



November 1, 2010

Committee on the Judiciary
Subcommittee on Crime and Drugs
United States Senate
Washington, DC 20510-6275

RE: Responses to Written Questions Submitted by Senator Tom Coburn, M.D.

Dear Committee Members:

Thank you for the invitation to testify at the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs hearing entitled "Crimes Against America's Homeless: Is the Violence Growing," held on September 29, 2010.

I appreciate the written questions submitted by Senator Tom Coburn, and I will do my best to respond to these queries.¹ However, I would like to reiterate that I find the plight of America's homeless to be heartbreaking, and it is impossible not be repulsed by the crimes of violence committed against the homeless, as described in media accounts and the recent report by the National Coalition for the Homeless.² Moreover, I have no abiding objections to the bill at issue in the hearing, the Hate Crimes Against the Homeless Statistics Act.³ As a general matter, I encourage the gathering and dissemination of data and other relevant information as a means to enlighten policy judgments on criminal justice,⁴ so long as policymakers understand and acknowledge the limitations of data collection and the conclusions they may draw from the resulting statistics. My principal concern is not the gathering and dissemination of crime data, but instead the enactment of substantive⁵ "hate crimes" laws, especially by the federal

¹ All opinions expressed and any errors herein are my own.

² See NATIONAL COALITION FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: AMERICA'S GROWING TIDE OF VIOLENCE (Aug. 2010); Eric Lichtblau, *Killings of Homeless Rise to Highest Level in a Decade*, N.Y. TIMES, Aug. 18, 2010.

³ Hate Crimes Against the Homeless Statistics Act, S. 1765, 111th Cong. (2009). See also Hate Crimes Against the Homeless Statistics Act, H.R. 3419, 111th Cong. (2009). For important criticisms of the Hate Crimes Statistics Act of 1990, see JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 39-44, 69-74, 146-47 (1998). See also PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS AND CONTROVERSIES 166-71, 284 (2d ed. 2010).

⁴ See, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (encouraging the collection and distribution of criminal justice information in order to make police decision-making more accessible and accountable to the public, thereby helping to democratize the law enforcement process).

⁵ I take no position here as to the propriety of allowing evidence of bias as a factor at sentencing.

government. As stated in my written testimony and restated in this letter, I have grave doubts about the alleged necessity and constitutionality of the federal Hate Crimes Prevention Act.⁶

Immediately below, I have listed each of Senator Coburn's questions in bolded italics, followed by my response in regular font.

1. ***In your testimony, you explain that the FBI's hate crime data collection guidelines state that classifications of a crime as bias-motivated may come down to whether a "substantial portion of the community where the crime occurred perceived that the incident was motivated by bias." How does one prove that the community perceives a crime as bias-motivated?***

To be clear, my written testimony did not claim that the classification of an offense as a hate crime "may come down to" community perception. Rather, I stated that the guidelines promulgated by the FBI's Uniform Crime Reporting (UCR) Program

provide a series of criteria that might support a finding of bias. Some of the listed items seem commonsensical, like the presence of bias-related markings at the scene of the crime (e.g., a swastika painted on the door of a synagogue). Others are less obvious or might raise serious legal questions if used at trial, such as whether a "substantial portion of the community where the crime occurred perceived that the incident was motivated by bias." It is hard to imagine the evidentiary basis (let alone constitutional argument) for admitting testimony or documents about popular sentiment in order to prove that a crime has been committed.⁷

My testimony referred to this *community perception* factor precisely because I believe it is a questionable basis for classifying an offense as a hate crime. I have similar concerns about other criteria, such as the fact that "a historically established animosity existed between the victim's and the offender's groups."⁸ Like community perception, the use of historical group animosity as courtroom proof would be problematic under the rules of evidence and dubious as a matter of constitutional law. But this is of no legal moment if the goal is to categorize data rather than condemn defendants. It is, however, a reason for caution. Again, policymakers need to understand and acknowledge the limitations of data collection under the UCR guidelines and be wary in drawing any conclusions from the statistics.

Indeed, Senator Coburn's question may help demonstrate the limitations of data collection. Although the FBI documents list community perception as a factor or question to ask in determining whether a hate crime has been committed,⁹ these documents do not offer a

⁶ See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009).

⁷ Testimony of Erik Luna, *Crimes Against America's Homeless: Is the Violence Growing?*, Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong., at 2 (2010) [hereinafter "Luna Testimony"].

⁸ FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 6 (rev. ed. 1999) [hereinafter "GUIDELINES"].

⁹ See *id.* at 5; FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION 23 (1996) [hereinafter "TRAINING GUIDE"].

methodology for making this specific determination. Instead, the FBI's *Training Guide for Hate Crime Data Collection* suggests a general two-tier procedure for law enforcement agencies in their collection of hate crime data: A "Responding Officer" makes an initial determination as to whether there is any indication that the offender was motivated by bias, and if so, a "Second Level Judgment Officer" then carefully reviews the facts of the incident to determine whether, in fact, a hate crime has been committed.¹⁰ According to the *Training Guide*, among the questions that a Second Level Judgment Officer should answer is whether "a substantial portion of the community where the crime occurred perceive[s] that the incident was motivated by bias."¹¹

Again, the FBI documents do not describe how community perception should be measured, and the examples and exercises that follow the listed factors/questions do not seem to involve issues of community perception.¹² Assuming the boundaries of the relevant community could be ascertained with some degree of certainty—a presumption that may be erroneous in some circumstances—a reliable measure of whether that community perceived the incident as motivated by bias would require more than just a conversation with a few neighbors. In turn, a statistically meaningful public opinion poll would almost certainly be a non-starter as inefficient and financially prohibitive. Ultimately, however, I have been unable to ascertain what is (or is believed to be) an appropriate, efficient, and realistic methodology. In an effort to respond to Senator Coburn's question, I called the FBI's Criminal Justice Information Services Division, which is responsible for the UCR Program. Although the Unit Chief was very cordial, he was reluctant to give me an answer that, in turn, would be provided in writing to the Committee Members. Instead, he suggested that the Committee send a formal inquiry to FBI Director Robert Mueller regarding the methodology for proving that a community perceives a crime as bias motivated, which would allow the agency to fully vet and respond to the question.¹³

a. What should the standard of proof be to establish bias and include these crimes in hate crime statistics?

The FBI's *Hate Crime Data Collection Guidelines* describe a hate crime (or bias crime) as a "criminal offense committed against a person or property which is motivated, in whole or in part, by the offender's bias." In turn, bias is defined as a "preformed negative opinion or attitude toward a group of persons based on their race, religion, disability, sexual orientation, or ethnicity/national origin."¹⁴ The guidelines then state that "before an incident can be reported as a hate crime, sufficient objective facts must be present to lead a reasonable and prudent person to conclude that the offender's actions were motivated, in whole or in part, by bias."¹⁵ This last quote, though not explicitly labeled as such, would appear to be the *standard of proof* for

¹⁰ See TRAINING GUIDE, *supra*, at 19-23.

¹¹ *Id.* at 23.

¹² See TRAINING GUIDE, *supra*, at 24-26; GUIDELINES, *supra*, at 7-8.

¹³ Phone Conversation with Greg Scarabro, Unit Chief, Uniform Crime Reporting Program, Criminal Justice Information Services Division, Federal Bureau of Investigation, October 28, 2010.

¹⁴ GUIDELINES, *supra*, at 2. See also TRAINING GUIDE, *supra*, at 17.

¹⁵ GUIDELINES, *supra*, at 4. See also TRAINING GUIDE, *supra*, at 22.

reporting an offense as a hate crime. As stated in my written testimony, this standard vaguely resembles “probable cause”—the amount of evidence needed to conduct a search and seizure, for instance¹⁶—rather than the constitutionally mandated standard for conviction at trial. To be sure, the foregoing is descriptive, while Senator Coburn’s question asked for a normative judgment—that is, what *should* the standard of proof be to establish bias sufficient to include an offense in the federal hate crimes statistics. Unfortunately, I cannot provide a clear-cut response, as the answer depends on the intended use of these statistics.

If the goal is determine how many incidents involved hate crimes that could be proven as such at trial, then the appropriate standard for the bias element (like all elements of crime) would be proof beyond a reasonable doubt.¹⁷ This approach might effectively limit the number of reported incidents to cases where defendants are not only convicted of an offense in court but are found guilty of a legislatively enacted hate crime. Like other offenses, not all hate crimes are solved, not all suspects are apprehended, and not all defendants are convicted—and even relatively successful cases may end with plea agreements that avoid hate crime convictions. The issue is further complicated by, *inter alia*, the fact that hate crime statutes differ as to the conduct criminalized and the groups covered. State and federal governments do not have identical definitions of hate crimes, and, in fact, the federal Hate Crimes Statistics Act and the FBI guidelines appear to employ a different hate crime formulation than that provided by the federal Hate Crimes Prevention Act.¹⁸

In contrast, a low or ambiguous standard of proof risks over-inclusion, with incidents listed as hate crimes based on questionable evidence of bias or, worse yet, facts that do not clearly demonstrate that a crime has been committed. As discussed in my written testimony, advocacy groups use disparate or loose standards, or no real standards at all, in the gathering and presentation of data.¹⁹ The U.S. Justice Department’s Bureau of Justice Assistance has recognized the “widespread disparities between the hate crime data provided by public interest

¹⁶ See U.S. CONST. amend. IV; *Brinegar v. United States*, 338 U.S. 160, 175-76 (“Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”).

¹⁷ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁸ The Hate Crimes Statistics Act calls for the collection of data “about crimes that *manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity*,” Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (emphasis added); while the FBI guidelines define as a hate crime a “criminal offense committed against a person or property which is *motivated, in whole or in part, by the offender’s bias*.” GUIDELINES, *supra*, at 2. The Hate Crimes Prevention Act, however, makes it a crime to “willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, *because of the actual or perceived*” race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. 18 U.S.C. § 249(a)(1), (2) (emphasis added). The relevance of these linguistic differences is the subject of debate, as is the appropriate interpretation of the “because of” terminology in the Hate Crimes Prevention Act. Compare Letter of the U.S. Commission on Civil Rights to the Hon. Joseph Biden, Jr., et. al., Regarding S. 909, June 16, 2009, reprinted at 155 Cong. Rec. S7509-06, S7514 (claiming that “because of” language would, *inter alia*, make every rape a federal hate crime); with Senate Committee on the Judiciary Holds a Hearing on the Matthew Shepard Hate Crime Prevention Act of 2009, CQ Transcriptions, June 25, 2009, available on Westlaw at 2009 WL 1804153 (U.S. Attorney General Eric Holder, Jr. denying this interpretation in response to questions by Senators Orrin Hatch and Jeff Sessions) [hereinafter “Holder Testimony”].

¹⁹ See, e.g., JACOBS & POTTER, *supra*, at 46-50; GERSTENFELD, *supra*, at 170-71; BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, A POLICYMAKER’S GUIDE TO HATE CRIMES 8-10 (1997) [hereinafter “POLICYMAKER’S GUIDE”].

groups.”²⁰ Some organizations count all incidents as “hate crimes”—even if they do not amount to a criminal offense or only involve bias-motivated comments, and regardless of the source of information.²¹

The relevant standard of proof thus represents a judgment call for lawmakers and law enforcers, who must decide whether under- or over-inclusive reporting is more problematic and which standard of proof along an evidentiary continuum—more or less, from “reasonable suspicion”²² to “proof beyond a reasonable doubt”—strikes an appropriate balance in light of the potential categorization errors. This should be a non-delegable decision for policymakers, fully cognizant of the limitations of data collection and the conclusions they may draw from the resulting statistics. For what it is worth, however, the approach taken pursuant to the Hate Crime Statistics Act does not seem inherently unreasonable to me. If nothing else, it provides a single standard for data collection and avoids the terminological problems of the Hate Crimes Prevention Act.²³

b. *Will it take more law enforcement or prosecutor resources to prove that these incidents are motivated by bias?*

This question appears to raise two separate issues: [1] the resources required to classify (appropriately) incidents as hate crimes for statistical purposes, and [2] the resources required to investigate a purported hate crime and prosecute it as such in court. As for the former question, the FBI has stated that “[h]ate crime reporting should not ... require large new commitments of personnel and other resources by local, state, and federal UCR data contributors.”²⁴ This is because the approach adopted by the FBI “incorporates hate crime data into the already established nationwide UCR program,” requiring only “the addition of a single new data element to [the existing system] to provide the capability for flagging criminal incidents as bias motivated.”²⁵

During the September 29th hearing, Commander Richard Wierzbicki of the Broward County (Florida) Sheriff’s Office testified

From an operations standpoint, I foresee absolutely no difficulty arising from the inclusion of the homeless population as a covered group by the Federal Hate Crimes Statistics Act. Further, the addition of the homeless population to the Hate Crime

²⁰ POLICYMAKER’S GUIDE, *supra*, at xv.

²¹ See, e.g., *id.* at 8-10; JACOBS & POTTER, *supra*, at 46-50. Unfortunately, these problems appear to exist in the NCH’s well-intentioned and otherwise laudable reports, which sometimes fail to differentiate between crimes against the homeless and hate crimes against the homeless. See Luna Testimony, *supra*, at 4-7.

²² “Reasonable suspicion”—the evidentiary requirement for police to conduct a “stop and frisk”—represents the lowest constitutional standard of proof (qua burden of persuasion) in American criminal procedure. See, e.g., *Alabama v. White*, 496 U.S. 325, 330-31 (1990).

²³ See *supra* note 18. But see *supra* note 3 (noting criticisms of the Hate Crimes Statistics Act).

²⁴ GUIDELINES, *supra*, at 2. See also TRAINING GUIDE, *supra*, at 6.

²⁵ TRAINING GUIDE, *supra*, at 6.

Statistics Act will in no way impede efforts to collect and report data on bias-motivated crimes committed against currently covered groups.²⁶

Commander Wierzbicki reaffirmed this point when Senator Cardin stated that he was “impressed by your testimony that it would be very little additional burden to your agency to identify [the necessary] information for the FBI data collections.”

Yes, Senator. All it amounts to is checking under a different box. We would add the homeless into the category, check a box, and change the software, and it is pretty much a done deal.²⁷

Although I am unable to assess the claims by either the FBI’s data collection division or Commander Wierzbicki, I have no reason to doubt them. Instead, I would note in passing that the simplicity of a classification system and relevant instrument may raise concerns about the validity of any results.²⁸ Moreover, the appropriate application of any set of guidelines and research instrument requires a training regime, for instance, which involves the allocation of resources. But again, I have no reason to doubt claims about the limited nature of any resource commitments for the collection of hate crime data. And absent an unexpectedly large price tag for such efforts, I believe the benefits would likely outweigh the costs given my general support for the collection and dissemination of criminal justice information.

I cannot reach the same conclusion with regard to the prosecution of apparently bias-motivated offenses under hate crime statutes, especially the federal Hate Crimes Prevention Act. This is not simply because the investigation and prosecution of hate crimes cases are inordinately expensive. To be sure, hate crimes cases are more resource intensive than other cases, involving not only the costs associated with proving that crimes are motivated by bias but also the expenditure of resources to train police and government attorneys on how to investigate and prosecute statutory hate crimes.²⁹ Yet like the costs associated with gathering and disseminating

²⁶ Unedited Hearing Transcript, *Crimes Against America’s Homeless: Is the Violence Growing?*, Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong., at 37 (2010) (testimony of Commander Wierzbicki).

²⁷ *Id.* at 45.

²⁸ For the FBI’s “Hate Crime Incident Report,” see <http://www.fbi.gov/about-us/cjis/ucr/reporting-forms/hate-crime-incident-report-pdf>. For the FBI’s “Quarterly Hate Crime Report,” see <http://www.fbi.gov/about-us/cjis/ucr/reporting-forms/quarterly-hate-crime-report-pdf>.

²⁹ The U.S. Department of Justice, through the Bureau of Justice Assistance (BJA), has initiated several programs to support police and prosecutors in enforcing hate crime statutes. See, e.g., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, ADDRESSING HATE CRIMES: SIX INITIATIVES THAT ARE ENHANCING THE EFFORTS OF CRIMINAL JUSTICE PRACTITIONERS (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/179559.pdf> (describing some examples of “BJA-funded projects in this area,” which include summits, training programs, videos, resource guides, and pamphlets for all law enforcement, civil leaders, prosecutors, and victims involved with hate crimes); see also *id.* at 8 (“In early 2000, BJA will send a copy of the video (in excess of 14,000 copies) to every state, county, and municipal law enforcement agency in the nation.”); *id.* at 9 (noting that federal funding will be used to “print 450,000 copies of the publication (including the pocket insert) and distribute them to police departments and victims advocates across the nation”); *id.* at 10 (describing how “[w]hen completed, the more than 100-page resource guide will be bound in a 3-ring binder to facilitate updating,” and distributed “to all 3,100 local and state prosecutor’s offices in the country”). While the “breadth of these projects demonstrates law enforcement’s commitment to creating and creativity in developing a multifaceted approach to hate crimes,” it also shows the vast amount of “BJA provided funds and support to [these] projects targeting law enforcement.” *Id.* at 6. Although the BJA admitted that “the number of hate crimes is small compared with that of other violent crimes,” the federal government still spends significant resources to train state and local law enforcement on how to investigate and prosecute these crimes. *Id.* at 5. Cf. H.R. REP. NO. 111-86, at 16 (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr086.111 (estimating \$10

data, these expenses might well be acceptable if the investigation and prosecution of ostensibly bias-related offenses as hate crimes were both necessary and constitutional. Neither is true, however, at least with regard to the federalization of bias-motivated offenses under the Hate Crimes Prevention Act.

As discussed in my written testimony,³⁰ hate crimes do not represent an “epidemic” as some advocacy groups and politicians have argued. After 2001, the amount of hate crime incidents reported by the FBI has remained roughly the same, despite an increase in the number of reporting agencies and a constantly growing American population. To this day, the number of bias-motivated crimes represents miniscule fraction of the total number of offenses in the nation.³¹ Moreover, there is no evidence that state and local law enforcement fail to prosecute vigorously bias-motivated crimes under traditional criminal statutes or pursuant to hate crime provisions that now exist in most jurisdictions. Nor is there evidence that offenders who commit bias-motivated crimes get off easy in state criminal justice systems. Despite arguments that the Hate Crimes Prevention Act was necessary to deal with the “scourge” of bias-motivated violence—as well as claims that it was “vital,” “crucial,” and “necessary” to serve the federal government’s “strong” interest in this area³²—the statute has generated a grand total of zero federal prosecutions.³³

Not only was the Hate Crimes Prevention Act superfluous, however, but it also raises significant policy and constitutional questions. As noted in my written testimony, it is unlikely in the extreme that the federalization of hate crimes will deter violent acts or in any other way protect communities from bias-motivated offenses.³⁴ Instead, the few federal prosecutions that may ensue in the coming years might only perpetuate rather ameliorate intergroup animosities, provoking concerns of group favoritism in federal law enforcement, regardless of whether such claims are legitimate or baseless, as well as providing fodder for racists, xenophobes, anti-

million in costs associated with the Hate Crimes Prevention Act from 2010-2014). Moreover, prosecutors have “acknowledged that bias crime cases” are “harder to prosecute than ‘ordinary’ criminal cases” because they require “evidence of the perpetrator’s motivation in addition to evidence that the perpetrator had committed the underlying offense.” JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* 161 (2002); *see also id.* at 161-70 (describing the difficulties prosecutors face in prosecuting civil rights crimes as opposed to ordinary crimes); Anti-Defamation League & Cook County Hate Crimes Prosecution Council, *Hate Crimes Data—Collection and Prosecutions: Frequently Asked Questions* 3 (acknowledging that hate crimes charges are generally more difficult to prove than other crimes and noting that “[s]ome prosecutors have expressed a reluctance to prosecute bias crimes because of the additional evidentiary burden at trial”), *available at* http://www.adl.org/combating_hate/hatecrimes_qa/hatecrime_qa2.asp. According to one prosecutor, “In 99 percent of cases, other substantive criminal charges, [such as] malicious destruction of property, can be brought without having to get into looking for evidence of motivation to show to the judge or the jury.” BELL, *supra*, at 162.

³⁰ *See* Luna Testimony, *supra*, at 7-14.

³¹ *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbls. 3.106-3.109, 3.112-3.114, *available at* <http://www.albany.edu/sourcebook/>; *see also supra* note 29.

³² *See* Luna Testimony, *supra*, at 8-9.

³³ To be sure, desuetude tends to weaken arguments against the law on fiscal grounds. *See supra* note 29. But again, the key point here is that a year’s experience helps demonstrate that the Hate Crimes Prevention Act was unnecessary. Ironically, a recent case described by the media as a federal “hate crimes” prosecution did not include charges under the Hate Crimes Prevention Act. *See* *United States v. Pierkarsky*, 2010 WL 3211700 (M.D. Pa.); *Two Found Guilty of Hate Crimes Related to Death of Immigrant*, Oct. 15, 2010, *available at* <http://www.cnn.com/2010/CRIME/10/14/pennsylvania.hate.crime/index.html?hpt=T1>.

³⁴ *See* Luna Testimony, *supra*, at 9-10.

Semites, and so on. Most of all, the Hate Crimes Prevention Act raises serious constitutional issues of free speech, due process, double jeopardy, equal protection, and, as discussed in my testimony, federalism and the limited, enumerated powers of Congress. For these and other reasons, I believe the Hate Crimes Prevention Act is unjustifiable, even if it does not take more federal resources to prove that alleged hate crimes were motivated by bias.

c. *Is there any reason to not also collect statistics for other victims of crimes that might be motivated by bias such as members of the military, pregnant women, or members of a certain political party? If not, why not?*

No, I have no fundamental objection to collecting data for other victims of crimes that might be motivated by bias. Once again, I encourage the gathering and dissemination of data and other relevant information as a means to enlighten policy judgments on criminal justice, so long as policymakers understand and acknowledge the limitations of data collection and the conclusions they may draw from the resulting statistics. When such information is used appropriately, it can help inform policy judgments, like allocating law enforcement resources, determining policing methods and patrol routes, and ensuring responsiveness to community concerns and attentiveness to crime victims (all within constitutional bounds). This information may also be helpful to civic organizations, religious groups, and other private actors who seek to reduce the causes and consequences of crime through their own good works.

So if there were some sort of *prima facie* showing that a non-trivial number of crimes had been motivated by group bias—let’s say that crimes against libertarians like myself were on the rise, motivated by animosity against classical liberalism—there would be no inherent reason for me to oppose the collection and dissemination of data regarding this specific type of victimization. Conceivably (I guess), law enforcement might use this information to increase patrols around the Cato Institute, for instance, or to be prepared for bias-motivated violence at a convention of the Libertarian Party.

What I could not agree with, however, would be the creation of a new crime where anti-libertarian bias was an element of the offense, for instance, or the addition of “libertarian status” to an existing statutory scheme. It is one thing to gather and distribute data on bias-motivated offenses, where the main concern is the value of the statistics and the validity (and efficiency) of the method of data collection. Statistics do no work on their own, nor do they work any constitutional injury. But it is an entirely different matter to prosecute and convict individuals precisely because of their alleged bias, which, as mentioned, raises serious concerns of both law and policy. So while the collection and dissemination of data raise no legal issues of consequence and the resulting hate crime *statistics* can cause no harm in and of themselves, hate crime *statutes* have the potential to do both.

What is more, there is no logical limit to the number or types of groups that might be included in a hate crimes statute, and the attempts to do so demonstrate the symbolic politics involved, the *me-too-but-not-you* attitude of some advocacy groups, and the dubious nature of the entire hate crimes endeavor. Perhaps the nation’s most prominent institutional advocate of

hate crime laws, the Anti-Defamation League (ADL)—a group that was formed “to stop the defamation of the Jewish people and to secure justice and fair treatment to all”³⁵—has suggested that hate crimes statutes should be limited to immutable characteristics and that homelessness may not meet this standard.³⁶ But, of course, religion is not an unchallengeable characteristic, either; people convert to new religions or reject their previous faiths all the time. If immutability was the standard, bias-motivated offenses against Jews, Christians, Muslims, etc., should not be covered by hate crime statutes.

Likewise, some advocacy groups that lobbied Congress for the passage of the Hate Crimes Statistics Act in 1990 argued *against* the inclusion of violence against women as a hate crime. Among other things, they claimed that the key to genuine hate crimes is that the victims are “interchangeable,” while an act of violence against a woman tends to be based on the victim’s specific identity.³⁷ Ironically, this parameter for hate crimes would exclude the murders of Rabbi Meyer Kahane and Dr. Martin Luther King, Jr., for instance, given that the victims were selected precisely because of their personal identity and were not interchangeable with other members of their religion or race.³⁸ More recently, U.S. Attorney General Eric Holder, Jr. testified that the Hate Crimes Prevention Act was designed to cover groups that had historically been targeted for violence.³⁹ But if a history of discrimination and violence is the guide, a litany of other groups (e.g., members of lower socio-economic classes, union/non-union workers, and purported/actual communists) could be covered by the federal hate crimes statute as well. In the end, there is no limit to the groups that may seek special status under hate crimes laws, other than the sway that each group holds in the political process.

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Again, thank you for the invitation to testify at the September 29th hearing and for the opportunity to respond to Senator Coburn’s written questions. Please feel free to contact me if I can provide further information or answer any other questions.

Sincerely,



Erik Luna

³⁵ See “About the Anti-Defamation League,” *available at* <http://www.adl.org/about.asp?s=topmenu>.

³⁶ See Kate Davidson, “Debating Homeless Hate Crimes,” NPR, Oct. 18, 2009, *available at* <http://www.npr.org/templates/story/story.php?storyId=113916951>; Eric Lichtblau, *Attacks on Homeless Bring Push on Hate Crimes Laws*, N.Y. TIMES, Aug. 8, 2009.

³⁷ See, e.g., ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH, HATE CRIMES STATUTES: INCLUDING WOMEN AS VICTIMS 12 (1990); see also JACOBS & POTTER, *supra*, at 72-73; Joseph M. Fernandez, *Bringing Hate Crimes into Focus—The Hate Crimes Statistics Act of 1990*, 26 HARV.C.R.-C.L. L. REV. 261, 275 (1991); Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER SOC. POL’Y & L. 63, 82-87 (1994).

³⁸ JACOBS & POTTER, *supra*, at 73. This definition would also exclude “hate crimes where a victim and offender knew one another.” *Id.*

³⁹ See Holder Testimony, *supra* (response of General Holder to questions by Senator Sessions).