Department of Justice

STATEMENT OF

ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"THE MATTHEW SHEPARD HATE CRIMES PREVENTION ACT OF 2009"

PRESENTED

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Chairman Leahy, Ranking Member Sessions, and Members of the Committee, thank you for the opportunity to appear here before you today to discuss S. 909, the Matthew Shepard Hate Crimes Prevention Act of 2009. This Administration strongly supports this vital legislation, which will help protect all Americans from the scourge of the most heinous bias-motivated violence.

Almost exactly eleven years ago, on July 8, 1998, I first testified before this Committee as Deputy Attorney General to urge passage of an almost identical bill. While it is unfortunate that eleven years have come and gone without this bill becoming law, I am confident that we can make the important protections that it offers a reality this year. Indeed, one of my highest personal priorities upon returning to the Justice Department is to do everything I can to help ensure that this legislation finally becomes law.

President Obama strongly supports this bill; as you know, he co-sponsored similar legislation when he was in the Senate. On April 28, 2009, the President "urg[ed] members on both sides of the aisle to act on this important civil rights issue by passing this legislation to protect all of our citizens from violent acts of intolerance." The President and I seek swift passage of this legislation because hate crimes victimize not only individuals, but entire communities. Perpetrators of hate crimes seek to deny the humanity that we all share, regardless of the color of our skin, the God to whom we pray, or whom we choose to love.

As the recent tragedy at the Holocaust Museum demonstrates, our nation continues to suffer from horrific acts of violence inflicted by individuals consumed with bigotry and prejudice. Today, just as when I first testified in 1998, bias-motivated acts of violence divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit. Indeed, the number of hate crime incidents per year is virtually unchanged from when I first testified before this Committee. The FBI reported 7,755 hate crime incidents in 1998 and 7,624 in 2007,

the most current year for which the FBI has compiled hate crime data.[1] Since the year I first testified before the Senate Judiciary Committee on hate crimes legislation, there have been over 77,000 hate crime incidents reported to the FBI, not counting crimes committed in 2008 and 2009. That is nearly one hate crime every hour of every day over a decade.

The time has come to pass this crucial legislation, and I urge all Americans to stand with the President and the Department in supporting this bill, which has been pending for over a decade.

A. OVERVIEW

The Department's position on this legislation is detailed in a views letter that has been submitted in advance of this hearing. My testimony today will touch on some but not all of the issues discussed in that letter.

Hate crimes statistics reported to the FBI by State and local law enforcement agencies demonstrate that we have a significant hate crimes problem in this country. Over the past decade, approximately half of the hate crime incidents reported in the United States were racially motivated. However, many other victim classes are targeted for hate crimes. For example, during the last decade, religiously motivated incidents have generally accounted for the second highest number of hate crime incidents, followed closely by sexual orientation bias incidents. Moreover, recent numbers suggest that hate crimes against individuals of Hispanic national origin have increased four years in a row.[2] The Federal government has a strong interest in protecting people from violent crimes motivated by such bias and bigotry.

Although we at the Federal level are strongly committed to hate crimes enforcement, we recognize that most such crimes in the United States are investigated and prosecuted by other levels of government. The pending legislation would assist State, local, and tribal jurisdictions by providing funds and technical assistance to investigate and prosecute hate crimes. We welcome the bill's critical support of hate crimes enforcement efforts by State, local, and tribal authorities because all levels of law enforcement must have the tools they need to investigate and prosecute those who engage in bias-motivated violence.

This legislation also would create a new Federal criminal hate crimes statute, 18 U.S.C. § 249. Section 249(a)(1) would simplify the jurisdictional predicate for prosecuting violent acts

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[1] *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 2007 at 1 (October 2008); Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 1998 at 1 (October 1999) (reports available at: http://www.fbi.gov/hq/cid/civilrights/hate.htm).

[2] *See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crime Statistics, 1997-2007 (reports available at: http://www.fbi.gov/hq/cid/civilrights/hate.htm and http://www.fbi.gov/ucr/hc2007/incidents.htm).

undertaken because of the actual or perceived race, color, religion, or national origin of any person, by eliminating the requirement in current law that such hate crimes also be motivated by the victim's participation in one of six enumerated federally protected activities. *See* 18 U.S.C. § 245. This is a welcome change. The federally-protected activity requirement has no connection to the seriousness of the crime and is not constitutionally necessary.

I am particularly pleased that Section 249(a)(2) would for the first time allow for Federal prosecution of violence undertaken because of the actual or perceived gender, disability, sexual orientation or gender identity of any person. During the decade from 1998 to 2007, there were 12,372 hate crime incidents involving violence based on sexual orientation. These crimes fell entirely outside the scope of current Federal jurisdiction. The Department therefore welcomes the expanded coverage of section 249, which would allow us to prosecute and deter violent acts of this sort more effectively.

The remainder of my testimony will address the following issues: (1) federalism and comity; (2) the need for stronger Federal hate crime legislation; (3) constitutionality of the proposed bill; and (4) specific comments on three issues of particular importance to the Department, namely, the bill's rule of construction, certification provision, and statute of limitations.

B. FEDERALISM AND COMITY

The pending bill would assist State, local, and tribal officials in the investigation and prosecution of violent hate crimes. State, local, and tribal officials are on the front lines, and they do a tremendous job in investigating and prosecuting hate crimes that occur in their communities. I want to emphasize that nothing in the bill will change this longstanding practice: State, local, and tribal law enforcement agencies will continue to play the primary role in the investigation and prosecution of all types of hate crimes. In fact, this bill is designed to assist State, local, and tribal jurisdictions by providing them with funds and technical assistance so that they are better able to address this problem on a community level. This bill will ensure that State, local, and tribal governments have the tools and resources they need to investigate, prevent, and punish such crimes.

Although State, local, and tribal governments will continue to take the lead in anti-hate crime enforcement efforts, there are occasions when the Federal government may be in a better position to investigate and prosecute a particular hate crime. For example, Federal resources may be better suited to investigate interstate hate crimes, in which the same defendant or group of defendants commit related hate crimes in multiple jurisdictions. There may also be times when a State, local, or tribal jurisdiction expressly requests that the Federal government assume jurisdiction. Finally, there may be rare circumstances in which State, local, or tribal officials are unable or unwilling to bring appropriate criminal charges, or when their prosecutions fail to adequately serve the interests of justice.

For example, in July 2007, Joseph and Georgia Silva allegedly assaulted another couple on a public beach in South Lake Tahoe, California, using derogatory racial and ethnic slurs as they beat one of the Indian-American victims with a shoe and tackled and hit the other victim repeatedly in the head. Despite the defendants' repeated use of racial slurs, the State court refused to acknowledge that the crime was motivated by the victims' ethnicity. The court's dismissal of hate crime charges understandably resulted in outrage among Asian and South Asian communities. On March 5, 2009, a Federal grand jury in Sacramento charged each of the defendants with violations of 18 U.S.C. § 245(b)(2)(B) for their assaults on the victims. In special cases like this one, the public is served when, after consultation with State and local authorities, prosecutors have a Federal alternative to use to prosecute hate crimes.

The Department of Justice has carefully reviewed S. 909 and has concluded that its enactment would not unduly burden Federal law enforcement resources or infringe upon State interests in such prosecutions. The language of the bill itself would limit the number of newly prosecutable cases. First, the bill does not cover misdemeanor offenses and is expressly limited to violent acts that result in bodily injury (and a limited set of attempts to cause bodily injury). Second, the bill requires that Federal prosecutors obtain a written certification by the Attorney General or his designee before a prosecution may be undertaken. As under current law, such certification will ensure that a full and careful evaluation of any proposed prosecution by both career prosecutors and by officials at the highest level in the Department occurs before Federal charges are brought. And finally, the bill requires proof of a nexus to interstate commerce in cases involving conduct based on bias covered by any of the newly protected categories — gender, sexual orientation, gender identity, or disability.

In addition, the Department's prosecution efforts would be guided by Department-wide policies that impose additional limitations on the cases prosecuted by the Federal government. First, under the "backstop policy" that applies to all of the Department's criminal civil rights investigations, the Department would defer prosecution in the first instance to State and local law enforcement officials, except in highly sensitive cases in which the Federal interest in prompt Federal investigation and prosecution outweighed the usual justifications of the backstop policy. Second, under the Department's policy on dual and successive prosecutions, the Department would not bring a Federal prosecution following a State prosecution arising from the same incident unless the matter involved a "substantial Federal interest" that the State prosecution had left "demonstrably unvindicated."[3]

C. THE NEED FOR STRONGER FEDERAL HATE CRIME LEGISLATION

S. 909 would strengthen the ability of Federal law enforcement to combat bias-motivated violence in two vitally important ways. First, it would eliminate the antiquated and burdensome requirement under current law that prosecutors prove that a violent hate crime was motivated by a victim's participation in one of six enumerated federally protected activities. Second, the bill

[3] *See* United States Attorneys' Manual § 9-2.031

would expand coverage of protected categories beyond actual or perceived race, color, religion or national origin to include gender, disability, sexual orientation, and gender identity.

1. The "Federally Protected Activity" Requirement of 18 U.S.C. § 245

The current principal Federal hate crimes statute prohibits the use or threat of force to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person because of his race, color, religion or national origin" because of his participation in any of six "federally protected activities" enumerated in the statute. The six "federally protected activities" enumerated in the statute are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any State or local government; (C) applying for or enjoying employment; (D) serving in a State court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation. *See* 18 U.S.C. § 245(b)(2).

Not all hate crimes are committed because of the victim's participation in one of these six activities, however. Simply put, it makes no sense that our ability to prosecute violent hate crimes should depend on the happenstance of whether the victim was participating in a one of these six activities. Unfortunately, Department attorneys in fact have been unable to successfully prosecute incidents of brutal, bias-motivated violence because of the requirement that the Government prove not only that a defendant acted because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of the six federally protected activities enumerated in the statute.

This statutory requirement has led to acquittals in several prominent Federal prosecutions. For example, in June 2003, three white men brutally assaulted a group of Latino teenagers as the teenagers attempted to enter a Chili's restaurant in Holtsville, New York. The defendants used racial slurs as they assaulted the victims. As the defendants fled from the scene, one of them stabbed and seriously injured one of the victims. One of the three defendants entered a guilty plea for his involvement in the assaults and was sentenced to 15 months in prison. The two remaining defendants were acquitted at trial, after the jury determined that there was insufficient evidence to prove, beyond a reasonable doubt, that the offense happened because the victims were trying to use the restaurant (a public accommodation).

S. 909 would allow the Department to more effectively prosecute and deter violent acts based on existing protected categories of race, color, religion, or national origin by eliminating the "federally protected activity" requirement that serves as an unnecessary impediment to such prosecutions today.

2. Violent Crimes Based on Sexual Orientation, Gender Identity, Gender, or Disability

Currently the main Federal hate crimes law, 18 U.S.C. § 245, does not cover hate crimes committed because of the victim's sexual orientation, gender, gender identity, or disability.[4] Yet we know that violent acts are committed based on these biases every day. For example, according to 2007 statistics published by the Federal Bureau of Investigation's Uniform Crime Reporting Program, 16.6 percent of hate crimes were motivated by sexual-orientation bias (exceeded only by racial bias, 50.8 percent, and religious bias, 18.4 percent).[5] S. 909 would allow the Federal government to help protect all Americans from such violence.

a. Sexual Orientation and Gender Identity

This bill is named in honor of Matthew Shepard, a gay man who was brutally murdered ten years ago in Laramie, Wyoming, in a case that shocked the nation. Matthew Shepard was murdered by two men, Russell Henderson and Aaron McKinney, who set out on the night of October 6, 1998, to rob a gay man. After going to a gay bar and pretending to befriend him, the killers offered their young victim a ride home, but instead drove him away from the bar, repeatedly pistol-whipped him in his head and face, and then tied him to a fence and left him to die. The passerby who found Shepard the next morning, tied to the fence and struggling to survive, initially thought that Matthew was a scarecrow. He was rushed to the hospital, where he died on October 12 from massive head injuries. At the defendants' murder trial, Henderson and McKinney initially tried to use a "gay panic" defense, claiming that they killed Shepard in an insane rage after he approached them sexually. At another point, they claimed that they intended only to rob Shepard, but not to kill him. Both men were sentenced to serve two consecutive life terms in prison.

Sadly, this appalling crime is not unique, and State prosecutions may not always fully vindicate Federal interests:

- On May 16, 2007, 20-year-old Sean Kennedy, a gay man, was murdered as he left a local gay bar in Greenville, South Carolina. According to the National Coalition of Anti-Violence Programs, Kennedy was walking to his car after leaving the bar, when a car pulled along side him and a man got out, approached Kennedy, and punched Kennedy in the face while calling him a "faggot." The punch knocked Kennedy to the ground, where he hit his head on the pavement and suffered a fatal head injury. A State grand jury indicted Kennedy's attacker, Stephen Moller, for voluntary manslaughter, which carries a maximum sentence of five years. The State had no hate crime statute. Moller was

[4]Note that the criminal provisions of the Fair Housing Act, 42 U.S.C. § 3631, cover gender and disability.

[5]*See* Federal Bureau of Investigation, Uniform Crime Report, Hate Crimes Statistics, 2007 (available at: http://www.fbi.gov/ucr/hc2007/incidents.htm).

sentenced to five years, suspended to three years, with credit for seven months pre-trial detention. He is scheduled to be released from jail next month.

- On August 21, 2003, Emonie Spaulding, a transgendered woman in Washington, D.C., was shot to death by Derrick Lewis after Lewis learned that she was transgendered. Spaulding was shot and killed shortly after she left her home at 2:00 a.m. to head to an all-night convenience store. Her nude body was found in a grassy area near the street, with gunshot wounds in her arm and chest, and indications of blunt force trauma to the head. Lewis eventually pled guilty to the crime, admitting that he became angry upon discovering that Spaulding was transgendered. He was sentenced to serve ten years in prison.

b. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as bias-motivated crimes, it has long been recognized that a significant number of women "are exposed to terror, brutality, serious injury, and even death because of their gender."[6]

For example, the Leadership Conference on Civil Rights ("LCCR")[7] reports that in 2006, a gunman burst into a one-room Amish schoolhouse in Bart Township, Pennsylvania, where he shot ten young Amish girls, age 7 to 12. Before firing the shots, the gunman separated the boys from the girls, allowing the boys to leave. He then lined the girls against a blackboard, bound their feet with wire ties and plastic handcuffs, and shot them all at close range. Five of the victims died and the other five were severely injured. Local authorities reported that the gunman "wanted to exact revenge against female victims."[8]

Contrary to the concerns expressed by some, S. 909 would not result in the federalization of all sexual assaults and acts of domestic violence. Rather, the language of the bill itself, and the manner in which the Department of Justice would interpret that language, would ensure that the Federal government would strictly limit its investigations and prosecutions of violent gender-based hate crimes to those that implicate the greatest Federal interest. As is the case with other categories of hate crimes, State and local authorities would continue to prosecute virtually all gender-motivated hate crimes.

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[6]Statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund, *Women and Violence: Hearing Before the Senate Judiciary Committee*, 101st Congress, 2nd Sess. 62 (1990).

[7]*See* Leadership Conference on Civil Rights Education Fund, *Confronting the New Faces of Hate: Hate Crimes in America 2009*, at 33 (2009).

[8]*Id.*

c. Disability

Congress has shown a consistent and durable commitment to the protection of persons with disabilities from discrimination based on their disabilities, including the 1988 amendments to the Fair Housing Act, the Americans with Disabilities Act in 1990, and the amendments to the Americans with Disabilities Act, which were signed into law by President George W. Bush last year. Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts, and it is time they be protected from bias-motivated violence as well.

D. CONSTITUTIONALITY OF S. 909

The analysis underlying the Department's conclusion that S. 909 is constitutional is contained in the detailed views letter submitted in advance of today's hearing, as well as in the analysis contained in the Department's 2000 views letter on nearly identical legislation.[9] In short, the basis for the Department's view is that in criminalizing violent acts motivated by race, color, religion, or national origin, Congress would be acting pursuant to the power bestowed upon it by Section Two of the Thirteenth Amendment, and in criminalizing violent acts motivated by sexual orientation, gender, gender-identity, and disability, Congress would be acting pursuant to its authority under the Commerce Clause.

1. Thirteenth Amendment

Congress has authority under Section Two of the Thirteenth Amendment to punish racially motivated violence as part of a reasonable legislative effort to extinguish the relics, badges, and incidents of slavery. Congress may rationally determine, as it would do in S. 909, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race." S. 909 § 2(7).

The language of 249(a)(1) is not limited to violence involving racial discrimination; it would criminalize violence committed "because of the actual or perceived race, color, *religion, or national origin* of any person." The Supreme Court, in construing statutes enacted pursuant to the Thirteenth Amendment, has recognized that certain groups were considered to be "races" at the time the Thirteenth Amendment was passed even if – as is the case with Jewish and Arab groups – the characteristic defining the group is now more often considered a characteristic of religion or national origin. To the extent violence is directed at victims on the basis of a religion or national origin that was *not* regarded as a "race" at the time the Thirteenth Amendment was

[9] *See* Letter for Senator Edward Kennedy from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice (June 13, 2000); *see also* S. Rep. No. 107-147, at 15-23 (2002) ("Senate Report") (reprinting the Justice Department Letter as an explanation of the constitutional basis for such legislation).

ratified, prosecutors may bring appropriate actions under the other provision of the bill, § 249(a)(2), since religion and national origin are covered in both subsections.

2. Commerce Clause Jurisdiction

The proposed legislation would cover four categories of hate crimes not reached by current Federal law — namely, those that are motivated by bias against a person's sexual orientation, gender, gender identity or disability — as well as crimes committed because of the victim's religion or national origin if prosecutors choose not to use § 249(a)(1). The interstate commerce element contained in § 249(a)(2)(B) would ensure that Federal prosecutions for hate crimes based on sexual orientation, gender, gender identity, or disability would be brought only in those particular cases in which a Federal interest is clear. This is important as a policy matter as well: while there is a clear need to enable Federal law enforcement officials to investigate and bring cases in these areas, the Department of Justice believes that the new hate crime legislation must be implemented in a manner respectful of the criminal law enforcement prerogatives of the States.[10]

E. COMMENTS ON THREE AREAS OF IMPORTANCE TO THE DEPARTMENT

The Department strongly supports this legislation. However, we believe three particular issues deserve specific comment because of their importance to the Department. First, although we believe that S. 909's Rule of Construction is unnecessary, we also believe it is far preferable to the analogous evidentiary provision in H.R. 1913, which if enacted could significantly harm our efforts to prosecute violations of the new statute. Second, we believe that the bill contains an overly complex certification provision that should be modified to comport with existing Federal hate crimes law. Third, we believe that S. 909 has an unnecessarily short statute of limitations that potentially could bar prosecution of some of the most egregious hate crimes.

1. The Evidentiary Provision

Some have expressed concern that this bill could possibly infringe on First Amendment rights. The Department has studied the bill and we are confident that nothing in it would criminalize any expressive conduct or association. Section 249 could be used only to investigate or prosecute discriminatory acts of violence causing bodily injury (or attempts to commit such violent acts) and thus could never be used to investigate or prosecute mere association or expressions of beliefs, no matter how offensive those beliefs might be. Simply put, bias-motivated violence is not protected speech.

[10]In order to ensure the fullest possible coverage, the current bill also provides for prosecution of any hate crime that occurs in the Special Maritime and Territorial Jurisdiction of the United States (SMTJ). This will ensure that all categories of victims are protected in these unique locations, where there may be no State jurisdiction and no interstate commerce connection.

The United States Constitution, the Federal Rules of Evidence, and existing caselaw provide adequate protection for expressive conduct and association. S. 909, however, provides additional assurance for the protection of First Amendment principles through its proposed Rule of Construction, which expressly provides that nothing in the legislation shall be construed "to prohibit any constitutionally protected speech, expressive conduct or activities" or "to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs." S. 909, § 10(3) and (4).

The Department strongly prefers S. 909's Rule of Construction to the evidentiary provisions in H.R. 1913. S. 909 would allow for the admission of evidence consistent with the First Amendment and the Federal Rules. By contrast, H.R. 1913 contains a rule of construction and an additional prohibition on the introduction of evidence in hate crimes cases unless the evidence "specifically" relates to the charged offense. We are concerned that H.R. 1913 could be interpreted as imposing evidentiary restrictions far beyond those contained in the Federal Rules or required by the First Amendment. Indeed, this provision could inadvertently prohibit introduction of the very evidence of discriminatory intent that renders a violent act a hate crime in the first instance. Suppose, for example, an African-American woman were violently murdered in a park by the local leader of the Ku Klux Klan but nothing at the scene indicated a bias-related motivation. The evidence that could establish the racial motivation for the murder (the defendant's Klan robes kept at home, his racist tattoos, and his racist, hate-filled speeches and correspondence advocating harm to minorities) might be excluded at trial unless it "specifically" pertained to the individual woman whom he murdered or to that particular murder.

No special rule of evidence is necessary or appropriate for hate crimes cases — indeed, the Department opposes the notion of requiring different rules of evidence for different offenses as a general matter. Moreover, imposing an additional limitation on the admissibility of evidence in hate crimes cases could very well undermine the very goal of such prosecutions: to punish and deter discriminatory violence. For this reason, although we do not believe it is necessary, the Department strongly prefers S. 909's Rule of Construction to the analogous provisions contained in the companion House bill.

2. The Statute of Limitations

Proposed section 249 contains no express statute of limitations; therefore, even the most egregious bias-motivated murder that is prosecutable under this new provision would be subject to the general five-year limitation period provided under 18 U.S.C. § 3282(a). Despite vigorous investigation and enforcement efforts, there always will be cases in which a perpetrator cannot be identified, or the hate-crime motivation cannot be discovered, until more than five years have passed. It is essential that the Department be able to prosecute the most serious of these crimes even after the passage of time. Applying a uniform five-year limitation period would undermine this mission and would be inconsistent with Congress's mandate, recently expressed in the Emmett Till Unsolved Civil Rights Crime Act of 2007, that the Department aggressively investigate and prosecute "cold" hate crime murders. Accordingly, the Department recommends

that the bill expressly provide that any offense that results in the death of a victim have no limitations period and that the bill's statute of limitations be extended to seven years for all other offenses, as in the House companion bill.

3. The Certification Provision

Proposed subsection 249(b) would require the Attorney General or his designee to certify certain facts before a Federal hate crimes prosecution could be brought under the new statute. We recognize that such certification is important to ensure appropriate coordination between Federal and local law enforcement and in recognition of the fact that most crimes are generally investigated and prosecuted at the State or local level. However, we recommend that the bill's certification provision be amended to conform with the existing certification requirement in 18 U.S.C. § 245. Section 245's certification scheme has served the interests of justice effectively since its enactment over 40 years ago, and is already familiar to Federal, State, and local law enforcement.

F. CONCLUSION

I strongly urge passage of the Matthew Shepard Hate Crimes Act of 2009. We must do more than simply deplore horrific acts of bias-motivated violence. The time is now to provide our Federal, State, local, and tribal law enforcement officers with the tools they need to effectively prosecute and deter these heinous crimes. The time is now to provide justice to victims of bias-motivated violence and to redouble our efforts to protect our communities from violence based on bigotry and prejudice.