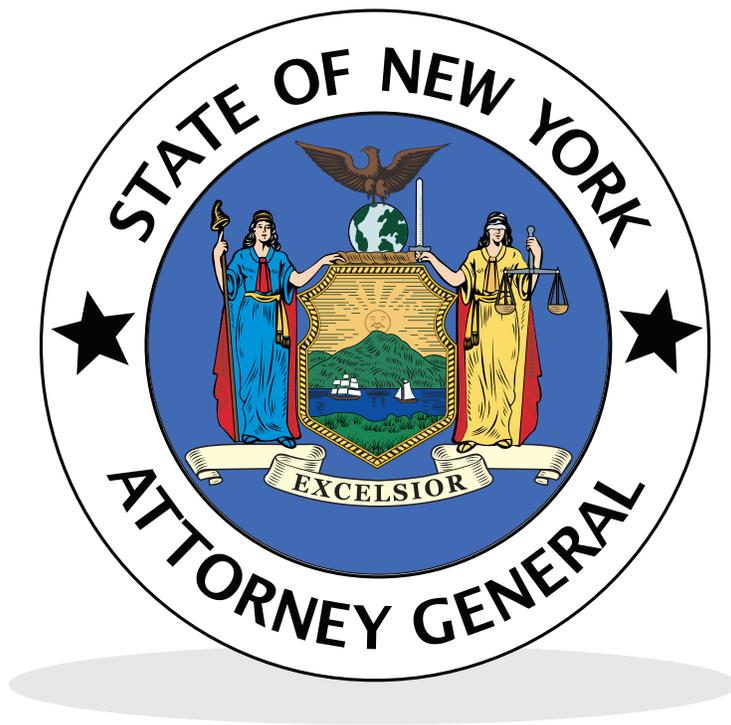


**Guidance To Law Enforcement Officials  
And Prosecutors In The Investigation  
And Prosecution Of Hate Crimes  
In New York State**



**New York State Attorney General  
Eric T. Schneiderman**

November 2016



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

EXECUTIVE OFFICE

November 16, 2016

Dear Colleague:

I write to provide guidance and support regarding our shared responsibility as law enforcement officials and prosecutors to identify, investigate, and prosecute hate crimes in New York State.

Hate crimes – also known as bias-related crimes -- are offenses that target particular individuals, groups of individuals and property because of a bias or prejudice regarding race, religion, national origin, ethnicity, gender, sexual orientation, disability, or some other protected characteristic as defined by law. These criminal acts include violence, threats and intimidation directed at individuals and groups as well as the destruction of public and private property.

Data collected by the New York State Division of Criminal Justice Services<sup>1</sup> shows that hate crime incidents in New York State declined for the third consecutive year in 2015, with 503 incidents reported to law enforcement agencies. More than half (54.7%) of those incidents targeted people (as contrasted to property), and hate crimes against individuals (275) increased 7 percent in 2015. The most frequently reported bias motivations for hate crimes against individuals were anti-male homosexual (26.2%), anti-Jewish (24%), and anti-black (15.6%). And the majority of hate crime arrests were for aggravated harassment (56.2%) and assault (20%).

While hate crimes target particular individuals or groups and are small in number compared to the overall crime rate, they are particularly invidious and tear at the social fabric by instilling uncertainty and fear in community members as they go about life's daily activities. In recent days we have seen reports of a spate of bias-based offenses that some of your agencies are already investigating. For example, in Wellsville, N.Y., the words "Make America White Again" was written alongside a swastika on the side of a softball dugout. A swastika was found on the outside wall of a residence hall at SUNY Geneseo Friday. In a suburb of Buffalo, a man found nooses and a death threat drawn on the glass of a bus shelter. And a hijab-wearing Muslim woman in Queens reported that while riding the bus to work, a white couple yelled that she should "take off the disgusting piece of cloth" because wearing the hijab "wasn't allowed anymore," and then attempted to grab the hijab off her head.

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<sup>1</sup> BRIAN DENVER, N.Y. STATE DIV. OF CRIMINAL JUST. SERV., HATE CRIME IN NEW YORK STATE 2015 ANNUAL REPORT (2016), available at <http://www.criminaljustice.ny.gov/crimnet/pubs.htm>

It was to combat exactly these types of offenses that I, as a state senator, co-sponsored the Hate Crimes Act of 2000. In enacting that important law, the New York State legislature noted that:

[c]rimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.<sup>2</sup>

Article I, § 11 of the New York Constitution provides that no person shall be denied the equal protection of the laws of this state or its localities, and that no person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, institution, or government agency. The investigation and prosecution of bias-related incidents give meaning to the promise contained in these powerful words.

We as law enforcement officials and prosecutors must send a strong message that hate crimes will not be tolerated, and that we will remain vigilant in detecting, investigating, and prosecuting hate crimes so as to promote the safety and well-being of our communities. I thank you for your ongoing work on behalf of our state and pledge my assistance in these efforts.

Yours truly,

A handwritten signature in blue ink, appearing to read "Eric T. Schneiderman". The signature is fluid and cursive, with a large initial "E" and "S".

ERIC T. SCHNEIDERMAN

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<sup>2</sup> N.Y. Penal Law § 485.00 (2000).

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## **Part I: New York State Hate Crimes Laws<sup>1</sup>**

### **A. New York Hate Crimes Act**

The New York Hate Crimes Act operates as a penalty enhancement statute that enhances penalties for certain specified offenses when the underlying conduct was motivated “in whole or in substantial part” by views about people with protected characteristics. As stated in the legislative findings section, the New York State Hate Crimes Act of 2000 was passed in response to a rise in “criminal acts involving violence, intimidation and property damage” motivated in whole or in part by the victim’s “race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation.” N.Y. Penal Law § 485.00. Such conduct is particularly pernicious because it impacts not just the individual victims but also the broader New York community by striking at our core democratic principles of equal treatment and equal opportunity.

The Hate Crimes Act is codified at N.Y. Penal Law §§ 480.00-480.10 and sets forth the following definition:

#### **§ 485.05. Hate crimes**

1. A person commits a hate crime when he or she commits a specified offense and either:

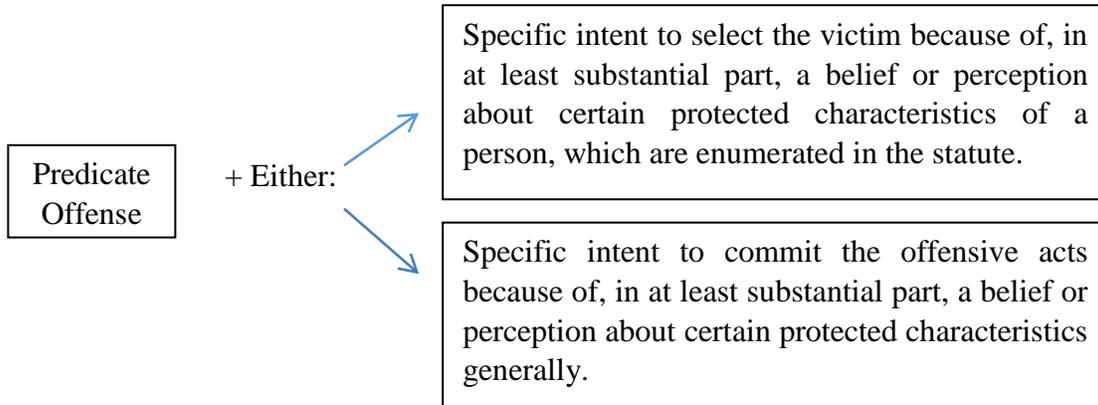
(a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or

(b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

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<sup>1</sup> This Guidance, in part, draws on, updates and expands on excerpts from HATE CRIMES: A MANUAL FOR PROSECUTORS, a 2001 publication of the New York State Office of the Attorney General.

Thus, to obtain a sentence enhancement under the Hate Crimes Act, a prosecutor must establish the following elements, as per N.Y. Penal Law § 485.05:



The specific intent requirement does not demand proof that a perpetrator acted out of malice or bias. Rather, the prosecutor must only establish that the individual acted, at least in substantial part, based on some views about a protected group or characteristic. See, e.g., People v. Fox, 844 N.Y.S.2d 627, 633 n.5 (N.Y. Sup. Ct. 2007) (noting that evidence of racial bias, e.g., use of racial slur, can support inference of intentional selection of victim because of their race, but proof of animosity or hatred is not required); see also People v. Moorjaney, 819 N.Y.S.2d 850, 850 (N.Y. App. Term 2006) (“the simple manner in which to allege a Hate Crime is to set forth the particular attribute of the protected class which is claimed to have motivated the defendant and not name any particular person or persons; the indictment could simply allege that the defendant committed the underlying crime in whole or substantial part because of a belief or perception of the race, or sex, or sexual orientation, or whatever, ‘of a person’.”)

Note that with respect to the specific intent requirements, the protected characteristics of the perpetrator or the victim or of the two combined are not, standing alone, legally sufficient to establish intent. N.Y. Penal Law § 485.05(2).

### 1. Predicate Acts

The Hate Crimes Act applies only to a specified set of criminal offenses, listed in N.Y. Penal Law § 485.05(3). In broad terms, the specified offenses include the following:

- Title H offenses involving assault, menacing, stalking, reckless endangerment, manslaughter, murder, rape, criminal sexual acts, kidnapping, and coercion;
- Title I offenses involving trespass, burglary, criminal mischief and arson;
- Title J offenses involving theft;
- Title N offenses involving harassment in the first degree and loitering; and
- Any attempt or conspiracy to commit any specified offense.

Upon the commission of the predicate crime, a simultaneous violation of the Hate Crimes Act occurs under either of two scenarios: (1) where the animosity is toward a specific person because of their actual or perceived protected characteristics; or (2) where the animosity is generally toward a protected group or set characteristics.

## 2. Specific Intent: Actual or Perceived Protected Characteristics

The first provision of the Hate Crimes Act applies to situations in which the perpetrator, in committing the predicate crime, intentionally targets an individual “because of a belief or perception regarding” the protected characteristics enumerated in the statute. N.Y. Penal Law § 485.05(1). The required *mens rea* is “intentionality” as defined by N.Y. Penal Law § 15.05(1). Thus, the perpetrator’s conscious objective or purpose must be to target the victim “in whole or in substantial part” “because of” a “belief or perception” regarding a specified attribute. N.Y. Penal Law § 485.05(1).

It is irrelevant whether the “belief or perception” regarding a specified attribute of the victim is correct. Id. For example, if a perpetrator targets an individual for an assault based on a mistaken belief that the victim is gay, the perpetrator is guilty of a hate crime regardless that the victim was not gay. The first provision of the Hate Crimes Act also applies when a person who is not a member of a protected class is targeted for a specified offense because the victim is associating with or supporting a protected class. To the extent the language of the Hate Crimes Act refers to the belief or perception regarding “a” person rather than the victim of the crime, identification of a specific individual or entity as the victim is not necessary for a Hate Crimes conviction. As the court noted in People v. Moorjaney, “The painting of the words ‘Kill Jews and Blacks’ on the walls of a subway is clearly a Hate Crime and that offensive conduct is directed at more than one person; it is a Hate Crime even though the specific person or persons about whom the writer had formed a perception that motivated the Criminal Mischief cannot be identified.” Moorjaney, 819 N.Y.S.2d at 850.

The New York Court of Appeals also has found that hate crimes charges may be brought in situations in which the offending conduct was directed at a corporation. To the extent an alleged hate crime arises from bias beliefs or perceptions about the religious affiliation of a corporation, the definition of “person” in the Penal Law is broad enough to cover such acts. In People v Assi, the defendant appealed his hate crime conviction for attempted arson and criminal mischief related to a Jewish synagogue, arguing that the synagogue was not a “person” for purposes of the Hate Crimes Act. The Court of Appeals rejected this position, explaining that because the Penal Law expressly defines “person” to include “a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality ... [,]the congregation that owned the synagogue would fall under the category of an association of individuals or a religious corporation.” 928 N.E.2d 388, 391 (N.Y. 2010) (quoting (Penal Law § 10.00(7)).

### 3. Specific Intent: Beliefs or Perceptions about Certain Protected Characteristics Generally

The second provision of the Hate Crimes Act applies when a perpetrator does not intentionally select an individual but intentionally commits the predicate crime because of a belief or perception regarding a protected group. N.Y. Penal Law § 485.05(2). In People v. Moorjaney, the court denied without prejudice the prosecution’s request to amend an indictment for criminal mischief as a hate crime because they sought to identify by name individuals who were targeted or impacted by the unlawful conduct. Moorjaney, 819 N.Y.S.2d at 850. In that case, a school teacher was charged with, *inter alia*, criminal mischief as a hate crime, having purportedly written the words “nigger”, “fuck”, and “pussi” on the walls of a female bathroom on the third floor of a public school. The charging document alleged that the defendant had “intentionally selected Carol Brady in whole or substantial part because of a belief or perception regarding the [protected characteristics enumerated in the Hate Crimes Act].” Id. The prosecution sought to amend the indictment to replace “Carol Brady” with “Carol Brady as legal custodian for and acting *in loco parentis* on behalf of the minority student population at” the school. The court noted that such an amendment was not necessary: “In the instant case, the victim of the criminal mischief is the owner or custodian of the damaged property; the individual or individuals of the protected class about whom the defendant is alleged to have formed certain beliefs or perceptions is not the victim.” Id.; see also, e.g., People v Assi, 928 N.E.2d 388 (N.Y. 2010) (holding that certain property crimes, if religiously motivated, are covered by the Hate Crimes Act even if no specific person is named as the victim or target); People v. Ivanov, 23 Misc. 3d 1129(A), 1129A (N.Y. Sup. Ct. 2008) (defendant charged with criminal mischief, graffiti, and other counts with hate crimes enhancement for allegedly “spray-painting or etching vile anti-Semitic words and/or symbols, including the swastika” on sidewalks and parked vehicles, and placing anti-Semitic flyers on the windshields of publicly parked vehicles); People v. McDowd, N.Y.S.2d 531, 533 (N.Y. Sup. Ct. 2004) (conviction affirmed, on other grounds, for aggravated harassment as a hate crime based on defendant’s posting of racist fliers which reinforced his oral threat to burn the house down if it were sold to blacks.).

### 4. Protected Characteristics

The protected characteristics largely track those identified in the New York State Human Rights Law, with some deviation. As set forth in the Penal Law § 485.05(1)(a) & (b), the protected characteristics for purposes of a Hate Crime enhancement are:

- Race;
- Color;
- National origin;
- Ancestry;
- Gender;
- Religion;
- Religious practice;
- Age (defined as 60 or above);
- Disability (defined as a physical or mental impairment that substantially limits a major life activity); and
- Sexual orientation

## 5. Hate Crimes Against Transgender Persons

The Hate Crimes Act does not specifically refer to transgender persons as a protected class, or to gender identity as a protected characteristic. A transgender person is someone whose gender identity – the internal sense the person has of his/her own gender – differs from the biological sex that person was assigned at birth. A significant number of hate crimes directed at the lesbian, gay, bisexual, and transgender community are made against transgender persons. In many instances those crimes involve an offender who perceives the victim to be one gender and then discovers that (s)he is another gender, or who is motivated by a victim’s gender presentation being non-conforming, whether in appearance or behavior.

The Attorney General is not aware of any reported criminal case law on point that would include gender identity within the Hate Crimes Act’s protection of “gender.” However, both existing state regulation and case law in the civil rights context treat discrimination based on gender identity as a form of gender discrimination.<sup>2</sup> In light of analogous law in the civil rights context, such an enhancement may be covered by the plain language of the Hate Crimes Act, on the theory that the crime was committed based on the offender’s perception of the victim’s gender. Given the significant number of hate crimes directed at transgender persons, the Attorney General welcomes requests for technical assistance from any office considering bringing a hate crime enhancement concerning a transgender victim.

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<sup>2</sup> See 9 N.Y.C.R.R. § 466.13(c) (“[D]iscrimination on the basis of gender identity is sex discrimination” for purposes of the New York State Human Rights Law); Maffei v. Kolaepon Industry, Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (New York City Human Rights Law prohibiting gender discrimination provided protection to transgender persons against employer harassment); Rentos v. Oce-Office Systems, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (holding that State and City Human Rights Laws protect transgender persons from discrimination because of prohibition against sex discrimination); Miles v. New York University, 979 F. Supp. 248 (S.D.N.Y. 1997) (claim of sexual harassment stated under Title IX, despite fact that the victim was a transgender woman, when employer perceived her to be a female). This interpretation of sex/gender discrimination to include discrimination based on gender identity is the prevailing theory in the interpretation of federal civil rights statutes as well. See, e.g., Macy v. Holder, EEOC Appeal No. 0120120821 (U.S. E.E.O.C. 2012) (interpreting Title VII of the Civil Rights Act of 1964); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (interpreting Gender Motivated Violence Act); Rosa v. Park West Bank and Trust Co., 214 F.3d 213 (1st Cir. 2000) (interpreting Equal Credit Opportunity Act).

## 6. Sentencing Enhancement

As for increased penalties, the Hate Crimes Act provides that:

1. If the predicate offense for which the defendant has been convicted is a violent felony offense, as defined in section 70.02 of this chapter, the hate crime constitutes a violent felony offense. N.Y. Penal Law § 485.10(1).
2. If the predicate offense is a misdemeanor or a class C, D, or E felony, the hate crime offense is one category higher than the specified offense the defendant committed or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit a specified offense, whichever is applicable. N.Y. Penal Law § 485.10(2).
3. If the predicate offense is a class A-1 felony, the minimum indeterminate sentence shall be not less than twenty years. N.Y. Penal Law § 485.10(4).
4. If the predicate offense is a class B felony:
  - (a) the minimum indeterminate sentence must be at least six years if the defendant is sentenced pursuant to section 70.00 of this chapter;
  - (b) the minimum indeterminate sentence must be at least eight years if the defendant is sentenced pursuant to section 70.02 of this chapter;
  - (c) the minimum indeterminate sentence must be at least twelve years if the defendant is sentenced pursuant to section 70.04 of this chapter;
  - (d) the maximum indeterminate sentence must be at least four years if the defendant is sentenced pursuant to section 70.05 of this chapter; and
  - (e) the maximum indeterminate sentence must be at least ten years if the defendant is sentenced pursuant to section 70.06 of this chapter. N.Y. Penal Law § 485.10(3)(a)-(e).
5. In addition to any of the penalties described above, courts may also, as part of the sentence imposed for commission of a hate crime, require the defendant to complete a program, training, or counseling directed at hate crime prevention and education, where the court determines such program, training, or counseling is “appropriate, available and was developed or authorized by the court or local agencies in

cooperation with organizations serving the affected community.” N.Y. Penal Law § 485.10(5).

## 7. Constitutionality of the Hate Crime Statute

Lower state courts have heard, and rejected, facial and as applied challenges to the Hate Crimes Act that claimed it was unconstitutionally overbroad and vague. See, e.g., People v Amadeo, 2001 NY Slip Op 40190[U] (N.Y. Sup. Ct. 2001) (summary rejection of constitutionality challenge in attempted murder-based hate crime charge) (citing Wisconsin v Mitchell, 508 US 476 (1993) (affirming validity of parallel hate crimes law in Wisconsin)); People v Diaz, 727 N.Y.S.2d 298 (N.Y. Sup. Ct. 2001) (rejecting constitutionality challenge in case involving assault-based hate crimes charge involving defendant’s perceptions about gay men generally and belief that victim was gay). With respect to overbreadth, because the Hate Crimes Act regulates conduct and not pure speech, to prevail on such a claim the “overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” New York v. Ferber, 458 U.S. 747, 770 (1982). For vagueness challenges, New York state courts apply a two-part inquiry, asking “whether the statute provides a person of ‘ordinary intelligence’ with sufficient notice of what conduct is prohibited” and “whether the statute is written in such a manner as to permit or encourage arbitrary and discriminatory enforcement” or is at least reasonably precise. People v Bright, 520 N.E.2d 1355 (N.Y. 1988). New York state courts have repeatedly rejected such challenges to the Hate Crimes Act.

For example, in People v Ferhani, defendants were indicted for, among other things, conspiracy to commit a hate crime based on evidence from a sting operation that they bought and resold handguns to commit and finance violent acts against those individuals they deemed responsible for the mistreatment of Muslims — primarily Jews, but also Christians and other non-Muslims. 37 Misc. 3d 1232(A), 1232A (N.Y. Sup. Ct. 2012). Defendants challenged the Hate Crimes Act as being unconstitutionally vague and overbroad on its face, stating in only general terms that the Act criminalized a broad swath of protected First Amendment activity. The court rejected this overbreadth argument pursuant to United States Supreme Court precedent holding that statutes implicating the First Amendment must be narrowly drawn, but pass constitutional muster if they “represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” Id. (quoting Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973)). Citing the legislative findings section of the Hate Crimes Act, the court found this requirement had been met. The court also noted that facial overbreadth challenges to statutes regulating both conduct and speech will only prevail if the overbreadth of the law is real and substantial, as compared against the law’s legitimate sweep. Id. (quoting Broadrick, 413 U.S. at 615). The court found the vagueness challenge equally unavailing, quoting the reasoning set forth in People v. Diaz, 727 N.Y.S.2d 298 (N.Y. Sup. Ct. 2001), namely, that an “ordinary” person could readily understand the text of the statute and the conduct prohibited thereunder and that the statute does not allow for arbitrary application because it contains “objective criteria

which must be observed throughout the accusatory process.” Ferhani, 7 Misc. 3d at 1232 (quoting Diaz, 727 N.Y.S.2d at 346)).

In People v. Fox, a lower court rejected an as-applied vagueness challenge to the Hate Crimes Act, claiming that the phrase “in whole or in substantial part” was “imprecise” and failed to provide “clear standards for enforcement.” 844 N.Y.S.2d 627, 635 (N.Y. Sup. Ct. 2007). Defendants further argued that only if the statute required proof of bias, prejudice, or hate could it be construed constitutionally. Id. The court concluded that defendants had not met their “heavy burden” of establishing vagueness “beyond a reasonable doubt” since that “the statute provides members of the public, the police, prosecutors and juries with clear notice of the specific conduct that is prohibited--the intentional selection of a crime victim in whole or in substantial part because of that victim's sexual orientation.” Id.

### **B. Reporting Requirements of the Hate Crimes Act**

The Hate Crimes Act also added a reporting requirement to the New York Executive Law. N.Y. Exec. Law § 837(4)-c. Specifically, the Division of Criminal Justice Services (DCJS) is empowered to:

collect and analyze statistical and all other information and data with respect to the number of hate crimes reported to or investigated by the division of state police, and all other police or peace officers, the number of persons arrested for the commission of such crimes, the offense for which the person was arrested, the county within which the arrest was made and the accusatory instrument filed, the disposition of the accusatory instrument filed, including, but not limited to, as the case may be, dismissal, acquittal, the offense to which the defendant pled guilty, the offense the defendant was convicted of after trial, and the sentence imposed. The division shall include the statistics and other information required by this subdivision in the annual report submitted to the governor and legislature pursuant to subdivision twelve of this section.

Consequently, DCJS each year issues a report compiling hate crimes reported by law enforcement agencies around the state. See, e.g., HATE CRIMES REPORT, available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2015-annual-report.pdf>

## Part II: Other Bias-Related Statutes

A number of other provisions in New York's Penal Laws also may be used to prosecute hate crimes as follows.

### A. Aggravated Harassment

#### 1. Aggravated Harassment in the First Degree

Under four of the five subsections of Penal Law § 240.31, a person is guilty of Aggravated Harassment in the First Degree if he or she engages in any of the acts enumerated in those subsections with intent to harass, annoy, threaten, or alarm another person, because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct.

To prove Aggravated Harassment in the First Degree with respect to any of the enumerated acts, a prosecutor must establish that the defendant engaged in the act in question:

1. With an intent to harass, annoy, threaten, or alarm another person, and
2. Because of a belief or perception regarding one or more attributes of the person (as specified in the statute), regardless of whether the belief or perception was correct.

Although the above-cited language seems to suggest that the target of the harassment must be an identified individual for the statute to apply, the sole published opinion squarely on the issue found no such requirement. "This Court finds that although Penal Law § 485.05(1)(b) may be somewhat inartfully drafted, in using the words 'a person,' the context of both that statute and § 240.31 clearly apply to protected classes and the targeted victim need not necessarily be identified as a member of such class. In other words, as long as a protected class is clearly targeted and identifiable, as it is here, by the charged conduct, a violation of these statutes is properly alleged....," People v. Ivanov, 23 Misc. 3d 1129(A) ) (N.Y. Sup. Ct. 2008). This decision also cites People v. Moorjaney, 819 N.Y.S.2d 850 (N.Y. App. Term 2006), which makes the same finding with respect to Penal Law § 485.05(1)(b).

Penal Law § 240.31(1) makes it a crime to, with the intent and motive described above, damage premises primarily used for religious purposes, where the damage to the premises exceeds fifty dollars. In addition to the elements that must be established for all instances of Aggravated Harassment in the First Degree, for this subsection a prosecutor must establish that:

1. The defendant damaged premises primarily used for religious purposes, and
2. The damage to the premises exceeded fifty dollars.

Thus, for example, this provision would presumably cover an instance in which an epithet is spray painted on the door or walls of a school's prayer room if the damage to the premises exceeded fifty dollars.

Penal Law § 240.31(3) makes it a crime to, with the intent and motive described above, etch, paint, draw upon, or otherwise place a swastika on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property. Thus, in addition to the elements that must be established for all instances of Aggravated Harassment in the First Degree, for this subsection a prosecutor must establish that:

1. The defendant etched, painted, drew upon or otherwise placed a swastika on a building or other real property, and
2. The defendant did so without express permission of the owner or operator of such building or real property.

Penal Law § 240.31(4) makes it a crime to, with the intent and motive described above, set on fire a cross in public view. Thus, in addition to the elements that must be established for all instances of Aggravated Harassment in the First Degree, for this subsection a prosecutor must establish that the defendant set on fire a cross in public view.

Penal Law § 240.31(5) makes it a crime to, with the intent and motive described above, etch, paint, draw upon or otherwise place or display a noose on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property. Therefore, in addition to the elements that must be established for all instances of Aggravated Harassment in the First Degree, for this subsection a prosecutor must establish that:

1. The defendant etched, painted, drew upon or otherwise placed a noose on a building or other real property, and
2. The defendant did so without express permission of the owner or operator of such building or real property.

In addition, under Penal Law § 240.31(2), a person is guilty of Aggravated Harassment in the First Degree if he or she commits the crime of Aggravated Harassment in the Second Degree under Penal Law § 240.30(3) and has previously been convicted under Penal Law § 240.30(3), or has previously been convicted of the crime of Aggravated Harassment in the First Degree within the preceding ten years. (The elements of Aggravated Harassment in the Second Degree are discussed below.)

Aggravated Harassment in the First Degree is a class E non-violent felony. A person convicted of this crime faces up to an indeterminate sentence of one-and-a-third to four years in state prison. A predicate felon convicted of this crime faces up to an indeterminate sentence of two to four years in state prison.

## 2. Aggravated Harassment in the Second Degree

Under Penal Law § 240.30(3), a person is guilty of Aggravated Harassment in the Second Degree when with intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct.

To prove Aggravated Harassment in the Second Degree, then, a prosecutor must establish that:

1. The defendant struck, shoved, kicked, or otherwise subjected a person to physical contact, or attempted or threatened to do so;
2. The defendant engaged in this act with the intent to harass, annoy, threaten, or alarm the person; and
3. The defendant engaged in this act because of a belief or perception regarding one or more attributes of the person (as specified in the statute), regardless of whether the belief or perception was correct.

Aggravated Harassment in the Second Degree is a class A misdemeanor. A person convicted of this crime faces up to one year in city jail.

### **B. New York Civil Rights Law §§ 40-c and 40-d**

Under Civil Rights Law §§ 40-c and 40-d, it is a class A misdemeanor to subject any person to discrimination in his or her civil rights or to harassment (as defined by N.Y. Penal Law § 240.25, Harassment in the First Degree<sup>3</sup>) because of the person's race, creed, color, national origin, sex, marital status, sexual orientation, or disability. Prosecution under section 40-c requires proof "not merely of the intent to harass, annoy or alarm, but also that defendant's acts were committed because of the complainant's race, creed, color, national origin, sex, marital status [, sexual orientation] or disability, as perceived by defendant, and an intent to discriminate against complainant in the exercise of his civil rights." *People v. Dieppa*, N.Y.S.2d 786, 788 (N.Y. Sup. Ct. 1993) (updated to reflect additional protected categories).

In light of this standard, for a conviction under Civil Rights Law §§ 40-c and 40-d, both the pattern of verbal threats or physical abuse as well as the environment under which such conduct

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<sup>3</sup> Harassment in the first degree is a class B misdemeanor of which a person is guilty "when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury. This section shall not apply to activities regulated by the national labor relations act, as amended, the railway labor act, as amended, or the federal employment labor management act, as amended." N.Y. Penal Law § 240.25.

occurs must be carefully considered. For example, in People v. Dieppa, the complainant, a native of Afghanistan and an employee of a fast food store endured several months of verbal harassment by the defendant, a customer, who would utter obscenities and religious epithets, such as repeatedly calling the complainant “a filthy Jew”. This conduct eventually escalated with the defendant entering the store and striking the complainant in the head with a bottle, while grabbing him and stabbing him in the back with a sharp object. Following extensive rehabilitation from injuries that included a punctured lung, the complainant visited the store, which was owned by his brother-in-law. The defendant again appeared outside the store and threw a garbage can through the front window while shouting epithets at the complainant and threatening to kill him if he called police. In construing the term “civil rights” contained in the statute, the court found that the term not only covers an individual’s right to access public places but also liberty from discrimination in employment, among other areas. Here, the complainant was evidently targeted due to his race and religion given the epithets and physical harm sustained. The complainant’s “civil rights” were implicated in so far as they affected his right to pursue employment and to engage in the use and occupancy of the food store. Dieppa, 601 N.Y.S.2d at 787-90.

Civil Rights Law § 40-c also is a civil statute and provides civil penalties of no less than \$100 and no more than \$500 for each violation. Although section 40-c is used almost exclusively in the civil context, several reported cases shows that it has been used for criminal prosecutions. See, e.g., People v. Dieppa, 601 N.Y.S.2d 786 (N.Y. Sup. Ct. 1993) (defendant convicted under both Civil Rights Law § 40-c and Penal Law § 240.30 based on his repeated threats and physical abuse of victim at his place of employment because of the victim’s perceived race and creed); People v. Fuller, 590 N.Y.S.2d 159, 163 (N.Y. Crim. Ct. 1992) (denying motion to dismiss criminal charges for aggravated harassment in the second degree, N.Y. Penal Law § 240.30(3), and discrimination, N.Y. Civ. Rights Law § 40-c, and allowing criminal prosecution of these charges to continue where defendant claimed that timely notice requirement to attorney general contained in N.Y. Civ. Rights Law § 40-d applied in criminal case as the notice requirement was not designed to be a condition precedent to criminal prosecution but rather a direction to report the occurrence to the attorney general for informational purposes); People v. Mulqueen, 589 N.Y.S.2d 246, 247 (N.Y. Dist. Ct. 1st Dist. 1992) (affirming guilty verdict of N.Y. Civ. Rights Law § 40-c (2) violation over defendant’s claims that the verdict was against the weight of the evidence and denying defendant’s claims that the Civil Rights Law § 40-c (2) conviction was in violation of defendant’s First Amendment rights as the statute does not apply exclusively to speech but the conduct of one person toward another, and denying defendant’s claim that the People failed to comply with the notification requirements of Civil Rights Law § 40-d as said provision does not apply to criminal proceedings); People v. Miccio, 589 N.Y.S.2d 762, 763 (N.Y. Crim. Ct. 1992) (rejecting motion to dismiss premised on first amendment for charges of aggravated harassment in violation of N.Y. Penal Law § 240.30 (3) and § 40-c of the Civil

Rights Law because these statutes deal with defendants' actions based on bias toward the victims and were a valid exercise of the state's police power).

### **C. Other Bias Crimes**

In addition to the Hate Crimes Act and the aggravated harassment laws, the following criminal statutes cover some types of bias crimes.

#### **1. Disruption of a Religious Service**

Disruption of a religious service occurs when an individual makes unreasonable noise or a disturbance while at a lawfully assembled religious service, funeral, burial or memorial service or within 300 feet thereof with the intent to cause annoyance or alarm or recklessly creating a risk thereof. N.Y. Penal Law § 240.21. This statute, in effect, elevates the offense of disorderly conduct, N.Y. Penal Law § 240.20(4), from a violation to a class A misdemeanor when the conduct disturbs a religious service, funeral, burial or memorial service. The statute is intended to protect those who lawfully assemble for the purpose of participating in a religious service from unreasonable noise or other disturbance that would interfere with the ability to celebrate the religious service at issue. Thus, an individual may possibly be charged with disruption of a religious service by, for example, entering a church, occupying the sanctuary and loudly chanting, thereby delaying the start of services or seizing microphones used to project the service to worshippers. *See, e.g., People v. Morrisey*, 614 N.Y.S.2d 686, 687-88 (N.Y. Crim. Ct. 1994) (rejecting as-applied constitutional challenge to Penal Law § 240.21 where defendants “scattered throughout the congregation, including in the altar area, loudly chanted, and in doing so, prevented the scheduled service from beginning”); *cf. People v. Steele*, 333 N.Y.S.2d 959, 962-63 (N.Y. Crim. Ct. 1972) (refusing to engage in forbidden process of interpreting and weighing church doctrine, dismissed “aggravated disorderly conduct” charges against defendant nuns and laywoman who lay down in cathedral’s center aisle during high mass and were alleged to have done so silently and asserted their conduct to be a form of worship).

#### **2. Criminal Interference with Religious Worship or Health Care Services**

An individual who has a hatred of a particular religion may, rather than disrupt a religious service, interfere with people who are attempting to enter the service by, for example, blocking the entrance way. An individual who engages in such conduct can be charged with criminal interference with religious worship if the person engages in acts of “physical obstruction,” “force,” or the “threat of force” with the intent to “injure,” “intimidate,” or “interfere” with (or attempt to injure, intimidate, or interfere with) a person because that person was or is seeking to exercise the right of religious freedom at a place of religious worship. N.Y. Penal Law § 240.70(1)(c).

This same law also provides that a person is guilty of criminal interference with health care services in the second degree if the person engages in acts of “physical obstruction,” “force,” or the “threat of force” with the intent to “injure,” “intimidate,” or “interfere” with (or attempt to injure, intimidate, or interfere with) a person because that person has sought or provided or is seeking to provide reproductive health services. N.Y. Penal Law § 240.70(1)(a) and (b). Violative conduct would possibly include an abortion clinic protestor pushing, shoving or pressing their body into an abortion clinic volunteer escort or patient so as to obstruct clinic access. See, e.g., New York v. Cain, 418 F. Supp. 2d 457 (S.D.N.Y. 2006); New York v. Kraeger, 160 F. Supp. 2d 360 (N.D.N.Y. 2001). Additionally, the following statements could constitute threats of force under N.Y. Penal Law § 240.70(1)(a) and (b): (1) statements to a clinic doctor, rhetorically asking “Where is a pipebomber when you need one” and (2) statements to a clinic administrator, “You're young. But just because you are young does not mean your life won't be taken early.” Kraeger, 160 F. Supp. 2d at 373 (citing United States v. McMillan, 53 F. Supp. 2d 895, 898 (D. Miss. 1999) and United States v. Scott, 958 F. Supp. 761, 769 (D. Conn. 1997)). In addition, a person who intentionally damages a health care facility or attempts to do so, because such facility provides reproductive health services, or intentionally damages the property of a place of religious worship, is guilty of criminal interference with health care and religious worship, respectively. N.Y. Penal Law § 240.70(1)(d). As such, throwing gravel and/or stones at an abortion clinic and/or at clinic escorts could similarly run afoul of the statute. See, e.g., New York v. Cain, 418 F. Supp. 2d 457 (S.D.N.Y. 2006).

Criminal interference with health care services or religious worship in the second degree is a class A misdemeanor.

### 3. Loitering

A person is guilty of loitering when such person being masked or disguised remains or congregates in a public place with others so masked or disguised by unusual or unnatural attire or facial alteration without permission from appropriate authorities. N.Y. Penal Law § 240.35(4). Loitering is a violation, and not a crime as defined under N.Y. Penal Law § 10.00 (6). Loitering may occur where, for example, members of the Ku Klux Klan gather in a public park for an extended period of time without a permit to do so.

### 4. Paramilitary Activities

Any person who assembles with one or more persons as a paramilitary organization and has knowledge of its purpose is guilty of a class C felony when such person practices with one or more members with military weapons in order to further the organization's purpose. N.Y. Mil.

Law § 240(6).<sup>4</sup> A paramilitary organization is defined as an organization of two or more persons who engage in military instruction or training in warfare for the purpose of unlawfully causing physical injury to any person or for the purpose of unlawfully damaging another person's property. N.Y. Mil. Law § 240(6)(b)(i). A military weapon is defined as any device capable of discharging a projectile by means of a gas generated from an explosive compound, or any explosive or incendiary bomb, grenade, rocket, missile, or similar device or launching device therefor; or any device that simulates any of the foregoing. N.Y. Mil. Law § 240(6)(b)(ii). Hate groups that engage in militia type activities may violate statute.

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<sup>4</sup> Local governmental subdivisions may not appropriate money for military purposes in absence of express legislative requirement or authority, and Military authority is of state and not local concern. 1941 NY Ops Atty Gen Feb 19. Also, formation of military organizations apart from the active militia or United States troops is forbidden by N.Y. Mil. Law § 240, except as to cadets under eighteen with the governor's approval and in educational institutions having prescribed courses in military science. 1941 NY Ops Atty Gen Feb 19.

## Part III: Guidance to Law Enforcement<sup>5</sup>

### A. FBI Hate Crime Indicators

In response to a growing concern about hate crimes, in 1990 Congress passed the Hate Crime Statistics Act, which directs the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.” The Federal Bureau of Investigation’s (FBI) Uniform Crime Reporting (UCR) Program collects and analyzes data voluntarily submitted by law enforcement agencies around the country.

Consequently, the FBI has developed valuable guidance and training curriculum on identifying hate crime incidents. The FBI UCR Program’s HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL advises that “before an incident can be reported as a hate crime, sufficient objective facts must be present to lead a reasonable and prudent person to conclude that the offender’s actions were motivated, in whole or in part, by bias.”<sup>6</sup> The manual further informs that while not one factor may be conclusive, facts such as the following, especially when in combination, may support a finding of bias:

1. The offender and the victim were of a different race, religion, disability, sexual orientation, ethnicity, gender, and/or gender identity. For example, the victim was African American and the offender was white.
2. Bias-related oral comments, written statements, or gestures were made by the offender indicating his or her bias. For example, the offender shouted a racial epithet at the victim.
3. Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue, mosque, or LGBT center.
4. Certain objects, items, or things which indicate bias were used. For example, the offenders wore white sheets with hoods covering their faces or a burning cross was left in front of the victim’s residence.

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<sup>5</sup> This part contains excerpts from the following publications: Criminal Justice Information Services (CJIS) Division, Federal Bureau of Investigation Uniform Crime Reporting (UCR) Program. HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL VERSION 2.0 (Feb. 27, 2015) [hereinafter HATE CRIME GUIDELINES AND MANUAL], available at <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf> and MPTC HATE CRIMES MODEL POLICY, NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE (November 2010), available at [http://www.nychiefs.org/ModelPolicies/MPTC\\_Hate\\_Crimes\\_Model\\_Policy.pdf](http://www.nychiefs.org/ModelPolicies/MPTC_Hate_Crimes_Model_Policy.pdf)

<sup>6</sup> HATE CRIME GUIDELINES AND MANUAL at 6.

5. The victim is a member of a specific group that is overwhelmingly outnumbered by other residents in the neighborhood where the victim lives and the incident took place.
6. The victim was visiting a neighborhood where previous hate crimes had been committed because of race, religion, disability, sexual orientation, ethnicity, gender, or gender identity and where tensions remained high against the victim's group.
7. Several incidents occurred in the same locality, at or about the same time, and the victims were all of the same race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.
8. A substantial portion of the community where the crime occurred perceived that the incident was motivated by bias.
9. The victim was engaged in activities related to his or her race, religion, disability, sexual orientation, ethnicity, gender, or gender identity. For example, the victim was a member of the National Association for the Advancement of Colored People (NAACP) or participated in an LGBT pride celebration.
10. The incident coincided with a holiday or a date of significance relating to a particular race, religion, disability, sexual orientation, ethnicity, gender, or gender identity, e.g., Martin Luther King Day, Rosh Hashanah, or the Transgender Day of Remembrance.
11. The offender was previously involved in a similar hate crime or is a hate group member.
12. There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.
13. A historically-established animosity existed between the victim's and the offender's groups.
14. The victim, although not a member of the targeted racial, religious, disability, sexual orientation, ethnicity, gender, or gender identity group, was a member of an advocacy group supporting the victim group.<sup>7</sup>

The FBI manual further cautions that the above is not an exhaustive list of objective facts that may evidence a bias motivation, and that even if the offender is mistaken about a characteristic of the victim, such as the victim's race, ethnicity, religion, disability, sexual orientation, gender or gender identity, the offense is still a bias crime if it was motivated by bias against that group.<sup>8</sup>

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<sup>7</sup> Id. at 6-7.

<sup>8</sup> Id. at 7.

## **B. Initial Response and Investigation**

Initial law enforcement response to and identification of criminal acts as possible hate crimes is essential to any successful prosecution under the Hate Crimes Act and other anti-bias statutes. While not exhaustive, this section on initial response and investigative procedures draws on recommendations and model policies of numerous law enforcement agencies, including the New York State Association of Chiefs of Police and the FBI. These suggestions are not meant to replace existing policies and procedures when responding to possible hate crimes, but to supplement them.

### **1. Initial Response**

- When protecting the crime scene and collecting photographic or physical evidence, keep an eye out for materials such as hate literature, spray paint cans, and offensive symbols or objects used by hate groups, such as swastikas and crosses.
- Request the assistance of a qualified interpreter or counselor when necessary. While relying on a lay individual on the scene for immediate interpretation assistance may be necessary in emergency situations, the expertise and impartiality of a qualified interpreter can minimize reliability and accuracy problems in subsequent investigation and prosecution.
- When collecting statements from victims, suspects, or witnesses, document:
  - exact language and not only summaries of remarks made/heard, given the importance that the specific words have in determining whether a criminal act was driven in part by bias; and
  - to the extent possible, the race, ethnicity, religion, national origin, sex, and other defining characteristics of the perpetrator(s) and victim(s) and whether either were present in groups or in isolation when the incident occurred.
- Clearly identify the matter as a possible hate crime or bias-motivated event in the incident report and/or other appropriate records.

### **2. Investigation**

In situations in which there may be little direct indicators of intent, law enforcement's experience shows that the following can be useful in identifying or eliminating the existence of a hate crime motive:

- The degree of violence or brutality of a given incident, particularly when the perpetrator(s) and victim(s) are strangers.
- The perpetrator's perception or belief about the victim and their identity or languages spoken, including perceptions about whether they associate with or support individuals covered by hate crimes protections.

- The date, time, or circumstance of the incident, i.e., did it occur on a holiday or event related to a celebration, commemoration, or remembrance by people affiliated by religion, ethnicity, race, national origin, sexual orientation, or other characteristic.
- The incident being one of several in a given time period that involved victims of the same (or perceived as same) group.
- In incidents involving physical contact or violence, any particular part of the body targeted by the perpetrator, e.g., targeting of the hair or head in crimes involving anti-Muslim sentiment, near or around genitalia in crimes involving sex-based bias.
- Dual motivations, e.g., perpetrating a burglary at a home in a predominantly immigrant neighborhood.

#### **Part IV: Special considerations when hate crimes are reported by immigrants**

A challenge facing law enforcement officials and prosecutors in the identification, investigation, and prosecution of hate crimes is ensuring that community members step forward to report such crimes in the first instance. Hate crimes directed at particularly vulnerable groups such as immigrants can be difficult to identify and investigate. Immigrants are often reluctant to report victimization out of fear that the authorities will begin inquiring about immigration status, their family members, or their employers. Fear of possible deportation is a significant obstacle to establishing trust between law enforcement and immigrant communities. For these and other reasons, numerous jurisdictions throughout New York State have adopted formal policies of not inquiring into immigration status during police-civilian encounters and not detaining people based on conjecture about their immigration status. The Office of the Attorney General encourages and supports such policies as they ease law enforcement's burdens in investigating and preventing crime and encourage immigrants to report crimes they have witnessed or suffered, making our communities safer for all. Additionally, it simply is not possible to identify an individual's immigration status based on appearances alone. Such practices often have resulted in unlawful profiling based on race or national origin, eroding trust and creating the risk of legal liability. Assessments about immigration status are best left to the responsible federal authorities.

Even with immigrants who are documented, numerous factors can reduce their willingness to seek help from law enforcement or other crime victim service providers. These include prior negative encounters with law enforcement in the U.S. or their country of origin, language barriers, limited familiarity with local government, limited awareness about what hate crimes are or the significance of including information about national origin, race, or ethnicity if they do file police reports. Reports indicate that immigrants are more likely to report crime to faith leaders, community advocates, and direct social service providers. Given these realities, law enforcement can take the following steps to facilitate crime reporting:

- Adopt and train all civilian-facing law enforcement personnel on how to access and properly use interpreters and translators.
- Inform immigrant community and advocacy organizations about the availability of such services.
- Meet with advocates and leaders in local houses of worship, schools, libraries, and other community spaces to solidify relationships.

## **Part V: Resources for law enforcement officials and prosecutors**

HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL VERSION 2.0 (Criminal Justice Information Services (CJIS) Division, Federal Bureau of Investigation Uniform Crime Reporting (UCR) Program, February 27, 2015), available at <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>

LESSONS FROM A HATE CRIME DETECTIVE: A GUIDE FOR LAW ENFORCEMENT (U.S. Department of Justice Office of Community Oriented Policing Services, 2015), available at <https://ric-zai-inc.com/Publications/cops-p313-pub.pdf>

RESPONDING TO HATE CRIMES: A POLICE OFFICER'S GUIDE TO INVESTIGATION AND PREVENTION (International Association of Chiefs of Police), available at <http://www.iacp.org/ViewResult?SearchID=123> (last visited on November 14, 2016).

MPTC HATE CRIMES MODEL POLICY (New York State Association of Chiefs of Police, November 2010), available at [http://www.nychiefs.org/ModelPolicies/MPTC\\_Hate\\_Crimes\\_Model\\_Policy.pdf](http://www.nychiefs.org/ModelPolicies/MPTC_Hate_Crimes_Model_Policy.pdf)