

July 10, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

On behalf of the Anti-Defamation League and the Leadership Conference on Civil Rights, I am pleased to respond to your July 1st follow up questions from the Committee's June 25th hearing on S. 909, the Matthew Shepard Hate Crimes Prevention Act.

Question 1. Critics of the *Matthew Shepard Hate Crimes Prevention Act* of 2009 ("MSHCPA") have objected to the bill on the grounds that its language is overly broad. For example, at the recent Judiciary Committee hearing on this legislation, the Ranking Member of the Committee pointed to a June 16, 2009 letter the Committee received from a majority of the United States Commission on Civil Rights opposing the bill. According to the letter, the MSHCPA's current language which prohibits acts "because of" an individual's actual or perceived race, color, national origin, gender, sexual orientation, gender identity or disability is over-inclusive. Indeed, the majority Commissioners argue that the legislation's "because of" language would apply not only to hate crimes, but also to acts that do not "require that the defendant be inspired by hatred or ill will in order to convict," including rapes and robberies already covered under state law.

A. At the hearing, the Attorney General of the United States expressed his views on the MSHCPA. Attorney General Eric Holder commented that he does not believe that "the concern about this [legislation] being overly broad is necessarily justified." Specifically, the Attorney General noted that the MSHCPA's current "because of" language tracks the current hate crimes law, 18 U.S.C. 245, and does not "in any way chang[e] what I think is the actionable language" of current hate crimes law. Do you agree with the Attorney General? If so, please explain why.

B. As an expert in hate crimes laws, how do you respond to the concerns from some Civil Rights Commissioners that the MSHCPA may be overly broad?

Answer: We share the view of Attorney General Holder that the proposed legislation is not overbroad. Far from vague or uncertain, the “because of” triggering causation language used in S. 909, the Matthew Shepard Hate Crimes Prevention Act (HCPA) is commonly used, universally understood, and guided by longstanding precedent.

- It is the language of many of the most important and most frequently used federal anti-discrimination laws – including Title VII of the 1964 Civil Rights Act, the heart of the federal workplace discrimination law. “Because of” is also the language of choice for more than 40 state anti-discrimination laws, more than 30 state fair housing laws, and dozens of other municipal anti-discrimination ordinances.
- In addition, the “because of” formulation has a 40-year track record of effective use as the centerpiece of federal criminal civil rights laws, 18 U.S.C. § 245, and is also the operative causation trigger language employed in other federal criminal civil rights laws and the vast majority of state hate crime statutes – some of which have been on the books for 25 years.
- Importantly, the precise question of whether “because of” language was overly broad or vague was specifically addressed – and flatly, unanimously rejected – in the 1993 landmark United States Supreme Court case *Wisconsin v. Mitchell*, which upheld a challenge to the Wisconsin hate crime statute *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

I. Federal and State Civil Rights Laws

We do not agree with the claim that the HCPA’s “because of” language would apply not only to hate crimes, but also to any act that does not “require that the defendant be inspired by hatred or ill will in order to convict.” This contention is not supported by either a plain reading of the HCPA or by the largest body of law interpreting the phrase “because of,” the federal civil rights case law.

The term “because of” has a long and unbroken history of being interpreted as requiring “actual motivation,” a “determinative influence,” or, in some cases, “the sole cause.”¹ More importantly, “because of” has never been interpreted by any

¹ A recent Supreme Court decision also found that “because of” means “but for.” See *Gross v. FBL*, No. 8-441 (S.Ct. June 18, 2009), (In an age discrimination case brought under the Age Discrimination Employment Act of 1967, the Court held that in a claim for disparate treatment under the ADEA, “because of” means “but for”).

federal court to permit a plaintiff to make out a cause of action for discrimination merely because he or she is a member of a particular group.

The plain language of the HCPA is in line with this longstanding precedent. Section 7 of S. 909 (at proposed 18 USC § 249(A)(1) and (2)), reads:

Whoever . . . willfully causes bodily injury to any person . . . **because of** the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person.

Under longstanding interpretation of “because of” by federal courts, this section will be interpreted by courts to require actual motivation, not mere membership in a particular group. This construction is amplified by a plain reading of the text of Section 10 of S. 909, which clearly adopts this traditional interpretation by saying that:

(2) Violent Acts. – This Act applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim.

Even if there was some doubt about whether “because of” means “motivated by,” the plain language of Section 10 eliminates that concern. A robbery or rape could not be prosecuted under the HCPA unless the crime was actually motivated by the race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim.

II. The Use of “Because of” in Federal Civil Rights Laws

As noted above, there is a great deal of support for the proposition that “because of” is defined by federal courts as “actual motivation,” a “determinative influence,” or, in some cases, “the sole cause.” Four key examples, the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Fair Housing Act support this interpretation.

Notably, and as discussed in greater detail below, the United States Supreme Court has relied on these federal civil rights statutes as the touchstone for its determination that the “because of” causation formulation in state hate crimes laws is constitutional. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Like workplace and housing civil rights laws, the prohibited conduct under the HCPA and other hate crime laws is the intentional selection of the victim for targeted, discriminatory criminal behavior because of the victim’s personal characteristics.

A. **Civil Rights Act of 1964.** Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) [emphasis added].

Indeed, a significant body of law has developed around proving that discrimination happened *because of* race, color, religion, sex, or national origin. A claim of intentional disparate treatment based on race, color, religion, sex, or national origin can survive summary judgment only when the plaintiff has presented sufficient evidence to show that there is a genuine issue of material fact that the plaintiff's race, color, religion, sex, or national origin actually motivated the allegedly discriminatory conduct. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (“[L]iability depends on whether the protected trait ... actually motivated the employer's decision.”). A plaintiff alleging discrimination may prove intentional discrimination through (1) presenting direct evidence of discrimination, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), or (2) presenting indirect evidence of discrimination that satisfies the familiar three-step framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The *McDonnell Douglas* framework is a burden shifting framework which requires an employee to first make out a prima facie case, then requires the employer to articulate a non-discriminatory reason for the challenged employment decision, then shifts the burden back to the plaintiff to show that the nondiscriminatory reason proffered by the defendant is a pretext. The *McDonnell Douglas* standard tests to see whether some adverse employment action happened because of animus.

B. Age Discrimination in Employment Act. To prevail on a claim of age discrimination under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”) (“it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age”), a plaintiff must prove that his or her age “actually motivated” and “had a determinative influence” on the employer's termination decision. *Reeves*, 530 U.S. at 141.

As recently as this term, the Supreme Court offered a fairly restrictive interpretation of ADEA's “because of” provision, saying that “...the ordinary meaning of the ADEA's requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act . . . To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must

prove that age was the ‘but-for’ cause of the employer’s adverse decision.” *Gross v. FBL Financial Services*, -- US – (June 18, 2009). This narrow interpretation lends further support to the proposition that “because of” is treated very carefully by the courts and that the courts will use an equally restrictive interpretation in the HCPA.

C. Americans with Disabilities Act. The Americans with Disabilities Act (ADA) also contains the “because of” language and also treats it as causal. The ADA prohibits employers from “discriminat[ing] against a qualified individual with a disability **because of** th[at] disability ... in regard to ... terms, conditions, and privileges of employment,” 42 U.S.C. § 12112(a); see *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001)(emphasis supplied). Similar to Title VII, the ADA uses the *McDonnell Douglas* framework to force the question of causation. See e.g., *Kosmicki v. Burlington Northern & Santa Fe R. Co.*, 545 F.3d 649, 651 (8th Cir 2008)(“Under this framework, [plaintiff] was first required to make out a *prima facie* case by proving that he was disabled within the meaning of the ADA, that he was qualified to perform the essential functions of his job, and that he suffered an adverse employment action because of his disability.”).

A review of the Fifth Circuit’s holdings regarding the definition of “because of” is instructive. The Fifth Circuit’s description of a circuit split on how to define “because of” shows how restrictive “because of” is treated in ADA cases, as the split is between “a motivating factor” or being a “sole cause:”

The causation question under the ADA is really a question of whether “the ADA’s use of the causal language ‘because of,’ ‘by reason of,’ and ‘because’ means that discriminatory and retaliatory conduct is proscribed only if it was solely because of, solely by reason of, or solely because an employee was disabled or requested an accommodation. The answer to this question is unsettled in the Fifth Circuit. Some circuit decisions in the 1990s endorsed, without explaining the reasons, the “sole causation” standard. Other circuit decisions have approved the “motivating factor” causation test for ADA claims Seven of our sister circuits have reached the conclusion that the ADA causation standard does not require a showing of sole cause. *Pinkerton v. Spellings*, 529 F.3d 513, 517 -518 (5th Cir 2008)(endorsing motivating factor).

However one views this split, the Courts uniformly give a very parsimonious and restrictive meaning to “because of.”

D. Fair Housing Act. The Fair Housing Act (FHA) provides that it is unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental

of a dwelling, or in the provision of services or facilities in connection therewith, **because of** race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(b). The Fair Housing Amendments Act of 1988 (FHAA) amended the FHA by adding a new subsection (f) that also prohibits housing discrimination “because of” a disability. Because the FHA and FHAA – like Title VII – require a plaintiff to show that he or she was denied his right to fair housing *because of* his status as a member of a protected class rather than for some valid reason, similar standards of causation and motive are used. Given that the problem of distinguishing racially-motivated from legitimately-motivated conduct arises just as it does under Title VII, the standards enumerated in *McDonnell Douglas* are applicable in nonclass suits alleging Fair Housing Act violations and are routinely used in FHA and FHAA cases. *See, e.g., Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003); *East-Miller v. Lake County Highway Dept.*, 421 F.3d 558, (7th Cir 2005); *Miller v. Poretsky*, 595 F.2d 780, 792, 193 (D.C. Cir 1978). Of course, evidence of direct discrimination (such as a facially discriminatory policy) forecloses the need for *McDonnell Douglas* analysis. In short, the FHA and FHAA generally require a searching inquiry under *McDonnell Douglas* to determine whether the allegedly discriminatory conduct occurred “because of” membership in a protected group, or merely was coincidental to that membership.

Like workplace and housing civil rights laws, the prohibited conduct under the HCPA and other hate crime laws is the intentional selection of the victim for targeted, discriminatory criminal behavior on the basis of the victim’s personal characteristics.

III. Federal Criminal Civil Rights Statutes.

As Attorney General Holder noted, the language of the HCPA mirrors the text of current hate crimes law in 18 USC §245. With over 40 years of effective use, the “because of” causation trigger language has been well understood and has withstood constitutional challenge.

Indeed, courts have described the “because of” trigger language as a separate element of charges under §245. For example, because the statute proscribes willfully injuring “any person *because of* his race,” 18 U.S.C. § 245(b), the Government was required to prove not only that the defendant killed his victim, but that he did so because of the victim’s race. *U.S. v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir 1998) (emphasis in original); *United States v. Makowski*, 120 F.3d 1078, 1081 (9th Cir 1997) (Section 245 prohibits the assault of an individual where the violence is motivated by racial animus and prevents the victim from enjoying a federally protected right); *United States v. Price*, 464 F.2d 1217, 1218 (8th Cir. 1972) (separately identifying racial bias and intent to interfere with a victim's use of a public facility in a case involving § 245(b)(2)(B)). As the Second Circuit noted in regard to section 245(b)(2)(B):

Section 245(b)(2)(B) properly understood, therefore stops well short of creating a general, undifferentiated federal law of criminal assault and instead restricts its attention to acts of force or threat of force that involve two distinct kinds of discriminatory relationships with the victim-- first, an animus against the victim on account of her race, religion, etc., that is, her membership in the *categories* the statute protects; and, second, an intent to act against the victim on account of her using public facilities, etc., that is, because she was engaging in an *activity* the statute protects. *U.S. v. Nelson*, 277 F.3d 164, 189 (2nd Cir 2002).

In addition, the “because of” causation language has also been employed in several other key federal criminal civil rights laws, none of which has been found vague or overbroad and each of which is an element of the various offenses.

For example, Criminal Interference with Right to Fair Housing, 42 U.S.C. § 3631(a), prevents intimidation of “any person because of his race, color, religion, sex” from exercising rights to fair housing. 42 U.S.C. §3631(a). To establish a violation of section 3631(a), the government must prove beyond a reasonable doubt that the defendant acted with the specific intent to injure, intimidate, or interfere with the victim's rights because of his or her race and because of the victim's occupation of his or her home. *U.S. v. Magleby*, 241 F.3d 1306 (10th Cir. 2001)(“ § 3631(a) requires that the government prove beyond a reasonable doubt that the defendant targeted the victims because of their race”) See also *U.S. v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007)(race must be shown to be at least a motivating factor) . See also discussion of Sentencing Guidelines § 3A1.1(a)(hate crime enhancements), *infra*.

Similarly, 18 U.S.C. § 247(a)(1), Damage to Religious Property and Obstruction of Persons in the Free Exercise of Religious Beliefs, provides that whoever “intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so” is guilty of a federal crime. And 18 U.S.C. § 247(c) provides that whoever “intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so” is also guilty of a crime.

Finally, the United States Sentencing Guidelines, as required by Section 280003 of Pub. L. 103-322, provide that if the district court determines beyond a reasonable doubt that the defendant intentionally selected a victim “because of” the victim's race, then the offense level is to be increased by three levels. U.S.S.G. § 3A1.1(a). See “Sentencing Guidelines” 38 Geo. L.J. Ann. Rev. Crim. Proc. 681, 699 - 751 (2009), citing cases as follows: *U.S. v. Johnson*, 152 F.3d 553, 554-55, 557 (6th Cir. 1998) (“Because the jury found beyond a reasonable doubt that Weems and

Mitchell selected the victim because of his race, the district court should have applied the three-level enhancement when calculating the correct guidelines range.”); *U.S. v. Weems*, 517 F.3d 1027,1029-30 (8th Cir. 2008) (hate crime enhancement applied because defendants conspired to injure, oppress, threaten, and intimidate man based on race); *U.S. v. Woodlee*, 136 F.3d 1399, 1414 (10th Cir. 1998) (sentence was properly enhanced under § 3A1.1(a), where defendant knew the racial motivation for his co-defendants’ taunting, chasing and shooting at the victims and chose to join their conspiracy); *United States v. Sheldon*,107 F.3d 868 (4th Cir. 1997) (conviction under 42 U.S.C. § 3631 required enhancement under section 3A1.1 as defendant selected victims based on race and isolated location of victims’ home); *U.S. v. Boylan*, 5 F. Supp. 2d 274, 283 (D.N.J. 1998)(Application of subsection (a) not appropriate where defendant generally chose “single, poor, Hispanic or light-skinned black females” as his victims because “it does not appear beyond a reasonable doubt that the primary motivation for the offense was a hatred of [the victims]”).

In summary, decades of experience clearly show that use of the “because of” causation language in various federal criminal civil rights statutes and in § 3A1.1(a) of the Sentencing Guidelines has never served as an occasion for the realization of generalized fears about this language. Our nation’s courts have uniformly, carefully, and judiciously applied this language without overreaching, without any successful constitutional challenge and without unlawfully “creating a general, undifferentiated federal law” to replace traditional state criminal law.

IV. State Hate Crime Laws.

The laws in 34 of the 45 states with hate crime statutes contain “because of” language as the operative causation trigger. And five other states use a very similar formulation -- “based on” or “by reason of” -- as their causation trigger language. A table outlining the causation trigger language of the nation’s state hate crime laws is attached.

There is no evidence that the “because of” language is confusing or vague to either police officials or prosecutors. In fact, the International Association of Chiefs of Police, the world’s most influential law enforcement organization, uses “because of” causation language in the definition section of its “Investigation of Hate Crimes” Model Policy. This Model Policy, which was updated in February, 2008, includes all of the categories of crime victims covered by the HCPA -- race, color, religion, national origin, sexual orientation, gender, gender identity, and disability.

In addition, most state courts have interpreted their various state hate crime statutes as requiring a causal connection between the protected characteristics enumerated in the statute and the criminal conduct . . . courts generally have stated that what is required

is a causal or "but for" connection between the victim's protected status . . . and the criminal conduct. Lu-in Wang, *Hate Crimes Law*, § 10:14.

For example, see *In re M.S.*, 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365, 1377 (1995) ("because of" means the conduct must have been *caused by* the prohibited bias. A cause is a condition that logically must exist for a given result or consequence to occur.").

We are not familiar with a single case of confusion, abuse, or misuse of either federal or state statutes that employ "because of" triggering causation language. Indeed, the complete lack of prosecutorial misuse or abuse of discretion is a fundamental reason why such a broad coalition of civil rights, religious, education, civic, and professional organizations has come together in support of hate crime laws in general – and this legislation in particular. It is also noteworthy that the policy opponents of the bill who served as witnesses at the June 25 hearing did not reference any specific cases that would illustrate their vagueness or misapplication concerns.

V. Wisconsin v. Mitchell

The United States Supreme Court addressed the constitutionality of hate crime statutes squarely in 1993 in *Wisconsin v. Mitchell*. Like the HCPA, the Wisconsin hate crime statute challenged in that case employs "because of" as triggering causation language. The relevant section of the Wisconsin hate crime statute at issue in *Wisconsin v. Mitchell* reads:

Wis. Stat. §939.645

§939.645. *Penalty; crimes committed against certain people or property*

- If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part **because of** the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.
[emphasis added]

Wisconsin v. Mitchell involved a vicious racial assault by a group of young black men against a white boy. The Supreme Court summarized the facts as follows:

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture “Mississippi Burning,” in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: “Do you all feel hyped up to move on some white people?” Shortly thereafter, a young boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: “You all want to fuck somebody up? There goes a white boy; go get him. Mitchell counted to three and pointed in the boy’s direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

A jury convicted Mitchell of aggravated battery, and also found that he had intentionally selected the victim because of his race. Under Wisconsin’s hate crime law, the maximum sentence for a felony such as aggravated battery is enhanced by five years (in this case, from two to seven years) when the defendant “intentionally selects” the victim “because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.” Mitchell was sentenced to four years in prison.

Appealing his conviction and sentence, Mitchell challenged the constitutionality of the Wisconsin law, contending that it violated his First Amendment rights. The Wisconsin Court of Appeals upheld his sentence, but the Wisconsin Supreme Court overturned it, finding that the penalty-enhancement statute punished his offensive thoughts. The state of Wisconsin appealed this ruling, and the Supreme Court granted *certiorari*.

In June 1993, the U.S. Supreme Court issued its decision – unanimously reversing the Wisconsin Supreme Court and finding Wisconsin’s hate crimes law constitutionally sound. Writing for the Court, Chief Justice William Rehnquist distinguished the Wisconsin law from the ordinance at issue in an earlier case, *R A V. v. City of St. Paul*, 505 U.S. 377 (1992), observing that the Wisconsin law was aimed at and punished criminal conduct, and “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”

Chief Justice Rehnquist addressed the “because of” causation formulation very directly:

Mitchell argues that the Wisconsin penalty enhancement statute is invalid because it punishes the defendant’s discriminatory motive, or reason, for

acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. See *Roberts v. Jaycees*, 468 U. S., at 628; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). Title VII, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e 2(a)(1) (emphasis added). In *Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R. A. V. v. St. Paul*, 505 U. S., at ---- (slip op., at 11), we cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content neutral regulation of conduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

The Court's resounding endorsement of hate crimes laws in *Mitchell* reflected a reaffirmation of several key concepts behind these laws. First and foremost, it stood for the proposition that "the punishment should fit the crime," and legislatures are justified in prescribing harsher sentences for crimes where the impact transcends individual victims. Second, it reaffirmed that – as in the case of different degrees of homicide – intent is relevant in addressing bias-motivated crimes, and legislatures can mandate tougher sentences for perpetrators who target their victims because of an immutable characteristic such as race or ethnicity. Finally, the Court determined that hate crimes laws, like anti-discrimination laws, do not violate a perpetrator's free speech rights, because even if bias is present, absent the prohibited conduct there would be no legal sanction.

Thus, just as federal anti-discrimination civil rights law does not allow claims for discrimination merely given the fact that the victim is in a protected category, neither will this statute permit prosecutions merely because the victim is in a protected category. Consequently, the rape and robbery examples fail. To obtain a conviction under the HCPA, a prosecutor would have to prove, beyond a reasonable doubt, that the perpetrator was motivated by membership of the victim in a protected category. It is that motivation, and not merely the fact that the victim was *in* the protected category, that establishes this requirement. The HCPA thus requires in the establishment of the motivation of the perpetrator, a requirement well-articulated and well understood in both federal and state civil rights laws and federal and state hate crime laws.

Question 2. During the hearing, some Republican Senators expressed concerns about whether empirical data shows that hate crimes are an ongoing and serious

problem for the Nation. Can you identify what data or empirical studies support the need for passage of the *Matthew Shepard Hate Crimes Prevention Act of 2009*? Are you concerned that in available empirical evidence, some hate crimes may be underrepresented due to gaps in data collection or the lack of voluntary compliance by the states? If so, please explain why.

Answer:

The Prevalence of a National Hate Crime Problem in America

The FBI has been collecting hate crime statistics and publishing an annual report on their findings since 1991, under the Hate Crime Statistics Act (HCSA) 28 U.S.C. §534. As stated in our testimony, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America – though still clearly incomplete.

Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322 September 13, 1994), Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

Existing Data is Incomplete – and Certainly Understates the True Number of Hate Crimes

There is very substantial evidence to demonstrate that the FBI HCSA data undercounts the actual number of hate crimes in America. There are at least three factors which combine to limit comprehensive, complete hate crime reporting.

First, the entire FBI crime data collection program is voluntary. Federal, state, and local police officials are generally under no obligation to report their crime data to the FBI. As noted in our testimony, in 2007, the most recent HCSA data available, only 13,241 of the 17,000 law enforcement agencies in the United States participated in this data collection effort. And of those participating agencies, only 15.3% reported even a single hate crime – every other jurisdiction affirmatively reported zero hate crimes to the FBI.

According to the FBI, among the almost 4,000 police agencies across the nation that did not participate in this HCSA data collection effort at all, were at least four agencies located in cities of over 250,000 population and at least twenty-one agencies in cities between 100,000 and 250,000. Further, in 2007, two of the 50 largest cities in America did not participate in the HCSA program at all – Indianapolis and

Honolulu. And four other cities among the largest in America affirmatively reported to the FBI that they had zero hate crimes in 2007. A chart which compiles the FBI HCSA reporting for the years 1997-2007, a state-by-state comparison of HCSA reporting, and a chart which compiles the HCSA reporting from the largest 50 cities in America from 1992 to 2007 are attached.

Second, there are significant gaps in data collection caused by the patchwork of state hate crime laws. While forty-five states and the District of Columbia have hate crime penalty-enhancement laws, many do not include all the categories included in the HCPA. Currently, only thirty states and the District of Columbia include sexual orientation-based crimes in their hate crimes statutes; only twenty-six states and the District of Columbia include coverage of gender-based crimes; only twelve states and the District of Columbia include coverage of gender-identity based crimes, and only thirty states and the District of Columbia include coverage for disability-based crimes. And five states – Arkansas, Georgia, Indiana, South Carolina, and Wyoming – have no hate crime statute at all. A chart of state hate crimes statutory provisions was attached as part of our testimony.

The fact that five states do not have hate crime laws, coupled with the fact that many states do not include all the categories of the HCPA in their laws, certainly has resulted in an undercounting of hate crimes in those states. Law enforcement officials must be trained to identify, report, and respond to bias-motivated criminal acts. Further, those states that lack a statutory basis for investigating and prosecuting hate violence – or certain categories of hate crime victims – would underreport those hate crimes to the FBI.

Third, the FBI itself, under the HCSA, only collects and reports data on crimes directed at individuals because of their race, religion, sexual orientation, national origin, and disability. The FBI does not currently collect and report data on gender-based crimes or crimes directed at individuals because of their gender identity. We have no national data on these crimes at all. Only five states currently collect gender-based hate crime data and only one state, California, currently collects data on gender identity-based hate crimes. The result is an obvious undercounting of gender-based and gender identity-based hate crimes. The HCPA addresses this deficiency by adding gender and gender identity to the FBI's HCSA reporting mandate. The FBI's effective implementation of the HCSA demonstrates that data collection efforts can also spark increased public awareness of the problem and improvements in the local response of police and the criminal justice system to these crimes.

For example, although not currently counted in FBI statistics, hate crimes directed against the transgender community are prevalent. As the examples below graphically

illustrate, hate crimes against transgender people are a national problem that must be addressed.

- In July of 2008, in Greeley, Colorado, Angie Zapata, a 20 year-old transgender woman, was fatally beaten after her date discovered she was transgender. Her attacker beat Zapata with a fire extinguisher and admitted to police that he hit Zapata twice in the head thinking he had “killed it.”
- In November of 2008, in Memphis, Tennessee, Duanna Johnson, a transgender woman, was found shot to death in North Memphis. No one has been charged with the crime. In February of 2008, she had been arrested on charges of prostitution. She was sitting in a chair in a holding area at the Shelby County Jail when an officer walked up and punched her several times. A surveillance camera shows the officer punching Johnson several times, apparently holding handcuffs in the hand that was hitting her.
- In the hate crime on which the film “Boys Don’t Cry” was based, 21 year-old Brandon Teena was raped and later killed by two friends after they discovered he was biologically female. After the rape and assault, Teena reported the crime to the police, but Richardson County Sheriff, Richard Laux, who referred to Teena as “it,” did not allow his deputies to arrest the two men responsible. Five days later, those two men shot and stabbed Teena to death in front of two witnesses, Lisa Lambert and Philip DeVine, who were then also murdered. JoAnn Brandon, Teena’s mother, filed a civil suit against Sheriff Laux, claiming that he was negligent in failing to arrest the men immediately after the rape. The court found that the county was at least partially responsible for Teena’s death and characterized Sheriff Laux’s behavior as “extreme and outrageous.” Had the HCPA been in effect, federal authorities could have investigated and prosecuted the offenders when the local authorities refused to do so.

In 2005, the Bureau of Justice Statistics (BJS) prepared a report, *Hate Crime Reported by Victims and the Police*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf>, based on estimates derived from victim reports from BJS’s National Crime Victimization Survey. That report estimated an annual average of 191,000 hate crime incidents over the period July 2000 to December 2003 – more than 15 times the number of incidents documented in FBI HCSA reports. Victims also indicated that only 92,000 of these hate crime victimizations had been reported to police.

Research has demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place. Yet, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the *most* likely targets of hate violence are the *least* likely to report these crimes to the police. In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police -- especially if they were in trouble. Gay, lesbian, bisexual, and transgender victims, facing hostility, discrimination, and, possibly, family pressures, may also be reluctant to come forward to report these crimes.

Notwithstanding this substantial discussion of evidence of undercounting of hate crimes in America, the numbers positively documented by the FBI are very disturbing. The devastating effects of hate crimes extend far beyond their numbers. A parallel example is the FBI's annual report focused on law enforcement officers feloniously killed in the line of duty. In 2008, the FBI reported 41 such deaths. In 2007, the number was 58. These numbers are fortunately very small, but the dramatic impact of each and every one of these police deaths justifies the attention devoted to these crimes – and our nation's best efforts to prevent and respond to them.

The same is true for hate crimes. It is crucial to keep in mind the impact of bias crimes on victims and on communities. These crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling fearful, isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension.

As highlighted at the June 25, 2009 hearing, in 2007 there were 7,624 reported bias-motivated criminal incidents – almost one hate crime every hour of every day. Of the 7,624 total incidents, 3,870 were motivated by racial bias; 1,265 by sexual orientation bias; 1,007 by ethnicity/national origin bias; and 79 were reported to have occurred against disabled individuals. 1,400 (18.3%) of all reported crimes were motivated by religious bias. Of the incidents motivated by religious bias in 2007, 969 (69.2%) were directed against Jews and Jewish institutions. They accounted for 12.7% of the total number of reported hate crimes in 2007.

Of special concern is the fact that reported crimes directed against Hispanics increased markedly – in a report year in which virtually every other category of crime decreased. In fact, as previously mentioned, 2007 was the fourth straight year the FBI documented increased reported hate crimes against Hispanics. The number of sexual orientation hate crimes rose to its highest level in five years, as well.

These numbers do not tell the whole story. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or national origin. Hate crimes tear at the fabric of our communities. They deserve the serious attention, and the enhanced protection, that this legislation provides.

Thank you for the opportunity to respond to these questions. We very much appreciate your leadership in holding the June 25 hearing for this important legislation and we hope this has adequately addressed your questions.

Sincerely,

Michael Lieberman
Washington Counsel

cc: Jess N. Hordes, ADL Washington Director