.counsel.nysed.gov/generalinformation>.

<sup>157</sup> <https://www.counsel.nysed.gov/Decisions/volume40/d14472>.

<sup>158</sup> <https://www.counsel.nysed.gov/Decisions/volume62/d18245>.

We support the recommendation from NYSED representatives<sup>159</sup> to establish a state-sponsored Dignity Act “Technical Assistance Center” (TAC) to provide “practical, direct assistance to schools.” This measure would be extremely helpful and has the potential to bring an enormous amount of improvement to implementation and enforcement of the Dignity Act, being a place where districts can go to find out how to address specific incidents of suspected bullying.

Specifically, a Dignity Act TAC could give direct help to districts in:

- Investigating complaints
- Helping students learn more appropriate behaviors
- Improving discipline
- Providing trainings, resources, etc.
- Helping to eliminate any hostile environments
- Creating more positive school culture and climate
- Preventing recurrence of problematic behavior

### **Recommendation 2: Require Head Dignity Act Coordinator To Be a Member of the School’s Student Support Services Team.**

The Task Force fully supports the recommendation of NYS Education Department representatives to enact a statutory change requiring that a district’s head Dignity Act Coordinator be a member of the Student Support Services team (e.g., a social worker), rather than a principal or assistant principal perform. In light of background, training and typical workloads, this arrangement makes more practical sense and will promote efficient enforcement of the Dignity Act.

### **Recommendation 3: Amend the Dignity Act to Create a Private Right of Action for Equitable Relief Only, Including Awards of Attorney’s Fees for Prevailing Plaintiffs.**

Another impediment to full Dignity Act implementation is that it lacks enforcement provisions. A district that fails to investigate or report faces little if any repercussion from the state or the court system. Courts that have addressed the question have found that the Dignity Act does not include a private right of action (PROA) for money damages, as it was designed primarily to be “a preventative, rather than punitive, measure.”<sup>160</sup>

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<sup>159</sup> The task force extends its heartfelt thanks to NYSED representatives Kathleen DeCataldo, Esq., Maribeth Barney, Karen Hollowood, Gwyn Marschman, and Daniel Morton-Bentley, Esq. for their time and efforts in connection with this section of the report.

<sup>160</sup> *The Dignity for All Students Act (DASA) Does Not Create a Private Right of Action for In-School Bullying and Harassment (Second Dept)*, N.Y. Appellate Digest, Dec. 12, 2018, <https://www.newyorkappellatedigest.com/2018/12/12/the-dignity-for-all-students-act-dasa-does-not-create-a->

However, the courts have not addressed whether a PROA could be available for equitable relief, with a provision for the award of attorney’s fees for successful parent litigants.<sup>161</sup> A private right of action for injunctive relief would be consistent with the legislative history stating that the statute is intended to be a “preventative rather than punitive measure.”

A private right of action for Dignity Act injunctive relief would be fully consistent with U.S. Supreme Court case law. While the Court has curbed the use of implied statutory rights of action, even in the absence of a statutory private right of action, courts still recognize *equitable* rights of action, at least some circumstances.<sup>162</sup>

We urge that any private right of action require the moving to comply with traditional requirements for equitable relief.<sup>163</sup>

Adding a PROA for equitable relief would provide some form of teeth for families, especially groups of families, frustrated by what they perceive as a lack of action or failure to follow the law by a district.<sup>164</sup> With the possibility of the award of attorney’s fees, equity is advanced as all parents, regardless of family income, could seek court help in forcing districts to do what the law requires, and attorneys are incentivized to take on these important cases.<sup>165</sup>

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[private-right-of-action-for-in-school-bullying-and-harassment-second-dept](#); Adam I. Kleinberg, and Alex Eleftherakis, *I’ll See You in Court, but Not Pursuant to DASA*, *Touro Law Rev.*, 35: 1 (2019), <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=2949&context=lawreview>

<sup>161</sup> *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988).

<sup>162</sup> *Sierra Club v. Trump*, 963 F.3d 874, 882, 892 (9th Cir. 2020) (“These cases support our holding here that Sierra Club has an equitable *ultra vires* cause of action to challenge DoD’s transfer of funds. Where it is alleged that DoD has exceeded the statutory authority delegated by Section 8005, plaintiffs like Sierra Club can challenge this agency action.” *Id.* at 892.).

<sup>163</sup> *E.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (moving party must show “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest”).

<sup>164</sup> Anecdotally, these families have been faced with pushback from districts, such as Corinth Superintendent Mark Stratton’s statement that he believed incidents “do not need to be reported to the state because the incidents were ‘handled.’” Liberatore, *supra* note 130. Consider Mamaroneck, where the Office of the Attorney General (OAG) addressed multiple claims of racism not being properly addressed by the district: “Black students and other students of color were regularly the targets of racial epithets and sexually offensive harassment. . . . [D]espite promptly investigating these [multiple] incidents, the district failed to engage in necessary responses to limit this behavior in the future.” Edwards, *supra* note 135. In Saratoga Springs, parents “spoke out that their Black and biracial children are the frequent target of racial slurs. They too alleged the district is dismissive, thus discouraging the students from reaching out to teachers, staff and principals to report harassment. Saratoga Springs schools reported zero incidents of bullying in 2020-2021. The district, in response, said it was handling the racism claims with its Diversity, Equity and Inclusion Committee.” Wendy Liberatore, *Parents Complain Racial Slurs Prevalent at Saratoga Springs Schools*, *Times Union*, March 17, 2023, <https://www.timesunion.com/news/article/parents-complain-racial-slurs-prevalent-saratoga-17845784.php>. In each of these instances, had parents had a PROA for equitable relief, with attorney fee provisions, parents could have sought a court order requiring the district to follow DASA’s requirements, all of them, and prevented further bullying.

<sup>165</sup> A minority of our working group opposes the creation of a private right of action, citing potential drains on the public fisc and the possibility of diverting resources from other programs run by schools. If such concerns prove warranted consideration could be given to imposing exhaustion requirements or sanctions provisions for unmeritorious litigation.

## **Section 5. Conclusion.**

*Congress determined that hate crimes have reverberating effects, not only for the targeted community but also for the nation. The Supreme Court has held that the widespread, systemic effects of hate crimes are significant enough to justify the use of enhanced sentences... Additionally, these enhanced sentences for hate crimes are often seen as symbolically important because these laws have a signaling effect in sending a “message to society that criminal acts based upon hatred will not be tolerated.”*

- *U.S. Commission on Civil Rights, The Federal Response to Anti-Asian Racism in the United States (Sept. 2023).*<sup>166</sup>

This task force has addressed the historically unprecedented wave of anti-Asian American hate crimes during the COVID-19 pandemic followed by an even more virulent strain of antisemitic hate crimes, which continues even as this Report is issued. Now is the time for our country to address the disturbing rise in hate crimes, a scourge that victimizes not only Asian Americans and Jewish Americans but every racial, religious, and ethnic group.

While this report presents practical and effective proposals to address the hate crimes problem, the work of this task force may continue into the future, and we may present new proposals. The proposals contained in the report are initial but crucial steps. We will advocate adoption of some of these proposals immediately in the New York State legislature.

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<sup>166</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

## APPENDIX A

### 485.05 Hate Crimes.

1. A person commits a hate crime when he or she commits a specified offense and either:

(a) intentionally selects the person against whom the offense is committed or intended to be committed ~~in whole or in substantial part~~ because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or

(b) intentionally commits the act or acts constituting the ~~offense in whole or in substantial part~~ because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

2. Proof of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim does not, by itself, constitute legally sufficient evidence satisfying the people's burden under paragraph (a) or (b) of subdivision one of this section.

3. A “specified offense” is an offense contained within any provision of this chapter. A “specified offense” is an offense defined by any of the following provisions of this chapter: section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.12 (aggravated assault upon a person less than eleven years old); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); subdivision one of section 130.35 (rape in the first degree); subdivision one of section 130.50 (criminal sexual act in the first degree); subdivision one of section 130.65 (sexual abuse in the first degree); paragraph (a) of subdivision one of section 130.67 (aggravated sexual abuse in the second degree); paragraph (a) of subdivision one of section 130.70 (aggravated sexual abuse in the first degree); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.20 (kidnapping in the second degree); section 135.25 (kidnapping in the first degree); section 135.60 (coercion in the third degree); section 135.61 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.10 (criminal trespass in the third degree); section 140.15 (criminal trespass in the second degree); section 140.17 (criminal trespass in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree);

~~section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 150.05 (arson in the fourth degree); section 150.10 (arson in the third degree); section 150.15 (arson in the second degree); section 150.20 (arson in the first degree); section 155.25 (petit larceny); section 155.30 (grand larceny in the fourth degree); section 155.35 (grand larceny in the third degree); section 155.40 (grand larceny in the second degree); section 155.42 (grand larceny in the first degree); section 160.05 (robbery in the third degree); section 160.10 (robbery in the second degree); section 160.15 (robbery in the first degree); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); or any attempt or conspiracy to commit any of the foregoing offenses.~~