Advisory Memorandum

To: U.S. Commission on Civil Rights
From: Massachusetts Advisory Committee to the U.S. Commission on Civil Rights
Date: June 13, 2019
Subject: Advisory Memorandum on Hate Crimes in Massachusetts

The Massachusetts State Advisory Committee to the United States Commission on Civil Rights (Committee), in support of the Commission's project on hate crimes, held a briefing on March 26, 2019. In Massachusetts, hate crimes reporting hit a 10-year high in 2017, according to a report issued by the Executive Office of Public Safety & Security (EOPSS).[1] The EOPSS reported that it received a total of 427 reports of incidents of hate crime, up from 391 in 2016.

The Committee sought to learn about the reported rise in hate crimes in Massachusetts and the response and efforts to address it. This Advisory Memorandum highlights the information the Committee learned at the briefing. The Agenda is at the end of the Advisory Memorandum.

Background

A hate crime is criminal behavior targeted at an individual because of his or her real or perceived association with personal characteristics that are protected under civil rights law. The United States Federal Bureau of Investigation (FBI) defines a hate crime as a "criminal offense[2] against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, ethnic origin, or sexual orientation."[3]

1. Hate Crimes Nationally

The Civil Rights Act of 1968 was a momentous statute that criminalized a new class of hate motivated acts.[4] The Civil Rights Act sought to address racial violence against civil rights workers and individuals pursuing federally protected activities. The Civil Rights Act permits federal prosecution of any person who willfully injures, intimidates, or interferes with another person, or attempts to do so, by force because of the victim's race, color, religion, or national origin, provided that the offense occurred while the victim was attempting to engage in a statutorily protected

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[1] *Hate Crimes in Massachusetts in 2017*, EXECUTIVE OFFICE OF PUBLIC SAFETY & SECURITY, p. 4 https://www.mass.gov/files/documents/2018/12/13/2017%20MA%20Hate%20Crime%20Report.pdf.

[2] A criminal offense or "crime" is any act or omission in violation of a law prohibiting it, or omitted in violation of a law ordering it. Each state, and the federal government, decides what sort of conduct to criminalize. *See Criminal Law*, LEGAL INFO. INSTITUTE, CORNELL U. SCH. of L., https://www.law.cornell.edu/wex/criminal_law (last visited May 24, 2019).

[3] *Hate Crimes Overview*, FBI, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited May 24, 2019).

[4] The Civil Rights Act of 1968, 18 U.S.C. § 245(b)(2) (2012).

activity.[5] Examples of statutorily protected activities under the Civil Rights Act include voting; enrolling in or attending any institution of public education; applying for or enjoying employment by any private or public employer; and enjoying the benefits or services of any establishment of public accommodation such as hotels, restaurants, movie theaters, and sports arenas.[6] Importantly, the Civil Rights Act did not designate as a hate crime offenses that occurred while a victim was not engaged in one of the identified statutorily protected activities. As such, prosecution under the Civil Rights Act often proved difficult.[7]

While advocacy groups such as the Anti-Defamation League, the Southern Poverty Law Center, and the National Gay and Lesbian Task Force began compiling data on bias-motivated violence in the 1980s, official federal data was not collected until 1990 with the passage of the Hate Crimes Statistics Act.[8] The Hate Crimes Statistics Act requires the Attorney General to collect, as a part of the Uniform Crime Reports Program, data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity."[9] In September 1994, the Violent Crime Control and Law Enforcement Act amended the Hate Crimes Statistics Act to add disabilities as a factor that could be considered as a basis for hate crimes.[10] Although the Hate Crimes Statistics Act mandated hate crimes data collection for five years, the FBI considers the collection of such statistics to be a permanent addition to the Uniform Crime Reports Program.[11]

Also included as part of the Violent Crime Control and Enforcement Act of 1994, the Hate Crime Sentencing Enhancement Act[12] mandated a revision of United States Sentencing Guidelines to provide sentencing enhancements of at least three offense levels for hate crime offenses. The Hate Crime Sentencing Enhancement Act included protection for those targeted because of their ethnicity, gender, disability, or sexual orientation, in addition to protecting individuals on the basis of race, color, religion and national origin.[13] Because this sentence enhancement can only be employed when an underlying federal crime is committed, its enactment did not expand the substantive scope of any federal criminal law prohibitions, and it excludes many offenses prosecuted at the state level where hate may be a motive. While the Hate Crime Sentencing Enhancement Act did evoke Congressional willingness to address hate crimes, the scope of substantive federal protection remained unchanged.

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[5] *Id.*
[6] *Id.*
[7] For a successful case using 18 U.S.C. § 245 (1996), S*ee United States v. Nelson*, 277 F.3d 164 (2nd Cir. 2002).
[8] Hate Crimes Statistics Act, 34 U.S.C. § 41305 (2017) [hereinafter Hate Crimes Statistics Act (1990)].
[9] *Id.*
[10] Violent Crime Control and Law Enforcement Act of 1994, (42 U.S.C. §§ 13701–14223 (2005).
[11] The Church Arson Prevention Act of July 1996, 18 U.S.C. § 247 (2018) (indefinitely extended the mandate for collection of hate crime statistics, making it a permanent part of the Uniform Crime Report program).
[12] Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994). (codified as amended at 18 U.S.C. § 3553) (hereinafter Hate Crime Sentencing Enhancement Act).
[13] *Id.*

In 2009, the enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009[14] provided additional authority for federal officials to investigate and prosecute hate crimes. The Hate Crimes Prevention Act closed the loophole in the Civil Rights Act which limited federal hate crime prosecution to cases in which the victim had been engaged in a statutorily protected activity at the time of the crime.[15] The Hate Crimes Prevention Act also authorized the U.S. Department of Justice to investigate and prosecute "certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability."[16] Finally, the Hate Crimes Prevention Act provided limited jurisdiction "for federal law enforcement officials to investigate certain bias-motivated crimes in states where current law is inadequate"[17] and provided federal aid and technical assistance to state, local, and tribal jurisdictions to help them more effectively investigate, prosecute, and prevent hate crimes from occurring.[18]

2. Hate Crimes in Massachusetts

Background

In 1991, Governor William Weld created the Governor's Task Force on Hate Crimes to coordinate and give priority to state implementation of the Hate Crimes Reporting Act.[19] The Task force brought together law enforcement officials and advocates to improve law enforcement effectiveness in responding to hate crimes.[20] The Task Force amended the Hate Crimes Penalties Act, expanding its scope and increasing penalties for those who commit hate crimes.[21] The Task Force was formalized in Executive Order 401 in 1997, and "had great success in focusing the attention of state and local law enforcement on the prevention and prosecution of hate crimes."[22] In 2003, Governor Mitt Romney vetoed a funding bill for hate crimes prevention and the Task Force lost its staff.[23]

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[14] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835, 2835-2845 (2009) (codified as amended at 18 U.S.C. § 249 (2009)) [hereinafter Hate Crimes Prevention Act (2009)].
[15] Hate Crimes Prevention Act (2009); *See* ANTI-DEFAMATION LEAGUE, MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT (HCPA) WHAT YOU NEED TO KNOW, http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf (last visited January 10, 2017) [hereinafter HCPA: WHAT YOU NEED TO KNOW].
[16] HCPA: WHAT YOU NEED TO KNOW; *See* 18 U.S.C. § 249(a)(1)-(2).
[17] HCPA: WHAT YOU NEED TO KNOW
[18] Mass. Exec. Order No. 578 (Nov. 6, 2017), https://www.mass.gov/executive-orders/no-578-reaffirming-and-restructuring-the-governors-task-force-on-hate-crimes
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *Id.*
[23] Michael Levenson, *Baker Relaunches Task Force to Combat Hate Crimes*, BOSTON GLOBE (Nov. 6, 2017), https://www.bostonglobe.com/metro/2017/11/06/baker-relaunches-task-force-combat-hate-crimes/qdDAKttqZ6dzh04uPLZaQM/story.html.

After the U.S. "experienced a number of horrific violent hate crimes and numerous reports of racist, anti-Semitic, anti-gay, and anti-immigrant episodes … and Commonwealth experienced 424 hate crimes in 2015,"[24] in November 2017 Governor Baker reconstituted the task force to "reinvigorate our statewide commitment to fight hate crimes and support victims and impacted communities."[25] The Task Force was "reaffirmed and established to advise the Governor on issues relating to and how best to combat hate crimes in the Commonwealth and support the victims of hate crimes."[26]

Hate Crimes Laws in Massachusetts

The Commonwealth of Massachusetts defines hate crimes as crimes motivated by the offender's bias toward the victim because of the victim's membership in a protected group. Specifically, the law provides:

> any criminal act coupled with overt actions motivated by bigotry and bias, including, but not limited to, a threatened, attempted or completed overt act motivated at least in part by racial, religious, ethnic, handicap, gender, sexual orientation or gender identity prejudice, or which otherwise deprives another person of his constitutional rights by threats, intimidation or coercion, or which seek to interfere with or disrupt a person's exercise of constitutional rights through harassment or intimidation . . . .[27]

Under the primary Massachusetts hate crime statute, there are three elements of hate crimes:

- Underlying criminal offense: The offender committed an assault or a battery upon the victim or damaged the victim's property.
- Offender's intent: The offender acted with the intent to intimidate the victim.
- Victim's protected characteristic: The offender targeted the victim because of the victim's race, religion, national origin, sexual orientation, gender identity, disability, or other protected characteristic.[28]

Although people accused of hate crimes are usually criminally prosecuted, the Attorney General can also bring civil prosecutions and may obtain an injunction, compensation for the victim, and

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] MASS. GEN. LAWS, ch. 22C, § 32 (2012).
[28] Protections Against Hate Crimes, Mass.gov, https://www.mass.gov/service-details/protections-against-hate-crimes.

in some cases, civil penalties, against a perpetrator who threatens, intimidates, or coerces another person on the basis of that person's membership in a protected group or protected activity.[29]

Section 33 of the Hate Crime Reporting Act, governs collection of hate crime data in the Commonwealth and provides, as follows:

> The colonel [of the State Police] shall promulgate regulations relative to the collection of hate crime data. Said regulations *shall include, but not be limited to*, the following:
>
> (1) establishment of a central repository for the collection and analysis of hate crime data and, upon the establishment of such repository, the crime reporting unit shall be responsible for collecting, analyzing, classifying and reporting such data, and shall maintain this information in a central repository;
>
> (2) *procedures necessary to ensure effective data-gathering and preservation and protection of confidential information, and the disclosure of information in accordance with section thirty-five;*
>
> (3) procedures for the solicitation and acceptance of reports regarding hate crimes which are submitted to the crime reporting unit;
>
> (4) *procedures for assessing the credibility and accuracy of reports of hate crime data from law enforcement agencies.*[30]

Data reporting for police organizations (referred to in the statute as "crime reporting unit") is voluntary under current regulations.[31] Neither state law nor state regulation requires police departments in the Commonwealth to report data to the Crime Reporting Unit of the Criminal History Systems Board and the Department of State Police within the Executive Office of Public Safety. Based on the Executive Office of Public Safety Fiscal Year 2017 Report on Hate Crimes in Massachusetts, only 101 (of 409) cities, towns and other reporting agencies (police departments eligible to report hate crimes under law/regulation) reported 1 or more hate crimes during the reporting period.[32] In FY 2017, the vast majority (308/409 or 75 percent) of cities, towns and other reporting agencies, regardless of population size or demographics, reported zero hate crimes (254/409 or 62 percent) or failed to report at all (54/409 or 13 percent).[33]

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[29] Ibid. (A protected group is defined as race, national origin, religion, age, gender, gender identity, sexual orientation, or disability and protected activity includes the right to vote or the right to associate.).
[30] MASS. GEN. LAWS ch. 22C § 33 (1991) (emphasis added).
[31] *Id*.
[32] *Hate Crimes in Massachusetts in 2017*, Executive Office of Public Safety & Security, at p. 5 https://www.mass.gov/files/documents/2018/12/13/2017%20MA%20Hate%20Crime%20Report.pdf.
[33] Ibid.

Assertions and Themes from the March 29, 2019 Briefing

Tracking and Responding to Hate Crimes: Reported hate crimes rose 9 percent in 2017.[34] It's unclear if this reflects an actual rise in crime or a rise in reporting. There is, however, significant under-reporting, particularly in Muslim and transgender communities.[35] Immigrants fear involvement with law enforcement, and victims do not always know whom to contact.[36] A majority of transgender victims are hesitant to report and some of those who do complain of abusive or disrespectful treatment by police: transgender women, for example, are sometimes put in male holding cells.[37] Unfamiliarity with local laws and law enforcement processes may also discourage reporting.

Data on hate crimes are unreliable.[38] Police departments in Massachusetts are not required to report hate crimes or to appoint designated civil rights officers. Statewide, it is not unusual to find no reports of hate crimes from cities with populations of 100,000 or more.[39] Police training is inconsistent, partly because Massachusetts has multiple police academies with different training curricula covering responses to alleged hate crimes and the treatment of victims.[40]

Prosecuting Alleged Hate Crimes: Anecdotal evidence suggests that the Massachusetts hate crime statute is not consistently applied: For example, are controversies involving homophobic, transphobic or Islamaphobic epithets charged as consistently as those involving racial epithets?[41] There is no good answer to this question because there are no good data to provide one. Individual police officers generally determine whether to charge a hate crime, so the standards for charging are often subjective.[42] Prosecutors theoretically review the suitability of the charges, but generally, at the district court level, the police officer's judgment stands. There are also questions about prevailing interpretations of the hate crime statute.[43] It explicitly provides that bigotry or bias must be a motivating factor of a criminal act that qualifies as a hate crime, but the law has been construed to apply when expressions of bigotry or bias may be incidental to the underlying act.[44]The

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[34] Jeremy C. Fox, *Hate crimes were up 9 percent in Massachusetts in 2017*, Boston Globe (Nov. 13, 2018), https://www.bostonglobe.com/metro/2018/11/13/hate-crime-reports-percent-fbi-says/SNua0hbaSbgUOp04Fdh8rJ/story.html.

[35] Vali & Dunn testimony, Briefing Transcript Before the Massachusetts State Advisory Committee to U.S. Commission on Civil Rights, Bost, CT, (Mar. 29, 2019) pp. 6, 17 (hereinafter cited as *Boston Briefing*).

[36] Vali testimony, *Boston Briefing*, transcript, pp. 6, 8, 11.

[37] Dunn testimony, *Boston Briefing*, transcript, p. 17.

[38] Vali testimony, *Boston Briefing*, transcript, p. 6, 17.

[39] Trestan testimony, *Boston Briefing*, transcript, p. 13.

[40] Ibid., at pp. 34-35.

[41] Alyssa Hackett, Telephone Interview with Massachusetts Advisory Committee, May 8, 2019, p. . The transcript is available upon request.

[42] Ibid.

[43] Ibid.

[44] Ibid.

Commonwealth's highest court, the Supreme Judicial Court, has not addressed this question.

Preventing Hate Crimes: Law enforcement is, of course, important, but perhaps not the most important tool for combating hate crimes, which represent about 40 percent of all bias incidents reported by self-identified victims[45]. Incidents that don't involve criminal conduct include, for example, housing or employment discrimination or speech deemed hateful. The rise of white Christian nationalism is a particular problem for Muslim communities.[46] Addressing the underlying problem of bias requires community involvement, partnerships with law enforcement, increased diversity of law enforcement personnel, and education, including mandatory public school anti-bias programs. The Anti-Defamation League's anti-bias curriculum, relying on peer to peer training, is currently used by over 70 schools, providing about 18 hours of anti-bias education.[47]

Many schools in cities and towns invite outside advocates into the schools for special programs designed to reduce hate and increase understanding and acceptance of differences. Still, the Anti-Defamation League, proposed that the Commonwealth should adopt a state-wide curriculum, consistent with current ADL programs, for anti-bias education with an emphasis on the consequences of unchecked hatred (including mandatory genocide education). Bills are currently pending in the legislature in this area.[48]

Police academies and police organizations should focus on education as well, adopting a uniform training program based on best practices for cadet training and continuing education related to hate crimes (including criteria for identification of hate crimes, training on special handling of investigations where a hate crime is suspected, and training on proper reporting of hate crimes data to the state).[49] And, in conjunction with uniform training for all police, each police organization should be required to designate a civil rights officer with responsibility for hate crimes investigations and reporting.[50]

The Committee submits this Advisory Memorandum in support of the Commission's 2019 report on hate crimes and concludes its work on hate crimes in Massachusetts.

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[45] Burke testimony, *Boston Briefing*, transcript, p. 20.

[46] Vali testimony, *Boston Briefing*, transcript, pp. 7-8.

[47] Trestan testimony, *Boston Briefing*, transcript pp. 13-14.

[48] Trestan testimony, *Boston Briefing*, *transcript*, p. 13; Sullivan testimony, *Boston Briefing*, transcript pp. 8-9.

[49] Trestan testimony, *Boston Briefing*, transcript p. 13.

[50] Ibid. (noting that the Governor "has already put out a notice to the 351 cities and towns that every police department in the commonwealth must have a designated civil rights officer.").

Massachusetts Advisory Committee

Littler Mendelson
One International Place, 28th Floor, Boston, MA

Friday, March 29, 2019
10:30 AM

AGENDA

1. **Welcome and Introductions**

2. **Briefing on Hate Crimes**

   Lieutenant Bruce M. Apotheker
   Newton Police Department

   Jonathan Burke, Assistant Attorney General
   Massachusetts Attorney General

   Mason Dunn, Executive Director
   Massachusetts Transgender Political Coalition

   Tanisha M. Sullivan, President
   NAACP - Boston Branch

   Robert Trestan, New England Regional Director
   Anti-Defamation League

   Yusufi Vali, Executive Director
   Islamic Society of Boston

3. **Open Comment**

4. **Adjourn**