

COVID-19 HATE CRIMES: WHY HATE IS RISING, AND WHAT THE UNITED STATES CAN DO ABOUT IT

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INTRODUCTION

“As much as I want to grieve and process the reality that she is gone, I have a younger brother to take care of and matters to resolve as a result of this tragedy.”¹ This is the new and horrific reality of Randy Park, whose mother, Hyun Jung Grant, was one of the victims of the brutal Atlanta spa shooting.² The spa shootings, which involved the hateful killings of six women of Asian descent in Atlanta, Georgia, in March 2021, put the Asian American and Pacific Islander (“AAPI”) community in

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1. Randy Park, *In Memory of HyunJungKim to Support My Brother & I*, GOFUNDME, <https://www.gofundme.com/f/in-memory-of-hyunjungkim-to-support-my-brother-i> [<https://perma.cc/9LAY-S4XA>].

2. See Juliana Kim, ‘*She Died Working for Us*’: *Sons of Atlanta Victim Struggle to Move Forward*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/06/10/us/atlanta-shooting-victims.html> [<https://web.archive.org/web/20220827024941/https://www.nytimes.com/2021/06/10/us/atlanta-shooting-victims.html>].

complete shock and fear.³ Alarming, this senseless attack was not sui generis. Just weeks earlier in San Francisco, California, Vichar Ratanapakdee, an eighty-four-year-old Thai man, was violently shoved to the ground and sustained injuries that ultimately led to his death.⁴ In New York City, in the same month as the Atlanta spa shootings, seventy-five-year-old Pak Ho was attacked, robbed, and left with brain trauma that led to his death.⁵ And in Oakland, California, a sixty-five-year-old Filipino woman was beaten to the ground while a security guard shut the door on her.⁶ These are just a few of the hate crimes that have been reported since the beginning of the COVID-19 pandemic. In fact, reported hate crimes against Asians in sixteen of the nation's largest cities and counties are up 164 percent since mid-2020.⁷ New York City, for example, saw a spine-chilling spike in reported anti-Asian hate crimes of 223 percent in early 2021.⁸ Along similar lines, "anti-Asian hate speech increased by 2,770% in 2020 compared to 2019."⁹

Researchers linked this rise in anti-Asian hate crimes to the anti-China rhetoric of then-President Donald Trump, who referred to SARS-CoV-2, the virus that causes COVID-19, as the "Chinese Virus" on Twitter.¹⁰ In the days surrounding Trump's usage of these derogatory terms, researchers examined 700,000 tweets containing more than 1.2 million anti-Asian hashtags, which researchers have said are known to be a precipitate of hate crimes and the formation of hate groups.¹¹ While Trump's remarks may have been a catalyst for the recent drastic rise in hate crimes, Asian-

3. Stop AAPI Hate, a nonprofit that tracks incidents of violence against members of the AAPI community, stated that the Atlanta spa shootings "will only exacerbate the fear and pain that the Asian American community continues to endure." Press Release, Stop AAPI Hate, Statement on the Shooting of Multiple Asian American Women in Atlanta (Mar. 16, 2021), <https://stopaapihate.org/wp-content/uploads/2021/04/Stop-AAPI-Hate-Pres-s-Statement-Shooting-Atlanta-210316.pdf> [https://perma.cc/L2KV-6FXP].

4. Kyung Lah & Jason Kravarik, *Family of Thai Immigrant, 84, Says Fatal Attack 'Was Driven By Hate,'* CNN (Feb. 16, 2021, 6:49 PM), <https://www.cnn.com/2021/02/16/us/san-francisco-vicha-ratanapakdee-asian-american-attacks/index.html> [https://perma.cc/A7PR-7WRN].

5. Vivian Ho, *After 75-year-old Dies From Attack, Alarm Increases in Oakland's Asian Community,* THE GUARDIAN (Mar. 12, 2021, 5:14 PM), <https://www.theguardian.com/us-news/2021/mar/12/asian-elderly-attack-die-oakland> [https://perma.cc/QV98-UG93].

6. Nicole Hong et al., *Brutal Attack on Filipino Woman Sparks Outrage: 'Everybody Is on Edge,'* N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/03/30/nyregion/asian-attack-nyc.html> [https://web.archive.org/web/20230306031148/https://www.nytimes.com/2021/03/30/nyregion/asian-attack-nyc.html].

7. Josh Campbell, *Anti-Asian Hate Crimes Surged in Early 2021, Study Says,* CNN (May 5, 2021, 6:29 PM), <https://www.cnn.com/2021/05/05/us/anti-asian-hate-crimes-study/index.html> [https://perma.cc/QCC8-U NTL].

8. *Id.*

9. DITCH THE LABEL, UNCOVERED: ONLINE HATE SPEECH IN THE COVID ERA 12 (2021), https://www.ditchthelabel.org/wp-content/uploads/2021/11/Uncovered_Online_Hate_Speech_DTLxvBW_V2-1.pdf [https://perma.cc/2VP2-3H38].

10. See Yulin Hswen et al., *Association of "#covid19" Versus "#chinesevirus" with Anti-Asian Sentiments on Twitter: March 9–23, 2020,* 111 AM. J. PUB. HEALTH 96 (2021).

11. *Id.*

Americans have long been suffering from hate crimes and hate speech. COVID-19 has simply added fuel to the fire, bringing an old issue into new light.

The roots of Asian American bigotry stem back almost two centuries, when people of Asian descent immigrated and built communities within the United States.¹² After the U.S. government formally abolished slavery, Chinese people came to the United States to meet the need for labor in industries such as railroads, sugar plantations, and mining.¹³ However, soon after, the Page Act of 1875 was passed.¹⁴ The Act required immigration officials to determine whether women immigrants from “China, Japan, or any Oriental country” had “entered into a contract or agreement for a term of service within the United States, for lewd or immoral purposes.”¹⁵ The Act promoted the “sex worker” stereotype¹⁶ and was used to prevent Chinese women from migrating to the United States.¹⁷ Soon after, in 1882, Congress overwhelmingly passed the Chinese Exclusion Act, which explicitly suspended immigration for all individuals of Chinese descent for ten years.¹⁸ Both of these exclusionary acts were not repealed for over sixty years.¹⁹

This sort of discrimination continued into the 1900s, as an outbreak of bubonic plague struck San Francisco.²⁰ While the outbreak likely began with a ship from Australia, the Chinese-American community was blamed for it because the first state-side victim was a Chinese immigrant.²¹ Overnight, law enforcement surrounded the Chinatown in San Francisco, preventing any non-white residents from entering or exiting.²² During the outbreak, Chinese residents were also subjected to home searches and property destruction by force.²³ Progressing to the 1940s, tens of

12. See Gillian Brockell, *The Long, Ugly History of Anti-Asian Racism and Violence in the U.S.*, WASH. POST (Mar. 18, 2021, 7:00 AM), <https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/> [<https://web.archive.org/web/20230307201023/https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/>]; Jessica Pearce Rotondi, *Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women*, HISTORY (Mar. 19, 2021), <https://www.history.com/news/chinese-immigration-page-act-women> [<https://perma.cc/6R37-UXYX>].

13. See Moon-Ho Jung, *Making Sugar, Making ‘Coolies’: Chinese Laborers Toiled Alongside Black Workers on 19th-century Louisiana Plantations*, THE CONVERSATION (Jan. 13, 2022, 8:01 AM), <https://theconversation.com/making-sugar-making-coolies-chinese-laborers-toiled-alongside-black-workers-on-19th-century-louisiana-plantations-173831> [<https://perma.cc/E7FD-ESYV>].

14. Page Act of 1875, ch. 141, 18 Stat. 477 (1875), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387.

15. *Id.* § 1, 18 Stat. at 477.

16. See Rotondi, *supra* note 12.

17. See *id.*

18. Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58, 59 (1882), *repealed by* Act of Dec. 7, 1943, ch. 344, § 1, 57 Stat. 600, 600.

19. See sources cited *supra* notes 14 and 18.

20. Brockell, *supra* note 12.

21. *Id.*

22. *Id.*

23. *Id.*

thousands of Japanese immigrants and Japanese Americans had built livelihoods and started families within the United States.²⁴ But after Japan bombed Pearl Harbor and the United States entered World War II, the U.S. government forced over 110,000 Japanese Americans into internment camps for the duration of the war over suspicions that they might aid the enemy.²⁵ Conditions in the camps were extreme—blazing hot in the summer and freezing cold in the winter.²⁶ No spies were ever found either within or outside of the camps.²⁷ The Japanese immigrants and Japanese Americans that survived and were freed from the internment camps returned to find their homes and businesses completely vandalized and in ruins.²⁸

Recognizing America’s history of deep-seated oppression is a key starting place for the changes needed to prevent the illogical scapegoating and violence on the Asian population in the United States. The current situation has exposed the insufficient legislation and law on both hate crime and speech. Notably, hate speech receives some of the strongest protections under the Constitution.²⁹ Sharp rises in hate speech have led to subsequent rises in discrimination and hate crimes against minority populations.³⁰ While it is true that no single law can solve the deeply-rooted hate in our society, there is no denying that the federal government’s and legislature’s responses have been largely inadequate in deterring both hate crimes and speech.³¹ There is still opportunity for improvement and revision to the hate crime laws that aim to protect against these hateful acts. Further, responses outside of the criminal justice system are also necessary to permanently alter the course of hate crime and hate speech in the United States.

Beyond debating whether the current statutes on hate crimes are effective, some critics ask whether hate crime laws themselves are even necessary. Opponents of hate crime laws rely on the idea that perpetrators have already been tried and convicted for some sort of crime and therefore have already received a punishment.³² They argue that searching for evidence to establish the bias motivation behind a hate crime puts “an unnecessary burden on the police” and prosecutors.³³ Opponents of

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* *Matal v. Tam*, 582 U.S. 218, 243–44 (2017).

30. *See* *DITCH THE LABEL*, *supra* note 9, at 6.

31. *See* Avlana Eisenberg, *Hate-Crime Laws Don’t Work as Their Supporters Intended*, *THE ATLANTIC* (June 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/hate-crimes-not-used-prosecutors/619179/> [<https://perma.cc/7CGJ-WGRM>].

32. *See, e.g.*, Cynthia M. Deitle, *The Legacies of James Byrd Jr. and Matthew Shepard: Two Decades Later*, *POLICE CHIEF MAG.* (Mar. 6, 2019), <https://www.policechiefmagazine.org/legacies-byrd-and-shepard/> [<https://perma.cc/3595-998X>].

33. *Id.*

hate crime laws also argue that punishing hate speech may inadvertently punish beliefs, which raises First Amendment concerns.³⁴

But supporters of hate speech laws respond that hate speech is dangerous because of its potential to legitimize intolerance, which can incite very serious and violent outcomes. They assert that hate crime laws are critical to promote equality and send a strong message rejecting hate, signaling that hatred based on identity and immutable characteristics will be punished with severity.³⁵ Lastly, the impact of hate crimes and hate speech goes far beyond the act performed on an individual victim. Often, the victim *and* his or her community are left feeling fearful, isolated, and unprotected by the law. This sentiment was expressed perfectly by Lisa Lu, a new mom in the Bay Area.³⁶ In an interview with NPR, Lu stated that “[she] felt like during the height of the pandemic it didn’t feel safe for [her] to go outside . . . [s]o that was especially scary, like the thought of [her] going anywhere and being attacked and anything happening to [her] baby.”³⁷ These degrading acts fragment our nation’s communities and damage the fabric of our society.

This Note uses the recent rise in hate crimes targeting Asians and Asian Americans as a focal point to analyze the past and current state of hate crime and hate speech legislation in the United States. Part I highlights the history of hate crime legislation and the constitutional precedent on hate speech. Part II traces various reasons why current government action and response have been largely ineffective against hate crimes and speech. And Part III explores the recent passage of new hate crime legislation and offers further recommendations to diffuse the long-standing bigotry and violence towards minorities in the United States.

I. THE HISTORY OF HATE CRIME LEGISLATION AND HATE SPEECH SUPREME COURT PRECEDENT

A. *State and Federal Hate Crime Legislation*

Oregon was the first State to take legislative action against hate crimes by enacting the Hate Crimes Act of 1981.³⁸ The Act as amended states that a person commits a bias crime in the first degree if the person causes physical injury or places another person in fear of imminent serious physical injury “because of the

34. See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014).

35. See *id.* at 872, n. 53.

36. Leila Fadel, *With Racial Attacks on the Rise, Asian Americans Fear for Their Safety*, NPR (Oct. 22, 2021, 9:46 AM), <https://www.npr.org/sections/health-shots/2021/10/13/1045746655/1-in-4-asian-americans-recently-feared-their-household-being-targeted-poll-finds> [<https://perma.cc/Z4DH-MWKF>].

37. *Id.*

38. James Morsch, Note, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM L. & CRIMINOLOGY 659, 663 (1991); see also Hate Crimes Act, 1981 Or. Laws 1103 (codified as amended at OR. REV. STAT. ANN. §§ 30.200, 166.155, 166.165 (West 2022)).

[perpetrator’s] perception of the other person’s race, color, religion, gender identity, sexual orientation, disability, or national origin.”³⁹ “However, there is not one uniform definition of hate crime across the states.”⁴⁰

The Anti-Defamation League conducted a statistical analysis in 2020 evaluating and documenting the difference in states’ definitions of hate crimes.⁴¹ The study shows that only two-thirds of states with hate crime laws consider sexual orientation, gender, or disability in their classification of hate crimes, and only one-third include gender identity.⁴² There is also variation in the definition of a hate crime between state and federal law.

On the federal level, the Department of Justice (“DOJ”) states that “[i]n the simplest terms, a hate crime must include both ‘hate’ and a ‘crime.’”⁴³ The DOJ further explains that hate in this context does not refer to synonyms such as rage, anger, or general dislike.⁴⁴ More specifically, hate in this context means “bias against people or groups with specific characteristics that are defined by the law.”⁴⁵ This includes crimes that are “committed on the basis of the victim’s perceived or actual race, color, religion, national origin, sexual orientation, gender, gender identity, or disability.”⁴⁶ The DOJ concluded the definition by articulating that although the “crime” in hate crime is often a violent crime, it may also encompass conspiring or asking another to commit such crimes, even if the crime was in fact never committed.⁴⁷

Before 1968, there was no federal hate crime law in the United States.⁴⁸ In and before the 1960s, law enforcement officials in the Jim Crow South refused to both investigate and prosecute many race-based crimes.⁴⁹ Civil rights workers and social activists faced violence and threats from members of the Ku Klux Klan (“KKK”) and

39. OR. REV. STAT. ANN. § 166.165 (West 2022).

40. Gisele Galoustain, *Hate Crime Legislation Vague and Inconsistent Among 50 U.S. States*, FL. ATL. UNIV. NEWS DESK (Jan. 18, 2023), <https://www.fau.edu/newsdesk/articles/hate-crime-legislation> [<https://perma.cc/DQV3-MMMJ>].

41. Beatrice Jin, *Biden Signed a New Hate Crimes Law – But There’s a Big Flaw*, POLITICO (May 20, 2021, 3:43 PM), <https://www.politico.com/interactives/2021/state-hate-crime-laws/> [<https://perma.cc/2G4V-KGNT>].

42. *Id.*

43. *Learn About Hate Crimes*, THE U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> [<https://perma.cc/4PPV-RTWJ>].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Hate Crime Laws*, THE U.S. DEP’T OF JUST. (Mar. 7, 2019), <https://www.justice.gov/crt/hate-crime-laws> [<https://perma.cc/9RV3-DNJE>].

49. Michael Lieberman, *Hate Crimes, Explained*, S. POVERTY L. CTR. (Oct. 27, 2021), <https://www.splcenter.org/hate-crimes-explained> [<https://perma.cc/SES7-H7U6>].

other organizations committed to segregation.⁵⁰ This is illustrated by the infamous 1964 killing of three civil rights workers: James Chaney, Andrew Goodman, and Michael Schwerner.⁵¹ The three men were investigating a church burning by a mob of armed KKK members in Longdale, Mississippi.⁵² During their investigative trip, the police arrested them for allegedly speeding.⁵³ Once they were released by the police, KKK members followed them, and their vehicle was found a couple of days later, completely torched.⁵⁴ In the years that followed, the state prosecutors in Mississippi chose not to charge anyone for the murders.⁵⁵ A few men served a handful of years in prison on federal civil rights charges, but otherwise, the KKK mob that murdered these three men escaped any serious legal consequences.⁵⁶

Recognizing the lack of the prosecution of race-based crimes and gruesome events like that, Congress enacted the Civil Rights Act of 1968.⁵⁷ The statute criminalized using or threatening to use force to “willfully injure[], intimidate[], or interfere[] with” any person because of their race, color, religion, or national origin.⁵⁸ That same year, Congress also criminalized the use, or threat to use, force to interfere with housing rights because of the victim’s race, color, religion, sex, or national origin.⁵⁹ In 1988, protections on the basis of familial status and disability were also added.⁶⁰

In 1990, Congress passed the Hate Crime Statistics Act.⁶¹ The Act required the Attorney General to collect data “about crimes that manifest evidence of prejudice

50. See *Mississippi Burning*, FBI, <https://www.fbi.gov/history/famous-cases/mississippi-burning> [<https://perma.cc/YZA2-3PZK>]; *The Murder of Chaney, Goodman, and Schwerner*, MISS. C.R. PROJECT, <https://mscivilrightsproject.org/neshoba/event-neshoba/the-murder-of-chaney-goodman-and-schwerner/> [<https://perma.cc/9W MF-WSHE>].

51. *Mississippi Burning*, *supra* note 50; *The Murder of Chaney, Goodman, and Schwerner*, *supra* note 50.

52. *Mississippi Burning*, *supra* note 50; *The Murder of Chaney, Goodman, and Schwerner*, *supra* note 50.

53. *Mississippi Burning*, *supra* note 50; *The Murder of Chaney, Goodman, and Schwerner*, *supra* note 50.

54. *Mississippi Burning*, *supra* note 50; *The Murder of Chaney, Goodman, and Schwerner*, *supra* note 50.

55. Camila Domonoske, *Officials Close Investigation into 1964 ‘Mississippi Burning’ Killings*, NPR (June 21, 2016, 10:14 AM), <https://www.npr.org/sections/thetwo-way/2016/06/21/482914440/officials-close-investigation-into-1964-mississippi-burning-killings> [<https://perma.cc/N7KL-JEVP>].

56. *Id.*

57. See Lieberman, *supra* note 49; see also Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

58. Civil Rights Act of 1968, § 101(a), sec. 245(b)(2), 82 Stat. at 73 (codified at 18 U.S.C. § 245(b)(2) (2018)).

59. See Fair Housing Act, Pub. L. No. 90-284, §§ 82. Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619 (2018)).

60. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b)(1), (2), (c), sec. 805(a), 102 Stat. 1619, 1622 (codified at 42 U.S.C. §§ 3604(d), (e), 3605(a), 3606 (2018)).

61. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 34 U.S.C. § 41305 (2018)).

based on race, religion, sexual orientation, or ethnicity.”⁶² The Attorney General delegated the responsibility of developing the procedures for implementing, collecting, and managing hate crime data to the Director of the FBI, who in turn assigned the tasks to the Uniform Crime Reporting (UCR) program.⁶³ Under the direction of the Attorney General, and with the cooperation and assistance of many local and law enforcement agencies, the UCR program collected hate crime data on a federal level to comply with the congressional mandate.⁶⁴

Next, Congress passed the Church Arson Prevention Act of 1996 in response to a rise in hate crimes committed against minority churches.⁶⁵ The law was introduced after an alarming number of church arson incidents: there were sixty-six Black churches destroyed between 1995 and 1996.⁶⁶ In one instance, three days before Christmas Day in 1995, the Mt. Zion Baptist Church burned to the ground in a mysterious blaze.⁶⁷ Three weeks later, on the same night, both the Little Mt. Zion Church and the Mt. Zoar Baptist Church were also burned.⁶⁸ Most notably, a non-denominational inner-city church in Tennessee was also the target of a similar attack.⁶⁹ That church was entirely destroyed, but on areas of the church that were still intact, there were several derogatory remarks graffitied.⁷⁰ Horrific events such as these sparked Congress to pass the Act into law in 1996.⁷¹

Existing law had prohibited damaging religious property “because of [its] religious character.”⁷² The Act expanded this prohibition to include damage to religious property motivated by “the race, color, or ethnic characteristics of any individual associated with such property.”⁷³

62. *Id.* § 1, 104 Stat at 140 (amended 1994) (codified as amended at 34 U.S.C. § 41305(b)(1) (2018)); see also *About Hate Crime Statistics*, FBI, <https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime> [<https://perma.cc/7YB5-3XUZ>].

63. *Hate Crime Statistics*, *supra* note 62.

64. *Id.*

65. Lieberman, *supra* note 49; see also Church Arson Prevention Act of 1996, Pub. L. No. 104–155, 110 Stat. 1392 (codified as amended at 18 U.S.C. § 247 and 34 U.S.C. § 20102 (2018)).

66. Lieberman, *supra* note 49.

67. Ann LoLordo, *Who Would Burn Houses of God? Painful Questions: Fires at Three Black Churches in the Past Month Have Left Residents of Tiny Boligee, Ala.—Black and White—Looking for Answers*, BALTIMORE SUN (Jan. 30, 1996, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1996-01-30-1996030044-story.html> [<https://perma.cc/UCT4-HMB9>].

68. *Id.*

69. TENN. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., BURNING OF AFRICAN AMERICAN CHURCHES IN TENNESSEE AND PERCEPTIONS OF RACE RELATIONS (July 10, 1996).

70. *Id.*

71. Aleksandra Sandstrom, *Half of All Church Fires In Past 20 Years Were Arsons*, PEW RSCH. CTR. (Oct. 26, 2015), <https://www.pewresearch.org/fact-tank/2015/10/26/half-of-all-church-fires-in-past-20-years-were-arsons/> [<https://perma.cc/H975-V8SF>].

72. 18 U.S.C. § 247(a)(1) (1994) (amended 1996).

73. Church Arson Prevention Act of 1996, Pub. L. No. 104–155, § 3(3), 110 Stat. 1392, at 1392–93 (codified at 18 U.S.C. § 247(b) (2018)).

Most recently, Congress passed, and President Obama signed into law, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in 2009.⁷⁴ The DOJ summarized what the Act does and seeks to accomplish:

The Shepard Byrd Act makes it a federal crime to willfully cause bodily injury, or attempt to do so using a dangerous weapon, because of the victim's actual or perceived race, color, religion, or national origin. The Act also extends federal hate crime prohibitions to crimes committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person, only where the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction. The Shepard Byrd Act is the first statute allowing federal criminal prosecution of hate crimes motivated by the victim's actual or perceived sexual orientation or gender identity.⁷⁵

The Shepard Byrd Act served to expand the federal definition of hate crimes, which in turn, gave prosecutors greater discretion and more tools to use in prosecuting hate crimes.⁷⁶ Previously, federal law only defined hate crimes as those motivated by the victim's race, color, national origin, or religion.⁷⁷

The Act was named after the gruesome deaths of James Byrd Jr. and Matthew Shepard.⁷⁸ In 1998, James was chained to the back of a pickup truck and dragged to his death.⁷⁹ In the same year, Matthew was beaten, tied to a buck rail fence, and left to die.⁸⁰ Matthew was a gay student who was beaten to death in Wyoming, and James was an African American man who was murdered by white supremacists in Texas.⁸¹

In addition to federal hate crime laws, forty-six States, D.C., and two territories have their own hate crime laws.⁸² These laws have many components that vary widely across states.⁸³ A core element of all state hate crime laws is the use of

74. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. 111-84, 123 Stat. 2835 (2009) (codified as amended at 18 U.S.C.A. §§ 249, 1389 and 34 U.S.C.A. §§ 30501–30506 (Westlaw through Pub. L. No. 117-262)).

75. *Hate Crime Laws*, *supra* note 48.

76. MOVEMENT ADVANCEMENT PROJECT, POLICY SPOTLIGHT: HATE CRIME LAWS (2021), <https://www.lgbtmap.org/file/2021-report-hate-crime-laws.pdf> [<https://perma.cc/M82C-GLAD>].

77. *Id.* at 13.

78. *Id.* at 6.

79. Wade Goodwin, *Texas Executes Man Convicted in 1998 Murder of James Byrd Jr.*, NPR (Apr. 24, 2019, 5:05 AM), <https://www.npr.org/2019/04/24/716647585/texas-to-execute-man-convicted-in-dragging-death-of-james-byrd-jr> [<https://perma.cc/C6KY-UR2T>].

80. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 6.

81. *Id.*; *see also* Goodwin, *supra* note 79.

82. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 11.

83. *Id.*

criminal punishment, typically through sentencing enhancements.⁸⁴ While most States use a distinct hate crime statute to create a new, independent crime, a small minority of States use general sentencing statutes to identify what characteristics may justify enhanced sentencing.⁸⁵ All States cover race, ethnicity, and religion as protected categories; however, there is considerable variation when it comes to disability, sex, gender identity, and other categories.⁸⁶

For example, thirty-five States make it a crime to target institutions like religious buildings, even if there was no person harmed in the crime.⁸⁷ Eleven States add additional consequences beyond sentencing for those convicted of hate crimes.⁸⁸ Twelve States have non-carceral sentencing, which gives judges the option to require anti-bias education or community service, in addition to traditional punishment.⁸⁹ Over thirty States give victims the right to a civil action.⁹⁰ Nine States explicitly provide resources and legal protections to victims of hate crimes.⁹¹ More than thirty States require the state and/or law enforcement agencies to collect, report, and analyze data on hate crimes in the state.⁹² Lastly, eighteen States require law enforcement to receive training on identifying, responding to, and collecting data about hate crimes.⁹³ This data shows that hate crime laws have many different components, which leaves room for variance on multiple fronts in state hate crime legislation.

B. *Supreme Court Precedent on Hate Speech*

The First Amendment protects speech and other expressive conduct from government interference.⁹⁴ This protection extends even to speech that expresses ideas that a reasonable person would find offensive or repugnant—thus, applying to hate speech.⁹⁵ As discussed in this Section, the U.S. Supreme Court has strongly supported this protection. Understanding the precedent and trends behind the First Amendment and hate speech law is integral to grasping the inherent difficulty in deterring both hate speech and hate crimes.

84. *Id.* at 7.

85. *Id.* at 8.

86. *Id.*

87. *Id.* at 28.

88. *Id.*

89. *Id.* at 11.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 24.

94. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

95. *See Matal v. Tam*, 582 U.S. 218, 244 (2017).

In 1942, the Supreme Court faced a question on the constitutionality of certain speech in connection to a state statute in *Chaplinsky v. New Hampshire*.⁹⁶ There, the Court reviewed a New Hampshire law prohibiting speech directed at a person on public streets that derides, offends, or annoys others.⁹⁷ The New Hampshire law stated:

[N]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.⁹⁸

In that case, Chaplinsky was distributing Jehovah's Witnesses literature on the streets of Rochester on a busy Saturday afternoon.⁹⁹ The City Marshal warned Chaplinsky a few times that the crowd was getting restless as he was denouncing all religion as a "racket."¹⁰⁰ As the City Marshal warned him for the last time, Chaplinsky addressed the Marshal, saying, "[y]ou are a God damned racketeer [and] a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists, the same being offensive derisive and annoying words and names."¹⁰¹ The Marshal arrested Chaplinsky, who was convicted under the statute. Chaplinsky filed suit, arguing that his conviction under the statute was a violation of his free speech rights under the First Amendment.¹⁰²

In upholding Chaplinsky's conviction, the Court held that the limited scope of the statute as thus construed did not contravene Chaplinsky's constitutional right of free expression.¹⁰³ The Court determined that the New Hampshire statute was narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, specifically "the use in a public place of words likely to cause a breach of the peace."¹⁰⁴ The Supreme Court ultimately found the New Hampshire

96. See 315 U.S. 568 (1942), *aff'g* 18 A.2d 754 (N.H. 1941).

97. *Id.* at 569.

98. 2 REVISED LAWS OF THE STATE OF NEW HAMPSHIRE, ch. 440, § 2, at 1787 (1942); see also Act of Aug. 28, 1885, § 1, 1885 N.H. Laws 274, 274 (session law codified at chapter 440, section 2 of the 1942 edition of the *Revised Laws of the State of New Hampshire*). The language quoted above was repealed in 1973, see Act of July 2, 1973, § 532:26, 1973 N.H. Laws 1010, 1010–11, but substantially similar language was later re-codified, see N.H. REV. STAT. ANN. § 644:2(II)(b) (West 2022).

99. *Chaplinsky*, 315 U.S. at 569–70.

100. *Id.* at 571.

101. *Id.* at 570.

102. *Id.* at 571.

103. *Id.* at 574.

104. See *id.*

Supreme Court’s reasoning persuasive.¹⁰⁵ The New Hampshire Supreme Court had explained its reasoning by breaking down the statute as follows:

“The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane, or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.”¹⁰⁶

The New Hampshire Supreme Court’s conclusion necessarily disposed of Chaplinsky’s contention that the statute was so vague and indefinite as to render a conviction thereunder a violation of due process.¹⁰⁷ The statute punished verbal acts and was carefully drawn so as not unduly to impair liberty of expression. Accordingly, it was not too vague for a criminal law.¹⁰⁸

Even under the broadest reading of the First Amendment, the freedom of speech cannot be said to be completely absolute. There is a class of speech that is not protected; *Chaplinsky* shows that the punishment of insulting speech or words that cause a “breach of the peace” is not questioned under the Constitution.¹⁰⁹

Beauharnais v. Illinois affirmed the holding that not all speech is protected under the First Amendment.¹¹⁰ There, the Court reviewed Illinois’s prohibition of literature that was derogatory to a class of citizens of any race, color, creed, or religion.¹¹¹ The law stated:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this State any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color,

105. *Id.* at 572.

106. *Id.* at 574 (alterations in original) (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H. 1941)).

107. *Id.* at 575.

108. *Id.*

109. *Id.* at 574.

110. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

111. *Id.* at 252.

creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.¹¹²

In that case, Joseph Beauharnais served as the president of the White Circle League.¹¹³ At a meeting, he passed out bundles of lithographs that portrayed depravity, criminality, and lack of virtue of black citizens.¹¹⁴ The leaflets contained the following statement: “If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not untie use, then the aggressions . . . rapes, robberies, knives, guns, and marijuana of the negro, surely will.”¹¹⁵ The league further called on city officials to halt the invasion of white people, their property, neighborhoods, and persons by black citizens.¹¹⁶ The Supreme Court granted certiorari on the question of whether the Due Process Clause of the Fourteenth Amendment prevented a state from criminalizing libelous speech about certain defined groups.¹¹⁷

The Court, in a sharply divided 5-4 opinion, upheld the statute against constitutional objections.¹¹⁸ Justice Frankfurter, writing for the Court, reasoned that the Illinois Supreme Court had consistently treated the statute as a form of criminal libel.¹¹⁹ Additionally, there are certain well-defined and limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem.¹²⁰ In evaluating the law, the Court stated that it was “not a catchall enactment left at large by the State court which applied it,” rather, “[i]t is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois.”¹²¹ Therefore, the Court explained:

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.¹²²

112. Act of June 19, 1917, § 1, 1917 Ill. Laws 362, 363 (repealed 1961).

113. *Beauharnais*, 343 U.S. at 253.

114. *Id.* at 252.

115. *Id.* at 253.

116. *See id.*

117. *Id.* at 252.

118. *Id.*

119. *Id.*

120. *Id.* at 257.

121. *Id.* at 254.

122. *Id.* at 263.

However, several subsequent Supreme Court opinions have seemed to substantively overrule *Beauharnais*, strengthening constitutional free speech rights. In *Brandenburg v. Ohio*, Brandenburg invited a local reporter to film a KKK “rally,” which was later broadcasted on the local station and on a national network.¹²³ The film showed twelve hooded figures, some of whom carried firearms.¹²⁴ They gathered around a large wooden cross, which they later burned.¹²⁵ Most of the words they uttered were incomprehensible, but scattered phrases could be understood that were derogatory towards African Americans.¹²⁶ Brandenburg made a speech, in which he stated:

“We’re not a revengent organization, but if our President, our Congress, our Supreme Court continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. . . . Thank you.”¹²⁷

Brandenburg was convicted under Ohio’s criminal syndicalism statute both for advocating the propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform and assembling a group of persons formed to teach doctrines of criminal syndicalism.¹²⁸ The Ohio statute made it unlawful to advocate for crime or methods of terrorism or to voluntarily assembly with any group to teach or advocate doctrines of syndicalism.¹²⁹ From 1917 to 1920, identical or similar statutes were adopted by twenty states and two territories.¹³⁰ Regardless, the Court held that Ohio’s statute violated the First and Fourteenth Amendments.¹³¹ The Court, in making the determination that the statute unconstitutionally infringed on First Amendment rights, stated that they must analyze the statute in a new way:

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe the advocacy of the use of force or of law

123. *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam).

124. *Id.* at 446.

125. *Id.*

126. *Id.* at 447.

127. *Id.*

128. *Id.* at 446.

129. *Id.* The language from the Ohio law issue in *Brandenburg* was originally enacted in 1919, *see* Act of Apr. 15, 1919, § 2, 1919 Ohio Laws 189, 189, and was codified as amended at section 2923.13 of the Ohio Revised Code when *Brandenburg* was decided, *see* OHIO REV. CODE ANN. § 2923.13 (Banks-Balwin L. Pub’g Co. 2d ed. 1958) (repealed 1971).

130. *Brandenburg*, 395 U.S. at 447.

131. *Id.* at 444.

violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹³²

Under this standard, the statute does not distinguish mere advocacy from actual incitement of imminent lawless action.¹³³ Therefore, the Court reversed Brandenburg's conviction.¹³⁴

The Supreme Court showed that the strong protection of free speech in *Brandenburg* was not an outlier, but the direction in which First Amendment rights would move. This was made clear by later opinions in *National Socialist Party of America v. Village of Skokie*,¹³⁵ *R.A. V. v. City of St. Paul*,¹³⁶ *Virginia v. Black*,¹³⁷ *Snyder v. Phelps*,¹³⁸ and most recently, *Matal v. Tam*.¹³⁹

In *National Socialist Party of America*, the Court reversed a decision to deny an injunction prohibiting the National Socialist Party of America ("NSPA") from holding a demonstration.¹⁴⁰ In that case, the NSPA attempted to march in Skokie, Illinois—a community where many Holocaust survivors now live.¹⁴¹ The NSPA wanted to march donning uniforms that resembled those of the Nazis while displaying the swastika and distributing pamphlets which incited or promoted hatred against persons of Jewish faith and ancestry.¹⁴² The Court reasoned that imposing an injunction that infringes on First Amendment rights must allow either immediate appellate review or a stay pending appeal.¹⁴³ Because the Illinois courts failed to provide either, the Court deduced that "the State must . . . allow a stay."¹⁴⁴

In *R.A. V.*, a teenager allegedly burned a cross inside the fenced yard of a black family.¹⁴⁵ He was charged under the St. Paul Bias-Motivated Crime Ordinance, which stated that "whoever places on public or private property a symbol, object . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor."¹⁴⁶ The Supreme Court

132. *Id.*

133. *Id.*

134. *Id.* at 449.

135. 432 U.S. 43 (1977).

136. 505 U.S. 377 (1992).

137. 538 U.S. 343 (2003).

138. 562 U.S. 443 (2011).

139. 582 U.S. 218 (2017).

140. 432 U.S. 43, 45 (1977).

141. *Id.* at 44.

142. *Id.*

143. *Id.*

144. *Id.*

145. *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 379 (1992).

146. *Id.* at 380 (quoting ST. PAUL, MINN., MUN. CODE § 292.02 (1990)).

reversed the decision of the Minnesota Supreme Court, reasoning that states are actually not permitted to regulate fighting words in all contexts.¹⁴⁷ Specifically, this statute applied to fighting words that provoke violence “on the basis of race, [or] color.”¹⁴⁸ The First Amendment did not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.¹⁴⁹ This opinion re-affirmed the importance of imminence and narrowed the First Amendment exception on “fighting words.”

The Supreme Court doubled down on their protections of cross-burning in *Black*.¹⁵⁰ In 1998, at a KKK rally, the leader of the rally burned a cross in a privately-owned field.¹⁵¹ Virginia’s cross-burning statute stated that “[i]t shall be unlawful for any persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.”¹⁵² The statute further specified that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”¹⁵³ The Court held that Virginia’s statute was unconstitutional.¹⁵⁴ While the KKK has often used cross burning as a tool of intimidation and threat of impending violence, burnings have also remained potent symbols of shared group identity and ideology.¹⁵⁵ Accordingly, the Court reasoned that it was an unconstitutional restraint on speech when “any cross burning” was the prima facie evidence of intent to intimidate.¹⁵⁶ The Court held that the state was wrong to interpret that cross-burning by itself could support a conviction without further evidence of intent.¹⁵⁷

In 2011, the Supreme Court, with an 8-1 majority in *Snyder*, continued to strengthen free speech rights.¹⁵⁸ There, the Westboro Baptist Church picketed the funeral of Lance Corporal Matthew Snyder, a homosexual Marine that was killed in the line of duty in Iraq, with signs that read “Thank God for Dead Soldiers.”¹⁵⁹ The Supreme Court affirmed the lower court’s reversal of a punitive award of \$2.1 million dollars on an intentional infliction of emotional distress claim that had been awarded to Snyder’s father.¹⁶⁰ The Court’s reasoning was largely based on the contrast

147. *Id.* at 381.

148. *Id.* at 391.

149. *Id.*

150. *Virginia v. Black*, 538 U.S. 343 (2003).

151. *Id.* at 348–49.

152. VA. CODE ANN. § 18.2-423 (2003).

153. *Id.*

154. *Id.* at 347–48.

155. *Id.* at 361.

156. *Id.* at 347–48.

157. *Id.* at 367.

158. *Snyder v. Phelps*, 562 U.S. 443, 446 (2011).

159. *Id.* at 448.

160. *Id.* at 459.

between public and private speech protections.¹⁶¹ In evaluating what, where, and how it was said, the Court found that the Church was speaking on matters of public concern, the picketing was on public land adjacent to a public street, and there was no pre-existing relationship between the speech and Snyder that might suggest that the speech on public matters was intended to mask an attack Snyder over a private matter.¹⁶²

Lastly, and most recently, the Court decided *Matal* in 2017.¹⁶³ There, the Court held that the disparagement clause of the Lanham Act violated the First Amendment's Free Speech Clause.¹⁶⁴ The disparagement clause of the Lanham Act prohibited the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."¹⁶⁵ Justice Alito, writing for a plurality of the Court, stated, "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"¹⁶⁶

With very limited exception, the Supreme Court precedent highlights the Court's inclination towards strong protections of free speech rights of the First Amendment in the face of hateful speech and offensive conduct.

II. GOVERNMENTAL RESPONSE TO HATE CRIMES AND SPEECH HAS NOT BEEN AN EFFECTIVE DETERRENT

Although Congress has made laudable efforts to pass legislation in response to hateful events, current legislation on hate crimes has been ineffective at deterring hate crimes in the United States. This can be attributed to the wide variance in hate crime law between states, ineffective reporting, a lack in federal prosecution, the federal prosecution incentive scheme, and reporting systems not being known by the individuals and communities that are victimized by hate crimes.¹⁶⁷ Furthermore, studies have shown that a rise in hate speech leads to a rise in hate crimes, but there is no way to limit hate speech without implicating our nation's strong First

161. *Id.* at 451.

162. *Id.* at 454–55.

163. *Matal v. Tam*, 582 U.S. 218 (2017).

164. 15 U.S.C. § 1052(a) (2018).

165. *Id.*

166. *Matal*, 582 U.S. at 246 (plurality) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

167. *See infra* Section II.A.

Amendment free speech protections.¹⁶⁸ This Part discusses each of these issues on hate crimes and hate speech in turn.

A. *Ineffective Hate Crime Legislation and the Prosecutorial Incentive Scheme*

Over the past twenty-five years, the federal government and forty-nine states have passed pieces of legislation which address hate crimes in some way.¹⁶⁹ However, reported hate crimes soared to new heights in 2020.¹⁷⁰ Even as new hate crime legislation continues to be passed, hateful acts continue to increase at an alarming rate.¹⁷¹ This legislative ineffectiveness can be attributed to a few reasons.

The multi-faceted disconnect and discrepancy between the state and federal hate crime laws contributes to the legislative ineffectiveness. At the federal level, hate crime laws include crimes committed on the basis of the victim's perceived or actual race, color, religion, national origin, sexual orientation, gender, gender identity, or disability.¹⁷² But hate crime laws vary widely from state to state as to which groups are afforded protection. For example, while Montana's hate crime laws cover race, national origin, and religion, Rhode Island's laws additionally cover sexual orientation, gender, and disability.¹⁷³ There is also variance on whether and how States address criminal penalties and civil remedies, the range of crimes covered, whether they require specific training of law enforcement to support improved prevention and response, and whether the statutes contain recording requirements.¹⁷⁴

The reality of the state-to-state and state-to-federal hate crime law variance is that an individual who is a victim of a hate crime may be denied protection depending on the state they live in.¹⁷⁵ Further, while the Shepard Byrd Act allowed for hate crimes to be charged in federal court, most States also enforce hate crimes through their own state and local law enforcement in state and local courts.¹⁷⁶ This creates another discrepancy as to where hate crimes can be brought to trial.

The variance in state hate crime statutes and the discrepancy between state and federal hate crime laws does not provide legal advocates or the public a clear definition of what a hate crime is. This variance is detrimental to the issue as a whole

168. See Kunal Relia et al., *Race, Ethnicity and National Origin-Based Discrimination in Social Media and Hate Crimes Across 100 U.S. Cities*, in PROCEEDINGS OF THE THIRD INTERNATIONAL AAAI CONFERENCE ON WEB AND SOCIAL MEDIA 417, 418 (2019).

169. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 22.

170. *Id.* at 7 (“According to the FBI, 2019 saw a ten-year high in reported hate crimes.”).

171. See Campbell, *supra* note 167.

172. *Learn About Hate Crimes*, *supra* note 43.

173. *Federal Laws and Statutes: Federal Hate Crime Laws*, U.S. DEP'T OF JUST. (Jan. 27, 2023), <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/VX82-76SH>].

174. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 11.

175. See *id.* at 22.

176. *Federal Laws and Statutes: Federal Hate Crime Laws*, *supra* note 173.

because as a result, hate crime reporting has never been able to be precise or reliable. This can be shown by the fact that one State's hate crime laws which cover fewer protected groups will inevitably have fewer reported hate crimes than a different State's hate crime laws which cover more protected groups. This fragmentation and imprecision of information creates a large obstacle to responding to hate crimes.

State and the federal governments have made efforts to increase reporting on hate crimes. As discussed above, about half of the States require some sort of hate crime data collection.¹⁷⁷ At the federal level, Congress passed the Hate Crimes Statistics Act.¹⁷⁸ This Act requires the collection of data “about crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity,”¹⁷⁹ and its collection requirement is carried out through the Uniform Crime Reporting (“UCR”) program.¹⁸⁰

The UCR collects data on hate crimes by relying on voluntary participation by law enforcement agencies across the country.¹⁸¹ The other key federal source is the Bureau of Justice Statistics' National Crime Victimization Survey (“NCVS”).¹⁸² “[T]he NCVS is an annual survey of a nationally representative sample of roughly 160,000 people across the country and their experiences of crime over the past year.”¹⁸³ The NCVS communicates directly with people in the United States, which means that it includes hate crimes that were not reported to law enforcement or the FBI.¹⁸⁴

The NCVS shows the clear deficiency in the data collection required by the Hate Crimes Statistics Act. The NCVS data illustrate that “from 2013 to 2017, an average of 204,600 ‘hate crime victimizations’ were experienced every year—but only 7,500 hate crimes were eventually reported by law enforcement to the FBI's UCR program.”¹⁸⁵ In other words, this means that only 3.6% of all violent hate crimes were actually reported to the FBI each year.¹⁸⁶ There are two main reasons for the lack of data and reporting, which are discussed below.

First, as a general matter, hate crime victims do not report their experiences to law enforcement. According to a recent special report by the Department of Justice,

177. See *supra* Section I.A.

178. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 34 U.S.C. § 41305 (2018)).

179. 34 U.S.C. § 41305(b)(1) (2018).

180. See 28 U.S.C.A. § 534 (Westlaw through Pub. L. No. 117-262) (creating the UCR program).

181. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 4.

186. See GRACE KENA & ALEXANDRA THOMPSON, U.S. DEP'T OF JUST., NCJ300954, HATE CRIME VICTIMIZATION, 2005–2019, at 11 fig. 6 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/hcv0519_1.pdf [<https://perma.cc/CE9G-6RF9>].

the most common reason that victims gave for not reporting to police was that the hate crime was handled another way (privately or through non-law enforcement officials).¹⁸⁷ The next reason, which twenty-three percent of respondents reported, was that victims believed that the police could not or would not do anything to help.¹⁸⁸ This belief is not irrational—only four percent, or one in every twenty-five reported hate crimes, actually resulted in an arrest.¹⁸⁹

Separately, a study showed that thirty-one percent of black adults and twenty-two percent of Native American adults have avoided calling the police, even when in need, due to concern that they would be racially discriminated against.¹⁹⁰ Only two percent of white adults reported this same behavior.¹⁹¹ A survey released by AAPI Data showed that “Asian Americans [during the pandemic] have experienced hate incidents at a significantly higher percentage than the general population but are also among the least likely to say they are ‘very comfortable’ reporting hate crimes to authorities.”¹⁹² “What our data show is that upwards of two million AAPIs have experienced these hate incidents since COVID-19 started,” Karthick Ramakrishnan, the AAPI Data’s founder, told NBC Asian America.¹⁹³ “But a very small fraction of them have reported to community hotlines and an even smaller proportion, at least what we know, have been established by law enforcement authorities as hate crimes.”¹⁹⁴

The second reason why there is a lack of reporting data is that many times, the hate crimes that do end up getting reported to law enforcement are not consistently or reliably collected, or even reported to the FBI.¹⁹⁵ This is because there are many obstacles to ensuring that the initial report of an individual experiencing a hate crime is actually submitted to the FBI.¹⁹⁶ For example, law enforcement must properly identify and respond to crimes as a hate crime.¹⁹⁷ While properly identifying a hate crime can be challenging and confusing, only eighteen states require law enforcement

187. *Id.* at 6.

188. *Id.* at 4, note.

189. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 27.

190. NPR ET AL., DISCRIMINATION IN AMERICA: FINAL SUMMARY 10 (2018), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf> [<https://perma.cc/HCS6-H8C6>].

191. *Id.* at 10.

192. Kimmy Yam, *Asian Americans are Least Likely to Report Hate Incidents, New Research Shows*, ABC NEWS (Mar. 31, 2021, 12:56 PM), <https://www.nbcnews.com/news/asian-america/asian-americans-are-least-likely-report-hate-incidents-new-research-n1262607> [<https://perma.cc/HC56-4YD6>]; *see also* Erin Pinkus, *AAPI Data/SurveyMonkey Poll: 2021 American Experiences with Discrimination*, SURVEY MONKEY, <https://www.surveymonkey.com/curiosity/aapi-data-2021-discrimination/> [<https://perma.cc/Z7Z6-B3RM>].

193. Yam, *supra* note 192.

194. *Id.*

195. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 28.

196. *Id.*

197. *Id.*

training on how to properly identify and investigate hate crimes.¹⁹⁸ Further, the Uniform Crime Reporting program relies on voluntary participation.¹⁹⁹ In reality, only about fourteen percent of the participating agencies actually reported any hate crime incidents in 2019.²⁰⁰

An example of the breakdown of this reporting chain can be seen by a report involving the Orlando Police Department in 2015.²⁰¹ The Department had reported five hate crimes in 2015 to the Florida Department of Law Enforcement, but the FBI data shows no hate crimes investigated in Orlando that year.²⁰² The Omaha Police Department stated that they “do not feel comfortable providing the numbers since they are concerned about their accuracy. It was difficult to identify hate crimes properly.”²⁰³ These obstacles create challenges for the police and leave room for potential bias.²⁰⁴ Many times, they can completely halt the initial report from making its way to the FBI.²⁰⁵

Breaking it down into numbers, there are an estimated 204,600 hate crime victimizations per year.²⁰⁶ Of those, 101,900 are reported to the police.²⁰⁷ 45,600 are reported to police and described by the victim as a hate crime.²⁰⁸ 15,200 of those are designated by police as a hate crime.²⁰⁹ 7,500 of those designated as hate crimes are actually reported by the police and make it to the FBI.²¹⁰ Thus, out of all of the estimated hate crime victimizations per year, only 3.6% make it to the FBI. “The current statistics are a complete and utter joke,” said Roy Austin, a former deputy assistant attorney general in the Department of Justice’s Civil Rights Division.²¹¹

In short, accurate reporting of hate crimes is critical in comprehending the full scope of hate crimes in the United States. While the recent legislative efforts are commendable, there are still many gaps in addressing the extreme disconnect between hate crime victimizations and FBI reporting. Without a clear picture of the hate crimes issue, it is infeasible to come up with solutions to defend against hateful

198. *Id.*

199. *Id.* at 2.

200. *Id.* at 28.

201. See Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017, 8:00 AM), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics> [<https://perma.cc/2UHH-N6MN>].

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 4.

207. *Id.* at 5, figure 3.

208. *Id.*

209. *Id.*

210. *Id.*

211. Schwencke, *supra* note 201.

violence from increasing in the United States. The variation and ineffectiveness of hate crime legislation reaches far beyond faulty hate crime statistics and reporting—it also spills into prosecution, education, and deterrence.

In addition to the unreliable reporting mechanisms for hate crimes, prosecutors rarely take reported hate crimes to trial.²¹² Federal and state legislatures have passed multiple statutes to deter violent and racist activities and to give prosecutors the right tools to bring these hateful acts to trial successfully.²¹³ Almost every State has enhanced criminal punishment for hate crimes.²¹⁴ While all States vary, all have some element of protected classes, institutional vandalism, collateral consequences, non-carceral sentencing, right to civil actions, victim protections, data collection, and law enforcement training.²¹⁵

On the federal side, the Civil Rights Act of 1968 made it a federal crime to use, threaten to use, or force to willfully interfere with any person because of race, color, religion, or national origin and because the person is participating in a federally protected activity, such as public education, employment, jury service, travel, or the enjoyment of public accommodations, or helping another person to do so.²¹⁶ Since then, federal hate crime law has expanded. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act eliminated some of the barriers in prosecuting hate crimes.²¹⁷ First, it removed the requirement that the hate crime must be committed while the victim was participating in a federally protected activity.²¹⁸ Second, it expanded the protected groups to include gender, sexual orientation, gender identity, and disability in certain situations.²¹⁹ Further, that Act expanded federal jurisdiction over hate crimes such that the federal government can aid states in their investigations and intervene to protect civil rights in some cases.²²⁰ As can be seen, with the recent passage of legislation like the Shepard and Byrd Hate Crimes Prevention Act, prosecutors have been given more tools to prosecute hate crime transgressors, at least theoretically.

However, even with the recent expansion of hate crime legislation, federal prosecutors rarely bring reported hate crimes to trial. From October 1, 2004, to September 30, 2019, U.S. Attorneys Offices have investigated a total of 1,864 suspects in

212. See MARK MOTIVANS, U.S. DEP'T OF JUST., NCJ 300952, FEDERAL HATE CRIME PROSECUTIONS, 2005–19 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fhcp0519.pdf> [<https://perma.cc/54AF-4B9C>].

213. See *supra* Section I.A.

214. Forty-six states have enhanced punishment statutes concerning hate crimes. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 4.

215. *Id.* at ii–iii.

216. *Supra* notes 57–58 and accompanying text.

217. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 1.

218. See *id.* at 9.

219. See *id.*

220. See *id.*

matters involving violations of federal hate crime statutes.²²¹ Out of the 1,864 suspects investigated for hate crimes, the U.S. Department of Justice declined to prosecute 1,548 of them, or eighty-two percent of hate crimes investigated.²²² Only one percent of hate crime suspects had their cases resolved by a magistrate judge, and only seventeen percent were prosecuted.²²³ Federal prosecutors gave a variety of reasons for deciding not to file federal charges.²²⁴ The most common reason, present in fifty-five percent of cases, was because of insufficient evidence.²²⁵ The second most common reason was the prioritization of federal resources, followed by the suspect being subject to the authority of another jurisdiction and the federal government lacking legal jurisdiction to file charges.²²⁶ Between 2005 and 2009, and 2015 and 2019, the share of declinations due to insufficient evidence rose from forty-nine percent to sixty-three percent.²²⁷

Given the thousands of incidents that happen every year, as well as the five federal statutes covering hate crimes, Michael German, a retired FBI agent stated that “it’s remarkable the DOJ only successfully prosecutes a small number each year. If the Justice Department made hate crimes a priority and stopped deferring to state and local police and instead devoted resources to federal investigations, they could find substantially more cases worthy of prosecution.”²²⁸

Not surprisingly, of the slim percentage of hate crimes that federal prosecutors did choose to charge, the conviction rate from 2005 to 2019 was over ninety-four percent.²²⁹ High conviction rates are not unique to hate crimes. Only 320 of 79,704 total federal defendants—fewer than one percent—went to trial and won their cases, at least in the form of acquittal.²³⁰ That means that most defendants who did go to trial were found guilty, either by a judge or jury.²³¹ Prosecutors use their conviction rates “as a measure of success. For instance, the U.S. Attorney’s Office keeps track of its successful ‘batting average.’”²³²

221. MOTIVANS, *supra* note 212, at 1, 3.

222. *Id.* at 3, 6 tbl. 5.

223. *Id.* at 1.

224. *See id.* at 6.

225. *Id.*

226. *Id.*

227. *Id.*

228. Justin Wise, *US Attorneys Prosecute Small Slice of Hate Crime Probes*, LAW360 (July 11, 2021, 8:02 PM), <https://www.law360.com/articles/1401505/us-attorneys-prosecute-small-slice-of-hate-crime-probes> [https://perma.cc/CN8V-7DCM].

229. MOTIVANS, *supra* note 212, at 1.

230. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://pewrsr.ch/2F1Qxn7> [https://perma.cc/24UL-3SXT].

231. *Id.*

232. Catherine Ferguson-Gilbert, Note, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CASE W. RESV. L. REV. 283, 291 (2001).

This incentive scheme and “win-at-all-costs” attitude leaves much room for misconduct. Prosecutorial discretion and misconduct are an age-old problem that is known to cause disparate racial effects. One of the most well-known examples of this is the war on drugs:

[T]he 1-to-100 crack-to-cocaine federal sentencing ratio results in much higher sentences for defendants convicted of drug trafficking offenses involving crack, of whom approximately 85% are black, than those whose offenses involve the same quantity of cocaine powder, of whom only 30.5% are black—even though ‘recent research indicates that the current penalty structure . . . greatly overstates the relative harmfulness of crack cocaine.’²³³

On the other hand, the same prosecutorial discretion and conviction incentive scheme overcharges minorities and undercharges transgressors that commit hate crimes against minorities. As discussed above, inaccurate reporting critically affects the evidence available to federal prosecutors. The high burden of proof also makes it less likely that prosecutors will want to bring hate crimes to trial.²³⁴ Therefore, out of the already–slim percentage of hate crimes that are reported to U.S. Attorney’s Offices, prosecutors have no incentive to take a case that would hurt their “batting average.” This sort of prosecutorial culture discourages minorities who are already, as previously mentioned, less likely to seek law enforcement help for reporting hate crimes.²³⁵

As discussed previously, there is an urgent need to improve the reporting system for hate crimes as a whole.²³⁶ On the other hand, it is equally critical to make sure that victims of hate crimes know that the reporting system is available to them. Even the most efficient and well-thought-out reporting system would not have much use if hate crime victims did not know it existed. It is especially unclear whether reporting resources will reach the communities that have been affected the most, amidst the surge in Asian hate crimes during the pandemic. Reports of harassment against Asians sixty-five or over grew the fastest from 2019 to 2020.²³⁷ While the number of harassment incidents against young Asian New Yorkers continued trending

233. Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, 19 FED. SENTENCING REP. 192, 193 (2007) (alteration in original) (footnote omitted).

234. See *supra* notes 229–233 and accompanying text.

235. See NPR ET AL., *supra* note 190.

236. See Section II.A

237. Christine Chung & Weihua Li, *Older Asians Face ‘A Whole Wave’ of Hate Hidden in Official NYPD Stats*, THE CITY (Apr. 20, 2021, 5:01 AM), <https://www.thecity.nyc/2021/4/20/22392871/older-asians-face-a-hate-hidden-nypd> [<https://perma.cc/D9HX-ZHS6>]; see also *NYPD Complaint Data Current Year (Year to Date)*, NYC OPENDATA, <https://data.cityofnewyork.us/Public-Safety/NYPD-Complaint-Data-Current-Year-To-Date-/5uac-w243> (last visited Oct. 19, 2022).

downward, those against Asians ages forty-five and up began to increase, with victims sixty-five and older experiencing the biggest spike.²³⁸

The increase in unprovoked attacks on elderly Asian Americans were not unique to New York; rather, they have been starkly rising around the nation. The Center for the Study of Hate and Extremism at California State University, San Bernardino, examined police data from sixteen jurisdictions across the country on the increase in anti-Asian hate crimes in the first quarter of 2021 compared with the same period last year.²³⁹ New York saw the greatest increase at 223%, followed by 140% in San Francisco, 80% in Los Angeles, and 60% in Boston.²⁴⁰ The study's author, Brian Levin, said the jurisdictions were chosen because they have large Asian American populations and a history of collecting reliable data on hate crimes.²⁴¹ This jurisdictional statistic is telling because the largest number of older Asian Americans live in California at 861,437 and New York at 214,189—both cities noted in the study.²⁴²

Other experts have further pointed out that such attacks are probably still underreported due to language barriers and technological issues.²⁴³ This is also troubling because elder individuals show low adjustments to the advent of new technologies compared to younger generations, either because they do not have the technological experience or because of their current health status.²⁴⁴ So, while expanding the reporting system is absolutely needed, it is unclear whether the elderly of the AAPI community, who have been the biggest victims of the recent hate crimes, would benefit much from an online reporting system, given their lack of familiarity with the internet.²⁴⁵ There is a need to reassess not only hate crime reporting as a whole, but also the way in which victims are able to learn and use the resources necessary to adequately report and thereby deter hate crimes.

Despite the many shortcomings of federal and state hate crime laws, the statutes are trending in the right direction. The Matthew Shepard and James Byrd Jr. Act

238. Chung & Li, *supra* note 237.

239. CAL. STATE UNIV., SAN BERNARDINO, CTR. FOR THE STUDY OF HATE AND EXTREMISM, REPORT TO THE NATION: ANTI-ASIAN PREJUDICE & HATE CRIME 2 (2021), <https://www.csusb.edu/sites/default/files/Report%20to%20the%20Nation%20-%20Anti-Asian%20Hate%202020%20Final%20Draft%20-%20As%20of%20Apr%2030%202021%206%20PM%20corrected.pdf> [<https://perma.cc/RKU5-AGW8>] [hereinafter CAL STATE REPORT TO THE NATION].

240. *Id.* at 3.

241. *Id.*

242. U.S. DEP'T OF HEALTH & HUMAN SVS., ADMIN. FOR CMTY. LIVING, 2018: PROFILE OF ASIAN AMERICAN AGE 65 AND OVER (2019), https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2018AsA_OAProfile.pdf [<https://perma.cc/54N4-Y8E4>].

243. CAL STATE REPORT TO THE NATION, *supra* note 239, at 3.

244. Zoe Roupá et al., *The Use of Technology by the Elderly*, 4 HEALTH SCI. J. 118, 119 (2010).

245. Youngjin Jang, Note, *Hate is a Virus: Recent Surge in Anti-Asian Hate Crimes and the Sufficiency of the Current Hate Crime Laws*, MINN. L. REV. (May 10, 2021).

broke down many barriers in federal hate crime prosecution.²⁴⁶ The hate crimes against members of the AAPI community around the nation have brought to light many issues on hate crime legislation, which led to the enactment of the COVID-19 Hate Crimes Act.²⁴⁷ But, as discussed above, the current reporting system has led to inaccurate data around hate crimes in the United States as a whole.²⁴⁸ Without a strong reporting system, it is impossible to gauge the full gravity of the issue. Further, prosecutors will likely not bring reported hate crimes to trial because of the lack of reporting, and the incentive to keep conviction rates high.²⁴⁹ Lastly, it is unclear if the current hate crime reporting systems will even reach the victims of the recent hate crimes against the AAPI community.²⁵⁰ By and large, there is a lot more that can be done to refocus or supplement current hate crime law to better understand and combat hate crimes in the United States.

B. *Non-Existent Hate Speech Law*

Hate speech, similar to hate crimes, had an immense increase during the COVID-19 pandemic. An increase in online abuse towards Asian people during the pandemic has been reported worldwide, with a new study showing the number jumping 2770% in 2020 from 2019.²⁵¹ A March 2020 tweet by then President Trump that referred to COVID-19 as “the Chinese virus” led anti-Asian hashtags on Twitter to rise “precipitously,” according to a new study published by the University of California, San Francisco.²⁵² In the days before and after Trump’s tweet, the researchers examined 700,000 tweets containing more than 1.2 million anti-Asian hashtags, which the researchers said are known to be a predictor of hate crimes and the formation of hate groups.²⁵³ The correlation between the rise in hate speech and crimes is not unique to the anti-Asian hate seen during the COVID-19 pandemic.

Free speech expert Susan Benesch, referring to President Trump’s anti-Muslim and anti-Hispanic rhetoric, stated that “[t]he president’s rhetoric has helped to shift discourse norms in our country such that it is more acceptable among more people to denigrate and attack other groups of human beings.”²⁵⁴ The hate rhetoric spoken by

246. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at 13.

247. See Barbara Sprunt, *Here’s What The New Hate Crimes Law Aims To Do As Attacks On Asian Americans Rise*, NPR (May, 20 202, 4:32 PM), <https://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise> [<https://perma.cc/WT25-U7D7>].

248. See Section II.A.

249. *Supra* notes 229–34 and accompanying text.

250. *Supra* notes 192–93 and accompanying text.

251. See DITCH THE LABEL, *supra* note 9, at 12.

252. Hswen et al., *supra* note 10, at 96.

253. *Id.*

254. Colby Itkowitz, *An Expert on ‘Dangerous Speech’ Explains How Trump’s Rhetoric and the Recent Spate of Violence Are and Aren’t Linked*, THE WASH. POST (Oct. 29, 2018, 2:40 PM), <https://www.washingtonpost.com>

Trump did not change the attitudes of individual Americans but may have “emboldened individuals to express, and act on, pre-existing views that they had once hidden.”²⁵⁵ Referring back to Trump’s anti-Muslim and anti-Hispanic remarks, there was a surge in discussions on Facebook and other social media sites sparked by his comments in 2016.²⁵⁶ This growing discussion led to an increase in anti-Muslim tweets, which garnered attention from cable news channels.²⁵⁷ In subsequent days, hate crimes against Muslims increased thirty-two percent, with a significant, but lesser, increase against the Hispanic community, another target of Trump’s rhetoric.²⁵⁸ Specific tweets have led to increases in hate crimes, with the level rising and falling depending on the prevalence of the social media activity.²⁵⁹

In 2019, NYU researchers used artificial intelligence to show the link between online hate speech and offline violence in 100 cities.²⁶⁰ According to this study, cities with a higher incidence of a certain kind of racist tweet reported more actual hate crimes related to race, ethnicity, and national origin.²⁶¹ The research team started by analyzing the location and linguistic features of 532 million tweets published between 2011 and 2016.²⁶² Then, they trained a machine learning model to identify and analyze two types of tweets: (1) those that are targeted (directly espousing discriminatory views), and (2) those that are self-narrative (describing or commenting upon discriminatory remarks or acts).²⁶³ The team compared the prevalence of each type of discriminatory tweet to the number of actual hate crimes reported during that same time period in those same cities.²⁶⁴ Head researcher Kunal Relia stated that the team found that more targeted, discriminatory tweets posted in a city related to a higher number of hate crimes.²⁶⁵ This trend across different types of cities (for example, urban, rural, large, and small) confirms the need for more specific studies on how

m/politics/2018/10/29/professor-who-defined-dangerous-speech-how-trumps-rhetoric-pittsburgh-are-linked/ [https://web.archive.org/web/20211219101405/https://www.washingtonpost.com/politics/2018/10/29/professor-who-defined-dangerous-speech-how-trumps-rhetoric-pittsburgh-are-linked/].

255. Daniel L. Byman, *How Hateful Rhetoric Connects to Real-world Violence*, THE BROOKINGS INST. (Apr. 9, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/04/09/how-hateful-rhetoric-connects-to-real-world-violence/> [https://perma.cc/6MTC-GD8B].

256. Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment*, AM. ECON. J.: APPLIED ECON. 1 (forthcoming) (manuscript at 3) (available at <https://perma.cc/KNW5-MBM8>).

257. *Id.* at 3.

258. *Id.*

259. *Id.* at 4.

260. Relia et al., *supra* note 168, at 417.

261. *Id.* at 418.

262. *Id.*

263. *Id.* at 417.

264. *Id.* at 425.

265. *Id.* at 417.

different types of discriminatory speech online may contribute to consequences in the physical world.²⁶⁶

The correlation between increases in hate speech leading to increases in hate crime is problematic because the U.S. Supreme Court has repeatedly ruled that laws criminalizing hate speech violate the guarantee to freedom of speech in the First Amendment.²⁶⁷ Our nation's response to the rise in hate speech has not just been ineffective—it has been non-existent.

As stated above, the Supreme Court has held that openly offensive or hateful speech is protected under the Constitution, unless that speech has undeniably crossed into the “inciting violence or danger” category.²⁶⁸ The Court in *Brandenburg* stated this rule:

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe the advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.²⁶⁹

The “inciting” or “fighting words” exception created by the Supreme Court has diminished as the Court continued to strengthen the guarantee to the freedom of speech. In *R.A. V.*, Justice Scalia, in delivering the opinion for the Court, struck down the ordinance that made burning a cross a misdemeanor because it was an impermissible restriction on the freedom of speech.²⁷⁰ The Court held that the cross burning outlawed by St. Paul did not constitute “fighting words;” rather, it was a prohibition on those speakers who express views on disfavored subjects.²⁷¹ Additionally, the Court in *Black* stated that cross burning could be banned if it was carried out with the intent to intimidate.²⁷² However, the statute there was unconstitutional because it specified that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”²⁷³ Justice Thomas dissented, stating that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”²⁷⁴ Additionally, Justice Thomas concluded that, “under the plurality’s view, physical safety will be valued less than the right to be free from unwanted communications.”²⁷⁵

266. *Id.*

267. *See Snyder v. Phelps*, 562 U.S. 443 (2011); *see also Matal v. Tam*, 582 U.S. 218 (2017).

268. *Supra* Section I.B.

269. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

270. *R.A.V. v. City of Saint Paul*, 505 U.S. 382, 379–96 (1992).

271. *Id.* at 392.

272. *Virginia v. Black*, 538 U.S. 349 (2003).

273. *Id.* at 349 (quoting VA. CODE ANN. § 18.2-423.01 (West 1996)).

274. *Id.* at 392 (Thomas, J., dissenting).

275. *Id.* at 401.

Even outside of cross burning, the Supreme Court has conclusively squashed the exception of “fighting words.” The Court has even upheld free speech rights in *Snyder v. Phelps*, as the Westboro Baptist Church picketed the funeral of Matthew Snyder, a gay Marine that was killed in the line of duty, with signs that read “Thank God for Dead Soldiers.”²⁷⁶ The Court has shown that no matter how egregious the speech in the cases above have been, strong commitment to protecting free speech is the priority. As hate speech continues to rise, the unbreakable and battle-tested “fighting words” exception to free speech perpetuate the subordination of public safety—especially the safety of minority groups in the United States.

Further, even if the “fighting words” exception was litigable, the most common forms of online hate speech are the use of slurs and tropes—which are completely protected by the First Amendment.²⁷⁷ Violent threats were the second most common form of online hate speech.²⁷⁸ Discussions about violence and threats online saw a twenty-two percent increase following the start of the pandemic and resurgence of the “Black Lives Matter” movement in the summer of 2020.²⁷⁹ Images and symbols of hate drove the least amount of online discussion compared to other forms but saw the largest increase in volume respectively since the pandemic began.²⁸⁰ Real examples of this sort of hate speech are “Black Lives Matter” signs getting defaced with swastikas and other racist symbols or images of individuals of Asian descent with messages about COVID-19 or telling them to return to where they came from.²⁸¹ Therefore, the majority of hate speech is indefensibly covered by the First Amendment.

Proponents of strong First Amendment free speech rights argue that the government should not have a say in what is acceptable in the expression of free speech.²⁸² Further, one individual’s idea of hate speech may completely vary from another’s idea of hate speech.²⁸³ Therefore, they argue that there should be no line drawing, especially from the government.²⁸⁴ These arguments stem from the “Marketplace of Ideas” theory, made popular by Oliver Wendell Holmes Jr. in his dissent in *Abrams v. United States*.²⁸⁵ There, Justice Holmes stated:

276. See *Snyder v. Phelps*, 562 U.S. 443 (2011).

277. DITCH THE LABEL, *supra* note 9, at 7.

278. *Id.* at 8.

279. *Id.* at 7.

280. *Id.* at 8.

281. *Id.*

282. See Lee Rowland, *Free Speech Can Be Messy, But We Need It*, ACLU (Mar. 9, 2018), <https://www.aclu.org/blog/free-speech/free-speech-can-be-messy-we-need-it> [<https://perma.cc/TPY3-NYAU>].

283. See *id.*

284. See *id.*

285. *Abrams v. United States*, 250 U.S. 616, 625–631 (1919) (Holmes, J., dissenting).

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely can be carried out.²⁸⁶

The idea behind this theory is that the foremost way to truly dispose of dangerous ideas is to refute them—not to stop them from being said.

However, the “Marketplace of Ideas” theory does not account for the fact that in the age of social media, public hate speech can attract and bring individuals together that share similar moral beliefs and values.²⁸⁷ University of Southern California (USC) researchers found that Gab users (an alternative social media network popular with alt-right and right-wing extremists) who had a similar moral profile were more likely to disseminate hate speech and use language intended to dehumanize or even call for violence against outgroup members.²⁸⁸ Hate speech utilized in this way has the power to be so derogatory that it does not engage with the public conversation on any level of reason and actually defeats it by leaving no room in the discussion. To demonstrate, a social media study run by Ditch the Label included examples of real hate speech comments that were found in online arguments where one individual began using someone else’s race or ethnic background as a reason to not believe or listen to them.²⁸⁹ “Tell me how it feels being a part of the ugliest and least desirable race in this world, you n****,” is just one such example of the comments given in the study.²⁹⁰ As can be seen, good ideas that are backed by ethics and reason do not always effectively shut down bad ideas.

When hate speech is aimed at historically oppressed minorities, it perpetuates their oppression by causing victims to internalize the hateful messages and act accordingly. Hateful language has the power to diminish tolerance and enable discrimination—values that the First Amendment was designed to protect.²⁹¹ It is impossible to predict the next time Donald Trump, or another future political leader, will publicly denounce a minority group. It is also not possible to predict when the next big racial equality movement or pandemic will occur. However, it is more than reasonable to

286. *Id.* at 630.

287. Jenesse Miller, *Hate Speech on Social Media is Fueled by Users’ Shared Values and Moral Concerns*, USC DORNSIFE COLL. OF LETTERS, ARTS AND SCI. (Dec. 16, 2021), <https://news.usc.edu/195881/online-extremism-linked-to-shared-moral-beliefs/> [<https://perma.cc/P2JE-YK4S>].

288. Mohammad Atari et al., *Morally Homogenous Networks and Radicalism*, 13 SOC. PSYCH. & PERSONALITY SCI. 999 (2021).

289. DITCH THE LABEL, *supra* note 9, at 11.

290. *Id.*

291. See Richard Stengel, Opinion, *Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019, 8:20 AM), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/> [<https://web.archive.org/web/20230318060849/https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/>].

predict that if hate speech rises around any of those events, the U.S. government will do nothing to stop the rise in hate speech, even when it causes an increase in hate crime.

III. RECOMMENDATIONS FOR THE RESPONSE ON HATE CRIMES AND SPEECH

A. *New Legislation and Further Recommendation to Improve Current Hate Crime Laws*

As discussed throughout this Note, there have been many legislative efforts to counteract and deter hate crimes in the nation. Even so, there are still many opportunities to improve existing hate crime laws by addressing the gaps in both state and federal legislation. Recently, Congress has passed new legislation to enhance our nation's ability to confront hate crimes. On May 20, 2021, President Biden signed the COVID-19 Hate Crimes Act into law, which had been sponsored by Hawaii Senator Mazie Hirono and New York Representative Grace Meng, both of whom were Democrats.²⁹² While the implementation and effects of this new legislation are still uncertain, it is certainly a step in the right direction. This Section discusses the new federal legislation as well as other recommendations and suggestions to further address the growing problem of hate crimes in the United States.

In response to the current surge in hate crimes that specifically target the AAPI community, the COVID-19 Hate Crimes Act called for the Attorney General to “designate an officer or employee of the Department of Justice . . . to facilitate the expedited review of hate crimes . . . and reports of any such crime to Federal, state, local or Tribal law enforcement agencies” that have occurred and will occur during the COVID-19 pandemic.²⁹³ The Act incorporated the federal definition of hate crime codified at 18 U.S.C. § 249,²⁹⁴ which defines hate crimes as crimes of violence motivated by “the actual or perceived race, color, religion, or national origin of any person.”²⁹⁵

Further, the Act stated that the Attorney General shall direct state and local law enforcement agencies to “establish online reporting of hate crimes or incidents, and to have online reporting that is equally effective for people with disabilities as for people without disabilities available in multiple languages.”²⁹⁶ Last, the Act instructed that “[t]he Attorney General and the Secretary of the Department of Health

292. Maegan Vazquez, *Biden Signs Bill Aimed at Addressing Rise in Anti-Asian Hate Crimes*, CNN (May 20, 2021, 4:12 PM), <https://www.cnn.com/2021/05/20/politics/biden-anti-asian-hate-crimes-covid-19-signing/index.html> [<https://perma.cc/237R-SK69>]; see also COVID-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265 (2021) (codified at 34 U.S.C.A. § 30507 (Westlaw through Pub. L. No. 117-262)).

293. COVID-19 Hate Crimes Act § 3(a), 135 Stat. at 266.

294. See *id.*

295. 18 U.S.C. § 249(a)(1), (2) (2018).

296. COVID-19 Hate Crimes Act § 4(a)(1), 135 Stat. at 265.

and Human Services, in coordination with the COVID-19 Health Equity Task Force and community-based organizations, shall issue aimed at raising awareness of hate crimes during the COVID-19 pandemic.”²⁹⁷

Section 5 of the COVID-19 Hate Crimes Act, the Jabara-Heyer NO HATE Act,²⁹⁸ was named in honor of two hate crime victims whose murders were prosecuted as hate crimes, but were not appropriately included in hate crime statistics.²⁹⁹ Khalid was shot to death by a next-door neighbor, a man known to law enforcement for his persistent targeting of the Arab-American family.³⁰⁰ One year later, Heather joined peaceful counter-protesters in the Charlottesville rallies.³⁰¹ She was walking down a side street when a man purposefully plowed his car into the crowd—a crowd he had targeted because of its racial diversity—killing Heather and wounding many others.³⁰²

The Jabara-Heyer NO HATE Act gave the Attorney General authorization to provide grant funding to state and local governments to implement the National Incident-Based Reporting System (the FBI’s latest crime reporting standard); allowed the Attorney General to make grants to states to create state-run hate crime reporting hotlines and provide granting funding to agencies to establish programs to prevent, address, or otherwise respond to hate crime; and required the Attorney General to collect and analyze hate crime information provided by local and state governments to improve the accuracy of hate crime reporting and to develop policies and draft a qualitative and quantitative report and analysis of that data.³⁰³ Last, the Jabara-Heyer NO HATE Act also amended 18 U.S.C. § 249, the federal hate crime statute.³⁰⁴ Now, sentencing courts may require defendants who violate § 249 to undertake educational classes or community service as a condition of their supervised release.³⁰⁵

On May 27, 2021, the Attorney General released a memorandum outlining the steps the Department of Justice would take to give full effect to the new legislative

297. *Id.* § 4(b).

298. Jabara-Heyer NO HATE Act, Pub. L. No. 117-13, 135 Stat. 266 (2021) (codified at 34 U.S.C. § 30507).

299. Press Release, Alex De Luca, Hum. Rts. Campaign, The Human Rights Campaign Celebrates Passage of the Jabara-Heyer NO HATE Act in the U.S. House of Representatives (May 18, 2021), <https://www.hrc.org/press-releases/the-human-rights-campaign-celebrates-passage-of-the-jabara-heyer-no-hate-act-in-the-u-s-house-of-representatives> [<https://perma.cc/K5HT-T6HU>].

300. Susan Bro and Haifa Jabara, Opinion, *Hate Crimes Are Slipping Through the Cracks*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/opinion/hate-crime-statistics-heather-heyer.html> [<https://web.archive.org/web/20220420000348/https://www.nytimes.com/2019/08/12/opinion/hate-crime-statistics-heather-heyer.html>].

301. *Id.*

302. *Id.*

303. *See* 34 U.S.C.A. § 30507(d)–(g) (Westlaw through Pub. L. No. 117-262)).

304. *See* Jabara-Heyer NO HATE Act, § 5, Pub. L. No. 117-13, 135 Stat. 265, 272 (2021) (codified at 18 U.S.C.A. § 249(e) (Westlaw through Pub. L. No. 117-262)).

305. *See* 18 U.S.C. § 249(a)(e).

Acts.³⁰⁶ The DOJ will “assign a Deputy Associate Attorney General to lead the creation and coordination of the Department’s anti-hate crime and incident resources.”³⁰⁷ “This coordinator will help focus, streamline, and maximize the effectiveness of the Department’s relevant resources.”³⁰⁸ Further, this coordinator will be responsible for the implementation of the Act’s provisions on hate crime reporting, including establishing online reporting of hate crimes and state-run hate crime hotlines.³⁰⁹ Not only will the DOJ pour more resources and manpower into the reporting system, but they will also look to raise awareness of hate crimes during the COVID-19 pandemic to improve the accuracy of hate crime data. The DOJ will look to raise awareness by doing the following. First, they will “compile an online toolkit that provides USAO Civil Rights Coordinators with customizable community outreach materials, information about the Department’s grant opportunities and technical assistance programs, and other materials that may improve local reporting of potential hate crimes and incidents.”³¹⁰ Second, they look to engage with the specific communities they serve by “convening regular community forums to build relationships of trust and providing education about civil rights statutes and incident reporting mechanisms.”³¹¹ Lastly, the Attorney General will oversee the establishment of a full-time “Language Access Coordinator” within the department to overcome the language barrier in reporting hate crimes and incidents.³¹²

As recounted above, the new legislative acts, coupled with the prompt action and execution by the Attorney General, should fill many of the gaps in current hate crime legislation. However, to further remedy the inaccuracy in hate crime reporting, the DOJ should also help mend the lack of uniformity within state hate crime legislation. To make reporting more accurate among the states, the DOJ should require the states to record hate crimes by protected class. For example, if a hate crime is committed based on sexual orientation, it would be marked as such in that state. Furthermore, the DOJ should direct the states to track all protected groups by the federal hate crime standard, even if a specific protected group is not covered under that state’s specific law. This added reporting standard, together with the new efforts in hate crime training, should make national efforts to track trends in hate crimes against specific groups simpler and more precise. In addition to directing the states to track and report hate crimes in this way, the U.S. government should incentivize states to conform to the federal hate crime standard. A precondition of the federal funding to

306. Memorandum from the Att’y Gen. of the U.S. to Dep’t of Just. Emps. (May 27, 2021) (available at <https://perma.cc/T8J8-7VRZ>).

307. *Id.* at 2.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 3.

312. *Id.* at 4.

help with reporting and response to hate crimes could be to adopt a state statute that includes all the federally protected groups. So long as states choose to conform, there would be less state-to-state and state-to-federal variance in hate crime laws in the United States.

Lastly, it is important for the protections in the new legislation to carry over beyond COVID-19-related hate crimes, given that the hate for the AAPI community was around long before the pandemic. This can be remedied by adding language specifically to a few parts of the Act. For example, the COVID-19 Hate Crimes Act defines the “applicable period” during which the Department of Justice must compile data concerning hate crimes as one year after the federal state of emergency declared in response to COVID-19 has ended.³¹³ Legislators could expand the length of the applicable period concerning hate crimes against the AAPI community beyond one year after the end of the COVID-19 state of emergency has ended.” This way, the DOJ would be required to collect data concerning hate crimes directed at the AAPI community that are unrelated to COVID-19, which would help document general and long-standing hatred against the AAPI community in the United States.

As discussed above, one of the most common reasons federal prosecutors decline to take reported hate crimes to trial is because of insufficient evidence.³¹⁴ Hopefully, increasing resources into reporting and awareness will give prosecutors more confidence to bring hate crime cases to trial. Peripherally, there is still a need for improved prosecutorial training and accountability, as prosecutors have unfettered discretion and are incentivized to keep conviction rates high. As noted above, only eighteen states require law enforcement to receive training on identifying, responding to, and collecting data about hate crimes.³¹⁵ The training that the DOJ currently requires must *also* address hate and racial bias in the criminal justice system as a whole. This training should shift a prosecutor’s focus from securing convictions and sentences to reducing recidivism and overall harm to the community.³¹⁶

Hate crime laws inherently rely on prosecutors to respond and act on the hate-motivated violence across the country. In order for prosecutors to respond to hateful violence in a more beneficial way, they must look past conviction rates as a pure marker of success and focus on the communities they serve. The Brennan Center’s Justice Program has presented creative solutions to the federal prosecutorial incentive

313. See COVID-19 Hate Crimes Act, Pub. L. No. 117-13, § 3(b), 135 Stat. 265, 266 (2021).

314. See MOTIVANS, *supra* note 212.

315. MOVEMENT ADVANCEMENT PROJECT, *supra* note 76, at iv.

316. See Lauren-Brooke Eisen, *The Gatekeepers: Four Ways Prosecutors Can Improve Their Decision-Making*, BRENNAN CTR. FOR JUST. (Mar. 16, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/gatekeepers-four-ways-prosecutors-can-improve-their-decision-making> [<https://perma.cc/BE4E-75M6>].

problem.³¹⁷ “Success-Oriented Funding . . . ties government funding as tightly as possible to clear priorities that drive toward the twin goals of reducing crime and reducing mass incarceration.”³¹⁸ Success-Oriented Funding is grounded in basic principles of economics and management, and it provides incentives to achieve the core priorities of reducing violence and serious crime, reducing prison populations, and reducing recidivism.³¹⁹ The report illustrates a few different ways to implement Success-Oriented Funding, such as only allocating government dollars to agencies that have achieved specific priorities in past performance or providing additional dollars to agencies or individuals if they achieve specific progress targets.³²⁰ The report further recommends establishing annual self-evaluations in U.S. Attorney’s Offices, because self-evaluations have no consequences and provide incentive to advance priorities.³²¹

On a separate note, DOJ policy requires U.S. Attorneys to create a Performance Work Plan (“PWP”) for each attorney in the office.³²² Surprisingly, the PWPs vary widely between districts and even within individual offices.³²³ PWPs set performance expectations for prosecutions, and supervising attorneys rate the prosecutors on performance elements.³²⁴ Based on the performance ratings, U.S. Attorneys are able to give out cash bonuses.³²⁵ A priority shift from conviction rates to reducing serious crime and recidivism would change the entire incentive scheme, allowing U.S. Attorneys to place less weight on keeping conviction rates and sentencings high. Prosecutors arguably play the most important role in the criminal justice system. They get to decide whether to charge, and what to charge.³²⁶ Prosecutors have unconstrained discretion and power to make every crucial decision in a criminal case—from the beginning to the end.³²⁷ Reorienting prosecutor incentives has the potential to support the overall goal of deterring hate crimes, while also furthering the even broader goal of a more effective, efficient, and fair criminal justice system. These suggestions should be implemented on both a federal and state basis.

317. See LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUST., *FEDERAL PROSECUTION FOR THE 21ST CENTURY* (2014), https://www.brennancenter.org/sites/default/files/publications/Federal_Prosecution_For_21st_Century.pdf [https://perma.cc/CN2V-PBB2].

318. *Id.* at 4.

319. *Id.*

320. *Id.* at 44.

321. *Id.* at 45.

322. *Id.* at 46.

323. *Id.*

324. *Id.*

325. *Id.*

326. ACLU, *The Power of Prosecutors: An Overview*, YOUTUBE (July 31, 2018), <https://www.youtube.com/watch?v=ZeslHAoiMIE&t=1s> [https://perma.cc/T38U-GCZX].

327. *Id.*

Apart from the recommendations made by the Brennan Center for Justice on prosecutorial incentives, there is still a need for a specialized effort centered around hate crimes. As discussed in Part II section A, properly identifying a hate crime can be challenging and confusing.³²⁸ Further, reported hate crimes are often not taken to trial.³²⁹ Hate crimes are unique cases that require a unique skill set, but there is a general lack of experience and expertise when it comes to charging and prosecuting reported hate crimes. The DOJ should require that U.S. Attorney's Offices around the nation must start a hate crimes prosecution unit under their criminal division. Specialization is not a new concept—the American Bar Association conceded that “it had become ultimately impossible for any one lawyer to keep pace with the vast amount of continually emerging case reports, articles, books, legislation, and special studies which encompassed a multitude of legal issues.”³³⁰ Hate crimes are a novel crime that have become more prevalent in within the United States. Therefore, the DOJ must combat the issue by specially training and designating federal prosecutors to build the unique skill set of charging and prosecuting hate crimes.

Lastly, the criminal justice system has historically targeted and biased minority groups in the United States. Thus, in furthering the goal of the deterrence of hate crimes, there must be additional support outside of the legal system. Los Angeles County has been a frontrunner, as the County recently launching a new initiative called “L.A. vs. Hate.”³³¹ The initiative partnered with local artists and organizations to perform art interventions and produce marketing materials which aim to combat hate.³³² It also looks to connect victims with needed resources via case managers.³³³ In response to the rise in violence against the AAPI community, the city of Bellevue launched their “Hate Has No Home Here” initiative to stand against all forms of hate.³³⁴ The initiative has provided (at no cost) signs that say “Hate Has No Home Here” in multiple languages as a visual message of strength and unity against hate to the local community members.³³⁵ The city has also taken a number of actions in solidarity with communities impacted by hate and bias.³³⁶ These sorts of responses should be echoed throughout the nation. If the victims of hate crimes know that their

328. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 76.

329. See MOTIVANS, *supra* note 212, at 5.

330. Michael H. Kahn & Lisa Davidson Kahn, Note, *Specialization in Criminal Law*, 41 L. & CONTEMP. PROBS. 252, 252 (1977).

331. *LA County Announces Launch of “L.A. v. Hate” Initiative to Report and End Hate by Calling 2-2-1*, CNTY of L.A., <https://covid19.lacounty.gov/covid19-news/la-county-launch-la-vs-hate-initiative-report-end-hate-calling-2-2-1/> [https://perma.cc/SYX6-6AKM].

332. *Id.*

333. *Id.*

334. *Hate Has No Home Here*, CITY OF BELLEVUE, WASH., <https://bellevuewa.gov/city-government/departments/city-managers-office/diversity-advantage-initiative/hate-has-no-home> [https://perma.cc/5U7N-DMSS].

335. *Id.*

336. *Id.*

respective communities are supporting them, it may make it easier for them to seek out resources and have the confidence to report the hateful action done to them. Correspondingly, hate crime offenders need to know that the law *and* their respective communities are seeking justice. Hate crimes have permeated and seeped into the seams of society. This sort of persistent and deep-rooted problem requires a multi-layered response from both legislation and individual communities from around the nation.

B. Recommendations to Combat Rising Hate Speech

The rise in hate crimes against minority groups in the United States has raised concerns about the connection between degrading hate speech and violent, hateful acts. Scholars and analysts have noticed a positive correlation between the rise in hate speech and crimes. Beyond the dangerous connection between hate speech and crimes, hate speech also further marginalizes minority groups and reinforces individuals who hold strong inclinations towards racism, misogyny, and homophobia through online niches. While free speech is meant to allow the free flow of ideas to speak freely and progress the nation, hate speech has worked to accomplish the opposite. Hate speech has the power to silence voices and stop participation in online spaces and debates. While it is important to consider the nuisances and importance of free speech rights, something must be done to combat hate speech. Below outlines potential recommendations and solutions to combat the ever-growing epidemic of hate speech.

Hate speech remains largely invisible simply because many victims do not know where to report instances of hate speech or even understand that they are victims of hate speech. Part of this problem is attributed to the unclear definition of hate speech, as there is no federal definition of hate speech under U.S. law. To combat this issue, legislators should pass an act against hate speech that (1) clearly defines and separates hate speech from incitement or “fighting words,” (2) monitors and collects data on hate speech, and (3) puts nationwide resources into school systems to create programming that combats hate. The Act would grant the DOJ the ability to start the tall task of recognizing, monitoring, and collecting data to analyze hate speech trends.

The Supreme Court has clearly prioritized increasing the right of free speech at the expense of potentially decreasing hate speech. Therefore, while it is not feasible to criminalize hate speech, it is possible to define it and begin addressing the severity of the problem in the United States. From there, as a nation, we can become more aware of the issue and start trying to address the root causes and drivers of hate speech to best mitigate its impact.

This sort of deeply ingrained hate must be fought on many fronts. We must look to the states and communities within the states, to stand up against hate and to

educate the next generation on the dangers of hate speech. Prejudice and discrimination are learned attitudes and behaviors. The DOJ created a manual for schools and communities called “Preventing Youth Hate Crime.”³³⁷ The manual made many recommendations, including that all students receive hate prevention training within their classroom.³³⁸ It is critical to teach children from a young age that even subtle forms of hate, like ethnic slurs, are hurtful and inherently wrong. The manual also suggested hate prevention training to all staff, district-wide hate incidence collection efforts, and developing and distributing a hate prevention policy.³³⁹ While this manual covered most of the important bases, it should be updated to factor in the recent uptick in hate crimes against the AAPI community during and after the COVID-19 pandemic. In this way, schools can help prevent more extreme manifestations of hate.³⁴⁰ However, schools cannot shoulder this burden alone—communities must play a role as well. If schools are able to partner with youth-serving organizations, parent groups, and criminal justice agencies, this message of zero tolerance for hate can be taught on many fronts to next generation.³⁴¹ While this sort of recommendation is not new, it is pivotal for legislators to provide grants to make sure that effective and impactful anti-bias programming is accessible to every classroom in America. It is impossible to change the dark history of bigotry and racism in the United States, but it is possible to teach the next generation the values of diversity and equality.

CONCLUSION

The COVID-19 pandemic has negatively affected many, but it has been particularly devastating for the AAPI community. Reported hate crimes and hate speech against Asians have increased at an alarming rate in recent times.³⁴² This sort of hate is not a new-wave issue—there is a long history in America of hate and bigotry against minority groups. This Note has argued that the government’s response to deter hate crimes and hate speech has been largely ineffective. Hate crime legislation has severely lacked a centralized reporting mechanism, and U.S. Attorney’s Offices are not incentivized to take cases that are not guaranteed convictions. Further, the Supreme Court, through its precedent, has been clear that hate speech effectively has complete protection under the First Amendment.

337. U.S. DEP’T OF JUST., NCJ169286, PREVENTING YOUTH HATE CRIME, A MANUAL FOR SCHOOL AND COMMUNITIES (1999), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/preventing-youth-hate-crime-manual-schools-and-communities> [<https://perma.cc/DUC4-8TS8>].

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. See Campbell, *supra* note 7; see also DITCH THE LABEL, *supra* note 9.

However, in response to the rise in hate crimes against the AAPI community, there have been new federal legislative acts that work to support previous federal hate crime legislation and deter the stark rise in hate crimes. While the new legislative efforts are commendable and give rise to hope, this nation's historically ingrained hate must also be resisted on many fronts. Combating hate crime and hate speech requires more than new legislative efforts—there must be action from individuals, communities, states, and organizations. These recent hateful attacks have wreaked incalculable damage to the AAPI community. The pillars that many of us look up to, our elders, have been specifically targeted. While we continue to mourn the loss of many in our community, there is an urgent need to act now (and in many ways) to work towards the herculean goal of disrupting systemic racism and deterring hate crimes in the United States.