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THE ROLE OF THE STATE ATTORNEY GENERAL IN PREVENTING AND PUNISHING HATE CRIMES THROUGH CIVIL PROSECUTION: POSITIVE EXPERIENCES AND POSSIBLE FIRST AMENDMENT POTHOLES

Amy Dieterich

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THE ROLE OF THE STATE ATTORNEY GENERAL IN PREVENTING AND PUNISHING HATE CRIMES THROUGH CIVIL PROSECUTIONS: POSITIVE EXPERIENCES AND POSSIBLE FIRST AMENDMENT POTHoles

Amy Dieterich*

I. INTRODUCTION

On July 3, 2006, Lewiston, Maine resident Brent Matthews threw a pig's head as "a joke" into the town's only mosque, frequented primarily by Somali refugees, during evening services.¹ Matthews presumably chose a pig's head because pigs are considered "dirty" in Islamic culture, and the Qu'ran forbids believers from eating its meat. Because of Matthews' "joke," members of the mosque were required by Islamic law to clean the desecrated area seven times, attendance at the mosque decreased, and some members said they feared physical harm.² Mosque members also told reporters that the investigating officers treated the incident as a joke, with one even going so far as to say "I wish I had thought of that."³

Unfortunately for Matthews, Maine is one of eight states that has given its Attorney General the authority to seek a civil remedy for a violation of a citizen's civil rights, which can be pursued concurrently or exclusively of criminal charges. Two weeks after the incident, Maine Attorney General Steven Rowe announced that his office had filed a civil action against Matthews under the Maine Civil Rights Act, asking the court to order Matthews not to have any contact with the mosque or its members, and to obey the Maine Civil Rights Act.⁴ In a press release announcing Matthews' prosecution, Attorney General Rowe opined that "[a]s a civil society and one governed by the rule of law, it is our obligation to take the legal steps necessary to make sure that Maine people who practice Islam and people of all other faiths feel completely free and safe to worship without violent interference from others."⁵

In contrast to the government's account of the event, Matthews claimed in his defense that he spoke with a member of the Lewiston Police Department before his "joke" and asked what charges he could face. Matthews claimed the officer told him

* Associate, Paul, Weiss, Rifkind, Wharton & Garrison, LLP; J.D., Columbia University School of Law, 2008. I would like to thank Former Maine Attorney General and Professor James Tierney for his extraordinary help and guidance with this Article. Without his wealth of knowledge—both academic and practical—this Article could not have been written.

1. Lindsay Tice, *Another Side of Brent Matthews*, SUN J., Apr. 29, 2007, at A8.

2. Christopher Williams, *State Files Bias Suit*, SUN J., Jul. 21, 2006, at A1.

3. Christopher Williams, *Pig's Head Suspect: I Asked Cop*, SUN J., Aug. 8, 2006, at A1. A police spokesperson said that the Lewiston Police Department was not treating the issue lightly. *Id.*

4. See Press Release, Me. Attorney Gen., AG Rowe Files Civil Rights Action Against Lewiston Man For Throwing Pig's Head into Mosque (Jul. 20, 2006), available at http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=48457&v=article.

5. *Id.*

that he could face only littering and improper disposal of body parts charges.⁶ However, the referenced police officer disputed Matthews' depiction of their conversation and has said that he told Matthews he could possibly be guilty of a hate crime and advised Matthews not to do anything with the pig's head.⁷ Matthews also claimed that his joke was not directed at the mosque because he did not know there was one in that building and, somewhat inconsistently, that he didn't know pork products were offensive to Muslims.

Not buying Matthews' claims, the court granted the government a preliminary injunction against Matthews and ordered him to stay away from the mosque.⁸ The FBI decided not to file federal charges shortly thereafter. By all accounts, Brent Matthews complied with the terms of the injunction, learned his lesson, and moved on with his life. Mosque members said that they forgave Matthews for his actions and considered it an isolated event.⁹ But, on April 21, 2007, Matthews drove to the parking lot of a local store, called 911, and threatened to kill himself.¹⁰ Officers tried to speak to Matthews, but shortly after their arrival Matthews shot and killed himself, leaving no note or explanation behind—a troubling end to a troubled life.

Brent Matthews' story provides a vivid illustration of what a state attorney general can do if given the authority to seek civil remedies against those who commit hate crimes. In these states, attorneys general are able to move swiftly and craft orders that enjoin and prohibit hateful activities with great specificity.¹¹ However, allowing the government to enjoin an individual from interacting with certain people, saying certain things, and going certain places without the rigor of a criminal trial raises serious constitutional questions. How broad should an attorney general's powers be? What actions justify their intervention?

This Article will look at the experiences of the eight states that have given their attorneys general this authority and determine whether they serve as a model that other jurisdictions should follow. Part II provides background and discusses the authority of state attorneys general acting as *parens patriae* of its citizens. Part III looks specifically at the laws and discusses how attorneys general's offices have wielded this authority. Part IV attempts to reconcile the states' experiences with enforcing this type of regulation and discusses at common trends that emerge. Part V examines possible constitutionality problems with this civil hate crime regulation, with a focus on the permissibility of punishing hate speech and the constitutionality of injunctions as a restraint on prior speech. Finally, Part VI recommends a course of action for states interested in adopting similar legislation in the future.

6. David Hench, *Man Asked Cop About 'Joke'*, PORTLAND PRESS HERALD, Aug. 8, 2006, at A1.

7. *Id.*

8. Tice, *supra* note 1, at A8.

9. *Id.*

10. *Id.*

11. Although there are many different names for a crime motivated by the hatred of a victim's characteristic, such as "bias-motivated crime" and "civil rights crime," I use the term "hate crime" throughout this paper to connote these crimes.

II. AUTHORITY OF THE STATE ATTORNEY GENERAL

In America, every state has an attorney general who is designated that state's chief legal officer.¹² The attorney general's specific duties and responsibilities are often amorphous because state law provides only that the attorney general may "perform duties 'prescribed as law'" or exercise powers given to the office in common law.¹³ Even more broadly, some states have entrusted their attorney general simply with the broad common law power of *parens patriae*—meaning parent of the state. In some states, the attorney general has the statutory authority to bring "consumer protection, environmental, civil rights, civil fraud, securities, and antitrust actions; some offices are also charged with maintaining oversight over public lands and charitable trusts."¹⁴ In addition, many attorneys general play a role in enforcing criminal laws by either prosecuting criminals directly or supervising law enforcement officials. Most attorneys general also provide legal services to the governor and state agencies.¹⁵

In order for a state attorney general to assert standing under the doctrine of *parens patriae*, "the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition."¹⁶ Although the Supreme Court declined to define quasi-sovereign interest in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, the Court observed that there are two categories of qualifying interests that emerge from case law. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."¹⁷ In addition to a quasi-sovereign interest, the Court held that a State "must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party."¹⁸ The Court's language in *Snapp* seems to imply that there is some type of numerosity requirement to be met before the attorney general can act as *parens patriae*, such that the office may not represent a private party merely to vindicate that party's private interest. The Court did not enunciate that a specific proportion of the population must be affected, but it articulated some guidelines:

One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.¹⁹

Interpreting this language, the Court's requirement turns on the type of injury, rather than a requirement that a certain number of citizens be affected. Therefore, even

12. See William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006).

13. Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 (Dec. 2001).

14. Marshall, *supra* note 12, at 2452.

15. See Lynch, *supra* note 13, at 2002.

16. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

17. *Id.* at 607.

18. *Id.*

19. *Id.*

if one person commits a crime against another person, the attorney general may act under his or her authority of *parens patriae* as long as the crime affects the community.

On balance, because the state attorney general's role is largely undefined and subject only to the very loose constraints of the doctrine of *parens patriae*, states are free to expand and experiment with the attorney general's authority.

III. THE ROLE OF THE STATE ATTORNEY GENERAL IN CIVIL RIGHTS VIOLATIONS

A. State Civil Rights or "Hate Crimes" Laws Generally

Although public awareness of the prevalence of hate crimes waxes and wanes, the number of hate crimes remains consistently high. Between July 2000 and December 2003, there was an average of 191,000 hate crimes involving one or more persons annually in the United States—about 3 percent of all crimes reported to the National Crime Victimization Survey.²⁰ 84 percent of these incidents were accompanied by a violent crime, such as robbery or assault, and the remaining 16 percent were property crimes, such as burglary or theft.²¹ Of the 191,000 hate crimes, an average of about 44 percent (80,760) was reported to police.²² Of that 44 percent, police took action in 85 percent of cases—about 68,646 incidents.²³ Breaking down hate crimes into categories by type of bias, 55 percent were motivated by race; 31 percent were motivated by association;²⁴ 29 percent were motivated by ethnicity; 18 percent were motivated by sexual orientation; 14 percent were motivated by another perceived characteristic; 13 percent were motivated by religion; and 11 percent were motivated by disability.²⁵

In order to address the problem of hate crimes, every state except Nebraska, Utah, and Wyoming has enacted some form of hate crimes law, most of which are based on model legislation drafted by the Anti-Defamation League (ADL).²⁶ The ADL's approach penalizes hate crimes through a "penalty-enhancement" of an underlying criminal offense, rather than the creation of an independent crime.²⁷ Expressions of hateful speech, without more, are not criminalized. Instead, hate crimes arise when an individual commits a predicate illegal offense, such as assault, harassment or vandalism, coupled with a motivation, at least in part, of underlying bias.²⁸

There are three main justifications offered for penalizing hate crimes more harshly than crimes. First, hate crimes have especially negative effects on the individual

20. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, HATE CRIMES REPORTED BY VICTIMS AND POLICE 1 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf> [hereinafter HARLOW].

21. *Id.*

22. *Id.*

23. *Id.* at 4.

24. Hate crimes motivated by association are those where the victim is targeted because of her association with someone who has a certain characteristic, such as a multiracial couple.

25. HARLOW, *supra* note 20, at 3. Note that the percentages add up to more than 100 percent because victims could identify more than one category.

26. See Robert J. Kelly et al., *Hate Crimes: Victimizing the Stigmatized*, in BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 23, 45-47 (Robert J. Kelly ed., 1993).

27. ANTI-DEFAMATION LEAGUE, HATE CRIMES LAW: A COMPREHENSIVE GUIDE 2 (1994) [hereinafter ADL].

28. See JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 12 (2002).

because their victimization is tied up with their identity, which can create feelings of anger and vulnerability.²⁹ Second, hate crimes have especially negative effects on the community as a whole because they can heighten hostilities between groups—perhaps leading to violence—as well as increase fear and distrust generally.³⁰ Third, “[t]he expression of bias is an element, that is, at least analytically, severable from the crime itself. . . . [T]he expression of bias has a meaning of its own that can produce negative effects regardless of the seriousness of the associated crime.”³¹

Hate crimes are unusual in that motivation is a required element. Whether a crime is motivated by hate is normally determined by the police officer investigating the underlying crime. Establishing a bias motive is complicated by the fact that police officers must determine *why* a crime has occurred, in addition to determining the facts of the crime. This determination necessarily requires police officers to interpret external actions to be evidence of internal motivation. Because of the difficulty in doing so from an evidentiary perspective, officials place a great amount of weight on what was said and what symbols were used, such as a swastika or a burning cross.³² These are not the only factors, however: officials may look at “the victim’s perceptions, the victim’s identity (in the sense of whether the victim is publicly recognized as a spokesperson for his or her group), whether the incident is part of a pattern of acts, and when the incident occurs (e.g., on holidays with special religious, racial or ethnic significance).”³³ In the most recent Bureau of Justice Statistics Report, nearly 99 percent of victims cited “[n]egative comments, hurtful words, [and] abusive language” as evidence of underlying bias.³⁴ Victims also cited evidence of hate symbols and independent police confirmations in 8 percent of cases.³⁵ As a practical matter, without concrete and explicit examples of bias or hatred, it may be difficult for police officers to recognize hate crimes and for attorneys general and prosecutors to meet their burden of proof in court.

B. The Differences Between Civil and Criminal Hate Crime Prosecutions

State officials may choose to pursue civil remedies for hate crimes for a variety of reasons. First, the burden of proof is less onerous for civil claims—usually a preponderance of the evidence, compared with beyond a reasonable doubt in criminal cases.³⁶ Second, a civil injunction is typically adjudicated more quickly than a criminal case.³⁷ Third, juveniles are subject to civil injunctions to a greater extent that they would be subject to criminal sanctions.³⁸ Lastly, civil injunctions can be permanent,

29. See James Garofolo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES*, *supra* note 26, at 64-65.

30. See *id.* at 65-66.

31. *Id.* at 66.

32. *Id.* at 70.

33. *Id.*

34. HARLOW, *supra* note 20, at 3.

35. *Id.* Note that the percentages add up to more than 100 percent because victims included more than one motivation or evidence of motivation.

36. Of the eight states studied in the paper, only the New Hampshire Civil Rights Act requires the State to meet a clear and convincing burden of proof. See N.H. REV. STAT. ANN. § 354-B:2 (Supp. 2008).

37. See ADL, *supra* note 27, at 19.

38. See *id.*

while stay away orders as part of a criminal prosecution normally only last for short periods of time.³⁹

In addition to the general advantages of civil prosecutions, there are specific benefits to state attorneys general taking up a hate crime case. First, the victim often has fewer resources to draw from, which means that claims for civil injunctions are often not filed when available.⁴⁰ Second, in some states the attorney general is held to a lesser requirement for standing than private individuals, having to prove merely a “public interest.”⁴¹ Lastly, there may be greater deterrent effects with the state’s involvement because increased publicity sends a message that the state takes civil rights violations seriously.

C. State Civil Rights Laws Delegating a Role to State Attorneys General

Of the eight states that have enacted civil hate crime legislation law, only five state attorneys general have incorporated these laws into their programs to combat hate crimes: Maine, Massachusetts, New Hampshire, Vermont, and West Virginia. The attorneys general of the remaining three states—California,⁴² New Jersey,⁴³ and

39. *See id.* at 20.

40. *Id.* at 19.

41. *Id.*

42. In 1976, California enacted the Ralph Civil Rights Act, which provides that all persons: have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic. . . , or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.

CAL. CIV. CODE § 51.7(a) (2006). The characteristics protected by the Act are not listed in the statute, but the California Legislature declared in its findings that the Act protected hate crime based on “race, color, religion, or sex, among other things.” A.B. 2719, ch. 98 § 1, Legislative Counsel’s Digest (2000). In 2001, the California Legislature passed an amendment that provides that the Attorney General, a district attorney, or a city attorney may seek a civil penalty of \$25,000, which is assessed individually against each person violating the law and awarded to each person whose rights have been violated. CAL. CIV. CODE § 52.1(a) (2008). This amendment was authored by the California Attorney General’s Office based on the inadequacy of existing law to incentivize victims to report hate crimes. The Attorney General testified that despite his office’s efforts to inform the public about the Attorney General’s ability to bring a hate crime claim, they were not very successful in getting requests for assistance even though they knew that hate crimes were occurring. Cal. Senate Comm. on Judiciary, Comm. Analysis of A.B. 587, at 4 (Apr. 3, 2001). Although the California Attorney General’s Office lobbied successfully for the 2001 amendments, the Office rarely, if ever, civilly prosecutes hate crimes itself. Telephone Interview with Louis Verdugo, Assistant Cal. Attorney Gen. (Jan. 3, 2007). Unlike other states, the California Attorney General has concurrent jurisdiction and direct supervision over county attorneys, district attorneys, and sheriffs. *See* CAL. GOV’T CODE § 12550 (2006). Hate crimes are investigated and prosecuted by these agencies under the guidance of the Attorney General’s Office, rather than the Office bringing cases itself. Telephone Interview with Louis Verdugo, Assistant Cal. Attorney Gen. (Jan. 3, 2007).

43. The New Jersey hate crimes law, originally enacted in 1993, currently provides:

A person, acting with purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, gender identity or expression, national origin, or ethnicity, who engages in conduct that is an offense under the provisions of the New Jersey Code of Criminal Justice, Title 2C of the New Jersey Statutes, commits a civil offense.

N.J. STAT. ANN. § 2A:53A-21(a) (West 2006). Notably, bias against persons because of their “gender identification” was not included in the 1993 legislation and was recently added to the enumerated

Pennsylvania⁴⁴—have yet to incorporate these laws into their civil rights initiatives. This Part, therefore, focuses on the five states that are actively using civil hate crime prosecutions.

1. Maine

The Maine Civil Rights Act was enacted in 1989 in direct response to an increase in hate group-related activity.⁴⁵ Modeled on, and nearly identical to, the Massachusetts Civil Rights Act, the Maine Civil Rights Act provides:

Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured.⁴⁶

In 1993, the Maine Legislature passed an amendment to the Civil Rights Act that specified the categories of people specifically guaranteed to be free from violations of

categories. Telephone Interview with Benn Meistrich, Assistant Attorney of N.J. (Jan. 8, 2007); *see also* N.J. STAT. ANN. § 2A:53A-21(a) (West 2006). If a person violates the law, the “Attorney General, as *parens patriae*, may initiate a cause of action . . . on behalf of any person or persons who have sustained injury to person or property as a result of the commission of the civil offense.” N.J. STAT. ANN. § 2A:53A-21(c) (West 2006). If the Attorney General shows by a preponderance of the evidence that a person has violated the law, the perpetrator is liable for compensatory and punitive damages, reasonable attorneys’ fees and costs to the State and/or private attorneys, injunctive relief to prevent further violations, and any additional appropriate equitable relief. *Id.* § 2A:53A-21(d)(1)–(4). Prosecution of hate crimes in the New Jersey Attorney General’s Office is divided between two separate divisions. The Division on Civil Rights brings civil suits to protect and enforce anti-discrimination and harassment claims, the majority of which deal with public accommodations and workplaces. Telephone Interview with Benn Meistrich, Assistant Attorney of N.J. (Jan. 8, 2007). The Division on Criminal Justice, which includes the Office of Bias Crime and Community Relations (OBCCR), brings criminal actions against people who have committed hate crimes. The Division on Civil Rights, which does not work with the Division on Criminal Justice or the OBCCR, pursues injunctive relief in the event of a hate crime. Because of this bifurcated organization, it appears that the Office rarely—if ever—uses the civil injunction provision to punish hate crimes.

44. The provision in the Pennsylvania civil rights law establishing a civil right of action for hate crimes was enacted in 1990. The law provides that a district attorney or the Attorney General, “after consulting with the district attorney,” may bring suit for injunctive or other equitable relief against a person who has committed the crime of ethnic intimidation. 42 PA. STAT. ANN. § 8309 (West 2006). Ethnic intimidation is defined as when a person commits a crime with malicious intent toward “the race, color, religion, or national origin of another individual or group of individuals.” 18 PA. STAT. ANN. § 2710(a) (West 2006). Although it has the statutory authority, the Pennsylvania Attorney General’s Office brings few—if any—cases under the civil rights law. Instead, the Office refers complaints to the Pennsylvania Human Relations Commission, a district attorney, or other state and federal agencies. *See* Office of the Pa. Attorney Gen., Civil Rights Division, <http://www.attorneygeneral.gov/complaints.aspx?id=462> (*last visited* Apr. 13, 2009).

45. *See* Christopher Parr, Comment, *The Maine Civil Rights Act: History, Enforcement, Application, and Analysis*, 53 ME. L. REV. 189, 194 (2001).

46. ME. REV. STAT. ANN. tit. 5 § 4681(1) (2002).

their civil rights.⁴⁷ As amended, the Civil Rights Act protects people from violence or property damage motivated by their “race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation.”⁴⁸ When a hate crime occurs, the statute authorizes the Maine Attorney General’s Office to file a suit for an injunction, a civil penalty of up to \$5,000, and reimbursement of attorneys’ fees.⁴⁹ A perpetrator who violates an injunction or consent decree issued under this section is guilty of a class D crime—punishable by up to a year in jail.⁵⁰

The Maine Attorney General’s Office vigorously and frequently prosecutes hate crimes. Every year, the Office receives about 250 reports of possible hate crimes and brings suit in about ten to fifteen cases.⁵¹ Since the law was enacted, the Office has successfully obtained 275 injunctions, only seven of which have ever been violated.⁵² The Office has never lost a case against the alleged perpetrator of a hate crime—perhaps because they are selective in which cases they prosecute and only bring cases that they are reasonably sure they can prove.⁵³ The average perpetrator of a hate crime in Maine is a white male between the ages of fourteen and seventeen, and the most common type of hate crime is motivated by race or color, followed by sexual orientation.⁵⁴

When the Attorney General’s Office civilly prosecutes a hate crime, the parties are likely to agree on a resolution, which is reduced to a consent decree, rather than proceed through the adjudicatory process. For example, between August 28, 1992 and October 21, 1999, the Office brought eighty-six formal actions.⁵⁵ From these actions, 135 defendants entered into consent decrees with the Office, “eight permanent injunctions were issued, three default judgments were granted, . . . and one order/decision was issued.”⁵⁶ Many perpetrators choose not to retain private counsel during this process and proceed *pro se*.⁵⁷ Consent decrees are essentially contractual agreements between the defendants and the State where the defendant agrees to a course of conduct or non-conduct. Consent decrees normally last the lifetime of the perpetrator and often contain boilerplate language that prohibits the perpetrator from coming within a specified distance of the victim, from encouraging anyone else to commit hate crimes, and from violating the civil rights of anyone in the future—including a violation involving a different type of bias or victim.⁵⁸ Thus, a defendant who has committed a hate crime based on race is enjoined from violating the civil rights of that person, anyone of the same race, *and* anyone else protected by the

47. See 2 Legis. Rec. House, H-1072-73 (1993).

48. ME. REV. STAT. ANN. tit. 5 § 4684-A (2002).

49. *Id.* § 4681.

50. See Parr, *supra* note 45, at 193.

51. Telephone Interview with Thom Harnett, Assistant Me. Attorney Gen. (Dec. 22, 2006) [hereinafter Harnett].

52. *Id.*

53. *Id.*

54. *Id.*

55. Parr, *supra* note 45, at 210 (citing Dep’t of Attorney Gen., Formal MCRA Actions Aug. 1992-Oct. 1999, at Table of Contents).

56. *Id.*

57. *Id.*

58. Harnett, *supra* note 51.

statute. As used by the Maine Attorney General's Office, consent decrees are designed not only to stop the conduct directed at a single person but also at halting the offensive conduct in the community-at-large. If a consent decree is violated, the perpetrator can be prosecuted for the new hate crime as well as for violating the injunction.⁵⁹

The case of *State v. Dow* is illustrative of the type of hate crimes the Office prosecutes.⁶⁰ In *Dow*, the defendant yelled racial slurs and threats, including "get out and I will beat your black ass, you nigger, you whore, you slut," at a pregnant twenty-one-year-old African-American woman.⁶¹ Dow then threw a can of beer at the woman, opened her car door, and kicked the woman in the arm and stomach.⁶² The Attorney General's Office brought suit against Dow, and the parties eventually entered into a consent decree where Dow agreed to be permanently enjoined from assaulting, threatening, intimidating, coercing, harassing, or attempting to do any of these things to the victim, the victim's family or anyone else, whether the bias be motivated by race, religion, sex, etc.⁶³ In addition, Dow is permanently enjoined from speaking to the victim and her family, and from coming within a certain number of feet of the victim's home or place of employment. If Dow knowingly violates the consent decree, he is liable for a fine of no more than \$2,000 and no more than 364 days in jail.⁶⁴

In addition to prosecuting offenders, the Maine Attorney General's Office has developed an educational program to prevent hate crimes and to educate citizens to recognize hate crimes.⁶⁵ To reach students, school administrators, and citizens, the Office conducts free presentations at schools and workplaces.⁶⁶ In 2006, the Office conducted 144 of these presentations throughout the state.⁶⁷ In addition, the Office works with middle and high schools across the state to create civil rights teams, which are composed of a faculty advisor and three students per grade, who receive training about raising awareness of bias and prejudice at their schools.⁶⁸ The goal of the teams is to provide the student body with a support group of team members to whom students can feel comfortable talking about harassment before it develops into a hate crime.⁶⁹ Team members then pass this information on to school administrators or law enforcement officials who can take appropriate action.⁷⁰

The Maine Attorney General's Office also trains police officers to enforce the Civil Rights Act. Each new recruit receives a basic amount of training in civil rights

59. *Id.*

60. No. CV 06-72 (Me. Super. Ct, Hancock Cty., Sep. 15, 2006).

61. Complaint at 2-3, *State v. Dow*, No. CV 06-72 (Me. Super. Ct, Hancock Cty., Sep. 15, 2006).

62. *Id.* at 3.

63. See Consent Decree at 1-2, *State v. Dow*, No. CV 06-72 (Me. Super. Ct, Hancock Cty., Oct. 4, 2006).

64. See *id.* at 2-3.

65. The educational program is unusually prominent in the Maine Attorney General's Office. In fact, the title of the Assistant Attorney General in charge of the Civil Rights Division is "Civil Rights Education and Enforcement Officer." Harnett, *supra* note 51.

66. *Id.* As this Article elaborates below, education in schools is especially important because most hate crimes are committed by teenage boys.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

law while at the Maine State Police Academy.⁷¹ Additionally, most police departments have a “Designated Civil Rights Officer” who is specially trained to identify bias-motivated crimes.⁷² This Officer then works as a liaison with the Attorney General’s Office to investigate and prosecute hate crimes.⁷³

2. Massachusetts

The Massachusetts Civil Rights Act was enacted in 1979 in response to a wave of racially motivated violence.⁷⁴ The Act provides:

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.⁷⁵

Because the Civil Rights Act does not enumerate the categories of people or rights protected, it has been interpreted broadly to apply to “threats, intimidation, or coercion on basis of his or her protected category (race, national origin, religion, age, gender, sexual orientation or disability); or protected activity (for example, the right to vote or the right to associate).”⁷⁶ The Civil Rights Act notably does not provide for a victim to collect damages in a suit under the Act—it provides merely for injunctive or equitable relief. If a victim wants to file a claim for damages, he must hire a private attorney. A violation of an injunction issued under the Civil Rights Act is a criminal offense, and the violation is punishable:

by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both such fine and imprisonment; provided, however, that if bodily injury results from such violation, the violation shall be punishable by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.⁷⁷

The Massachusetts Attorney General’s Office receives complaints of civil rights violations from both police and victims themselves. If the Office decides to pursue a case, it works with the local police department to investigate.⁷⁸ If a victim does not want to testify, she may prepare a written statement under oath, which the Office can

71. *Id.*

72. *Id.*

73. *Id.*

74. Virginia Nia Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 290 (1990).

75. MASS. GEN. LAWS ANN. ch. 12, § 11H (West 2007).

76. Office of the Attorney Gen. of Mass., http://www.mass.gov/?pageID=cagoterminal&L=2&L0=Home&L1=Civil+Rights&sid=Cago&b=terminalcontent&f=civilrights_hate_crimes&csid=Cago (last visited Apr. 23, 2009) [hereinafter Mass. Attorney Gen. Website].

77. MASS. GEN. LAWS ANN. ch. 12, § 11J (West 2007).

78. See Mass. Attorney Gen. Website, *supra* note 76.

present to receive an injunction.⁷⁹ Although there is no current data available regarding the annual number of civil prosecutions, from 1982 to 1989 the Office received “eighty-four injunctions against 233 defendants in hate-motivated violence cases” around the state.⁸⁰

A recent case illustrates how the Massachusetts Attorney General’s Office is enforcing the Civil Rights Act. In 2005, the Office obtained an injunction against a Sharon Brunelle for verbally assaulted four men—two of them gay—using anti-gay slurs and violent threats.⁸¹ According to the Office’s complaint, Brunelle shouted anti-gay slurs at her downstairs neighbors, who were two gay men, as they ate dinner in their backyard. When another neighbor tried to intervene on behalf of the two men, Brunelle threatened to “kill and beat the two gay men, the next door neighbor and another man visiting next door,” all while yelling anti-gay slurs.⁸² The injunction prohibits Brunelle from “threatening, intimidating or coercing any of the four male victims, or anyone else in the Commonwealth, on the basis of their actual or perceived sexual orientation.”⁸³ In addition, Brunelle must stay a minimum of 15 feet away from the victims at home, 150 feet away from the victims elsewhere, and 500 feet away from the victims’ place of employment; not communicate with the victims in any way; not handle the victims’ mail; not bang or make excessive noise at night; and “stop imitating or using gestures of stereotypical gay male movements.”⁸⁴

In addition to prosecuting hate crimes, the Office also works with students, teachers, and school administrators to reduce and prevent hate crimes from occurring in schools. In 2004, the Office produced a brochure educating students about what constitutes a hate crime, harassment, and discrimination, and telling students what they should do (and who to contact) if they believe they have been a victim.⁸⁵ In 2006, the Office launched a pilot program in three school districts to reduce bullying motivated by bias. The program, called the Safe Schools Initiative, was created after attorneys in the Attorney General’s Office, school administrators, and parents noted an increase in the number of reports of bullying or harassment where the perpetrator used hateful language.⁸⁶ According to an attorney in the Office’s Civil Rights Division, bullying using “anti-Semitic, antigay and lesbian language” was pervasive.⁸⁷ The Office is working with schools and community groups to “interview parents and students, convene focus groups, and collect statistics about the number and type of incidents that occur in each district to look for patterns and trends. Teachers, administrators, and

79. *Id.*

80. Lee, *supra* note 74, at 295.

81. See Mass. Attorney Gen.’s Office, AG Reilly Obtains Civil Rights Injunction Against a New Bedford Woman Accused of Gay Bashing (October 27, 2005), *available at* <http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1514>.

82. *Id.*

83. *Id.*

84. Joseph LaPlante, *Woman Ordered to Stop Abuse of Gay Couple*, THE STANDARD-TIMES, Oct. 8, 2005, at A7, *available at* <http://www.southcoasttoday.com/daily/10-05/10-28-05/a07lo194.htm>.

85. See MASS. ATTORNEY GEN.’S OFFICE, ERASING HATE: A GUIDE TO YOUR CIVIL RIGHTS IN SCHOOL: YOUR RIGHT TO BE FREE FROM DISCRIMINATION, HARASSMENT, AND HATE-MOTIVATED VIOLENCE (2004), *available at* <http://www.ago.state.ma.us/filelibrary/erashate.pdf>.

86. See Megan Woolhouse, *State Targets Bullies*, BOSTON GLOBE, Mar. 2, 2006, at Globe West 1.

87. *See id.*

other staff members will be schooled in the legal distinctions among bullying, harassment, and hate crimes.”⁸⁸ In addition, schools in the program are required to report all incidents, regardless of severity.⁸⁹

3. New Hampshire

The New Hampshire Civil Rights Act was enacted in 2000 as a result of the efforts of the former New Hampshire Attorney General Philip McLaughlin, who asked his assistant attorneys general to draft hate crime legislation when he came into office.⁹⁰ The Civil Rights Act provides:

All persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or trespass on property when such actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, gender, or disability. “Threatened physical force” and “threatened damage to or trespass on property” is a communication, by physical conduct or by declaration, of an intent to inflict harm on a person or a person’s property by some unlawful act with a purpose to terrorize or coerce.⁹¹

The Civil Rights Act further provides that it is a violation “for any person to interfere or attempt to interfere with the rights secured by this chapter.”⁹² The New Hampshire Attorney General may bring a civil action for an injunction whenever he or she has probable cause to believe that the Act has been violated.⁹³

As enacted, the Civil Rights Act differs from the one proposed by the Attorney General’s Office in one major way. While most civil rights laws require the Attorney General’s Office to prove the elements of their case with a preponderance of evidence, the New Hampshire Civil Rights Act requires the Office to prove their case with clear and convincing evidence.⁹⁴ This language was inserted because the proposed Civil Rights Act faced considerable opposition in the New Hampshire Legislature, and its supporters were forced to make this compromise to assure its passage.⁹⁵ New Hampshire is the only state to place such a high burden on the Office. This burden is especially difficult for hate crimes because of the uncertainty inherent in trying to prove a perpetrator’s internal motivation.

The New Hampshire Attorney General’s Office rarely brings suit under the Civil Rights Act. Since 2000, approximately three cases have been brought under the Act, two of which involved school children and one which involved an adult.⁹⁶ The

88. *See id.*

89. *See id.*

90. Telephone Interview with Anne Larney, Assistant N.H. Attorney Gen. (Dec. 28, 2006) [hereinafter Larney].

91. N.H. REV. STAT. ANN. § 354-B:1 (West Supp. 2008).

92. *Id.*

93. *See* N.H. REV. STAT. ANN. § 354-B:2 (West Supp. 2008).

94. *Id.*

95. Larney, *supra* note 90.

96. *Id.*

Attorney General's Office receives a "fair number of complaints"—the majority of which come from the police, although some come from the victims themselves.⁹⁷ When a complaint comes into the Office, a pair of assistant attorneys general will work on it with a police officer or school resource officer—a police officer working directly in the school—to investigate the incident.⁹⁸ If the Office decides not to pursue a complaint, it is usually because the Office lacks the requisite amount of proof of bias, but infrequently it is because the victim is uncooperative.⁹⁹ Although the Civil Rights Act allows the Office to go forward without the cooperation of a victim, it usually will not, either out of respect for the victim's wishes or because without the victim's testimony there is insufficient evidence.¹⁰⁰

Two cases involving minors in school are illustrative of the Office's enforcement efforts.¹⁰¹ In the first case, several students committed a hate crime against another student based on racial animus. On the recommendation of the Office, the court issued an injunction against the perpetrators from committing future hate crimes and ordering them to write a paper on civil rights.¹⁰² In the second case, four to five middle school children followed a classmate home and beat him up because of his perceived homosexuality. All but one perpetrator entered into a consent decree with the Attorney General's Office, agreeing to stop the hateful conduct.¹⁰³ The remaining perpetrator chose to go to court with the support of his parents, and an evidentiary hearing was held where the victim, the perpetrator, and four classmates—but not the co-perpetrators—testified.¹⁰⁴ The judge issued a bench order enjoining the perpetrator from further hate crimes and ordering him to pay a fine, which he forbade the boy's parents from paying.¹⁰⁵ In addition to the injunctions, all of the perpetrators were ordered to write a paper on civil rights, which they had to read in front of a school assembly.¹⁰⁶

Since the passage of the Civil Rights Act, the New Hampshire Attorney General's Office has conducted three trainings on the law.¹⁰⁷ Two of these trainings were conducted for police officers and one was conducted for school administrators.¹⁰⁸ In terms of public education, the Office issues a press release and works with the local newspapers to publicize any prosecutions, but there is no standing public education and outreach program in place.¹⁰⁹

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* In only one case has the Office brought suit without the victim's cooperation, and in this case the hate crime occurred in the presence of a teacher and a school police officer. The Office did not need the student's testimony and actually kept the name of the victim confidential. *Id.*

101. Although cases involving minors are sealed, attorneys in the Office may discuss their cases generally so that one can get a sense of how the Office prosecutes cases. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

4. Vermont

The Vermont Hate Motivated Crime Statute was drafted by the Vermont Human Rights Commission and the Attorney General's Office at a time when there was a sharp increase in the number of hate crimes.¹¹⁰ Based on the ADL's model legislation, the Vermont Attorney General considered the proposal "one of his top priorities for the 1990 legislative session. . . . [because he] believed that the penalty-enhancement approach afforded criminal prosecutors a much needed weapon to aggressively pursue hate crimes."¹¹¹ As enacted, the statute provides:

A person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap as defined by 21 V.S.A. § 495d(5), sexual orientation or gender identity [is guilty of a hate crime.]¹¹²

For the purpose of enforcement, the Statute defines plaintiff as either "the attorney general or a complainant."¹¹³ A victim "suffering damage, loss or injury as a result" of a hate crime may bring suit for "injunctive relief, compensatory and punitive damages, costs and reasonable attorneys fees, and other appropriate relief against any person who engaged in such conduct."¹¹⁴ In contrast, the Attorney General may seek an injunction,¹¹⁵ a civil penalty of not more than \$5,000, and costs and reasonable attorneys fees.¹¹⁶

The Vermont Attorney General's Office assists victims who wish to seek injunctive relief on their own, and the Office civilly prosecutes perpetrators independently.¹¹⁷ When a victim wishes to proceed independently, the judge can, and sometimes will, recommend that the victim contact the Attorney General's Office, which will offer its help.¹¹⁸ In recent years, the role of the Attorney General's Office in enforcing the Statute has decreased because state prosecutors have begun to criminally prosecute hate crimes more quickly, including seeking temporary restraining orders.¹¹⁹ When awarded quickly, a temporary restraining order obviates the need for a civil injunction under the statute. The Attorney General's Office plays a larger role in cases where the state prosecutor proceeds slowly, where the evidence is not clear cut, or where the victims approach the Attorney General's Office before a criminal prosecution begins.¹²⁰

110. See Erik B. FitzPatrick, *An Analysis of the Constitutionality of the Vermont Hate Motivated Crimes Statute in Light of the United States Supreme Court's Decisions in R.A.V. v. City of St. Paul and Wisconsin v. Mitchell*, 18 VT. L. REV. 771, 792-93 (1994).

111. *Id.* at 793-94.

112. VT. STAT. ANN. tit. B, § 1455 (1999 & Supp. 2008).

113. VT. STAT. ANN. tit. B, § 1458(5) (Supp. 2008).

114. VT. STAT. ANN. tit. B, § 1457 (1999 & Supp. 2008).

115. VT. STAT. ANN. tit. B, § 1461 (Supp. 2008).

116. *Id.* § 1466 (Supp. 2008).

117. Telephone Interview with Sandra Everitt, Assistant Attorney Gen. for Civil Rights (Dec. 29, 2006) [hereinafter Everitt Interview].

118. *Id.*

119. *Id.*

120. *Id.*

In an average year, the Office conducts far more investigations into potential hate crimes than it brings to court. If the Office decides not to file a suit, it is commonly because there is no clear identification of the perpetrator, or the hateful actions do not rise to the level of a crime.¹²¹ In 2007, eleven individuals contacted the Attorney General's Office, and ten of those complaints were investigated.¹²² Of these complaints, five involved crimes motivated by sexual orientation, two involved race, one involved religion, and two involved national origin.¹²³ After investigating these complaints, the Office did not file a single civil injunction, for a variety of reasons. In several instances, the victim requested that the Office not pursue the complaint.¹²⁴ In two instances the victims initiated private legal proceedings, which achieved the desired protection.¹²⁵ In the remaining cases, either the conduct did not establish criminal liability, or the perpetrator could not be identified.¹²⁶

In its most recent report, the Office reported a decrease in the number of referrals concerning hate and bias-motivated crimes over the past three years.¹²⁷ The Office theorized several reasons for this decrease. First, Vermont anti-harassment laws require school administrators to intervene before conduct escalates to the level of a hate crime.¹²⁸ These programs could have caused a decrease in the number of incidents in schools. Second, the Office has implemented a comprehensive education program for all Vermont law enforcement personnel, so they are better able to prevent incidents and counsel victims. Third, community and advocacy groups have conducted education and awareness training in targeted populations, leading to earlier intervention.¹²⁹

To date, all of the suits brought by the Office have resulted in a consent injunction at the hearing stage.¹³⁰ These injunctions are confidential and usually include provisions mandating counseling, treatment and community service for the perpetrator, and in cases where the perpetrator is a minor, the record is sealed and protected.¹³¹ As a result, the Office does not publicize when it brings a claim. Although barred from disclosing the details of its prosecutions, in its 2005 report to the Vermont Legislature, the Office briefly discussed the two cases it brought in 2004. In the first case, the Office obtained an injunction against an offender for a crime motivated by the victim's perceived sexual orientation.¹³² The Office also reported that it successfully enforced the consent decree when it was subsequently violated.¹³³ In the second case, the Office

121. *Id.*

122. SANDRA EVERITT, OFFICE OF THE ATTORNEY GEN. OF VT., REPORT TO THE VERMONT LEGISLATURE: HATE/BIAS MOTIVATED CRIMES 1 (2008), http://www.atg.state.vt.us/upload/1200689230_2008_Hate_Crime_Report_to_the_Vermont_Legislature.pdf [hereinafter EVERITT, HATE/BIAS CRIMES].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2.

128. *Id.*

129. *Id.*

130. EVERITT, HATE/BIAS CRIMES, *supra* note 122.

131. *Id.*

132. SANDRA EVERITT, OFFICE OF THE ATTORNEY GEN. OF VT., REPORT TO THE VERMONT LEGISLATURE: HATE CRIMES 1 (2005), http://www.atg.state.vt.us/upload/1110459031_2005_Report_to_the_Vermont_Legislature.pdf.

133. *Id.*

assisted a parent in filing an action on behalf of her child, who was the victim of a hate crime motivated by race.¹³⁴ On her behalf, the Office obtained “an injunction against one individual and assisted in a mediated resolution of the case with a second offender.”¹³⁵

In addition to bringing cases, the Vermont Attorney General’s Office also trains police officers to prevent, recognize, and investigate hate crimes.¹³⁶ In 2007, the Office conducted two full-day trainings for all new police recruits at the Vermont Criminal Justice Training Council facility.¹³⁷ The Office also made a presentation to county prosecutors about the prosecution of hate and bias-motivated crimes.¹³⁸

5. West Virginia

The West Virginia Human Rights Act was amended in 1998 to allow the Attorney General to bring a civil action

whenever any person, whether or not acting under the color of law, intentionally interferes or attempts to interfere with another person’s exercise or enjoyment of rights secured by this article or article eleven-a of this chapter, by actual or threatened physical force or violence against that person or any other person, or by actual or threatened damage to, destruction of or trespass on property.¹³⁹

The categories of bias protected by the Human Rights Act are listed explicitly and include “race, color, religion, sex, ancestry, national origin, political affiliation or disability,” and any other categories of bias which the courts find to be protected under the broader Human Rights Act.¹⁴⁰ In a civil action under the Human Rights Act, the Office may seek an injunction or other equitable relief, a civil penalty of no more than five thousand dollars per violation, or both.¹⁴¹ If a person knowingly violates an injunction issued under the Human Rights Act, he or she is subject to a fine of not more than five thousand dollars, imprisonment for up to a year in jail, or both.¹⁴²

When the Human Rights Act was first implemented, the West Virginia created a Hate Crimes Task Force, which is made up of state, local, and federal agencies, and organizations, including the West Virginia Attorney General’s Office.¹⁴³ The Task Force’s overarching goal is to prevent and respond to hate crimes using a multi-disciplinary approach with the support of all of its members.¹⁴⁴ The Attorney General’s authority to seek an injunction or civil penalty is part of this broader program.¹⁴⁵ Since

134. *Id.*

135. *Id.*

136. EVERITT, HATE/BIAS CRIMES, *supra* note 122, at 2-3.

137. *Id.*

138. *Id.* at 3.

139. W. VA. CODE § 5-11-20 (2008).

140. *Id.*

141. *See id.*

142. *See id.*

143. W. VA. HATE CRIMES TASK FORCE, ANNUAL REPORT, at Appendix A1-2 (2002) (on file with author) [hereinafter W. VA. ANNUAL REPORT].

144. *Id.* at 1-2.

145. W. VA. CODE § 5-11-20(b)(1)-(2) (2008).

1998, the Office has handled about a “handful of cases a year” and has obtained injunctions in a total of ten cases.¹⁴⁶

One prosecution of a race-motivated hate crime is illustrative of the Office’s enforcement efforts. In 2004, the Office brought suit against a man named Romie Dailey, who threatened and attempted to stop a biracial couple from moving next door to him.¹⁴⁷ Dailey told the couple and others that “Ain’t no niggers going to live there” and brandished a gun at them.¹⁴⁸ Dailey also told the man selling the house to the biracial couple, “I’m going to kick your nigger-loving ass.”¹⁴⁹ After a hearing, the court entered a preliminary injunction, which Dailey violated by assaulting the African-American man who was, by then, residing with his fiancée next door.¹⁵⁰ The parties entered into a consent decree which ordered Dailey to pay a fine of \$500, enjoined Dailey from committing further hate crimes against the victims or anyone else, contacting the victims, “using the term ‘nigger’ to refer to [the African-American neighbor he assaulted] or the term ‘nigger lover’ to refer to [his fiancée] or her family members[,]” and ordering Dailey to attend anger management classes.¹⁵¹ In addition, Dailey was permanently enjoined from returning to his “former” home or going within a quarter-mile of the couple’s house, except to retrieve his personal possessions at a time arranged with the victims’ attorney.¹⁵²

In addition to prosecuting hate crimes, Task Force members, including the Attorney General’s Office, have trained police officers to recognize and respond to hate crimes; recommended that each police department appoint a Designated Civil Rights Officer who will receive additional education and work with other Civil Rights Officers across the state; educated teachers and administrators about how to prevent hate crimes in school; created civil rights teams in schools made up of a group of students trained to engage their classmates in a dialog about hate crimes; created and publicized a toll-free number to report hate crimes and get referrals; held community education sessions; and worked with the federal government to coordinate responses to hate crimes.¹⁵³

Although the Task Force was very active when the law was first passed in 1998, it has become less so over time and now operates only minimally.¹⁵⁴ The lapse in coordination with police departments has proven to be a major problem for the Attorney General’s Office because of high officer turnover. New officers may not have been previously trained to look for hate crimes, and without this training, police officers responding to multiple calls involving the same parties may not figure out that there is a pattern of bias. As a result, the Office is trying to figure out how to get more

146. Telephone Interview with Paul Sheridan, Assistant W. Va. Attorney Gen. (Dec. 18, 2006) [hereinafter Sheridan].

147. See Charles Shumaker, *Settlement Reached in Civil Rights Case*, CHARLESTON GAZETTE, Aug. 21, 2004, at P2A.

148. Complaint at 3, State v. Dailey, No. 04-C-2248 (W. Va. Cir. Cty. Ct., Kanawha, Aug. 12, 2004).

149. *Id.*

150. See Consent Decree, State v. Dailey, No. 04-C-2248 (W. Va. Cir. Cty. Ct., Kanawha, Aug. 22, 2006).

151. *Id.*

152. *Id.*

153. See W. VA. ANNUAL REPORT, *supra* note 143, at 2-11.

154. Sheridan, *supra* note 146.

cases in the door. Assistant Attorney General Paul Sheridan believes that there are more actionable incidents than cases brought by the Office, but victims and authorities are not contacting the Office.¹⁵⁵

Another issue affecting the efforts of the Office is implementing the Task Force's call for each police department to appoint a Civil Rights Officer. When the Task Force first advocated for these officers, the Governor asked all police departments to comply.¹⁵⁶ However, the Governor has direct control over only state police officers—not county or city police departments, who do the majority of investigations.¹⁵⁷ Therefore, the local police departments are free to disregard the Governor's request and are unaccountable to the Attorney General's Office. This lack of authority, combined with the Task Force's neglect, has resulted in fewer departments appointing a Civil Rights Officer, which may have also contributed to fewer cases being reported to the Attorney General's Office.

IV. LESSONS FOR STATES INTERESTED IN ADOPTING SIMILAR LEGISLATION

Despite differences in size and organization of state attorneys' general offices, there are several common themes that emerge when comparing their experiences. First, there is a universal use of consent decrees and consent injunctions in place of adjudicatory proceedings. This approach may be the result of economics—attorneys' general offices tend to have scant resources and few staff members. When asked, assistant attorneys general in Maine and New Hampshire explicitly cited a lack of resources as one of the biggest hindrances for their Offices in vigorously prosecuting more hate crimes. Overworked assistant attorneys general may simply not have the time to prosecute every violation to judgment. This is not to say that if attorneys' general offices had unlimited resources that they would prosecute every case to judgment. The issue is that assistant attorneys general need enough resources to prosecute cases quickly and move on to the next one.

Another explanation for the use of consent decrees may be that perpetrators are often unrepresented by attorneys, either because they cannot afford an attorney, they choose not to hire one, or they want to settle as soon as possible. It is also possible that the social stigma of being a hate monger is so strong that perpetrators prefer to settle, rather than have their conduct be a matter of public record. This justification is especially strong in the states that routinely agree to keep consent agreements confidential, such as Vermont. Whatever the reason, the result of an attorney general's focus on consent decrees is a faster result for the victim—ensuring that they and others will not be future victims of hate crimes.

The second trend is the use of boilerplate language that generally prohibits future violations and protects the victim from the perpetrator in consent decrees. Boilerplate language allows offices to spend less time on each case, although narrow tailoring to the situation at hand may be lost. This also has the benefit of saving assistant attorneys general scarce time and resources.

155. *Id.*

156. *Id.*

157. *Id.*

The third commonality is the increasing number of hate crimes committed by minors in schools and the community at large. The average perpetrator of a hate crime in nearly every state is a white teenage boy. Recognizing the danger that these teenagers represent for the future, several states have started programs to train school administrators to recognize and deal with hate crimes and harassment that can lead to hate crimes. Several states like Massachusetts are trying to educate students directly by conducting training in schools about hate crimes. Many attorneys general hope they can prevent a lifetime of hate-filled conduct by early intervention.

The final trend is that offices are focusing on education, training and publicity, in addition to merely bringing cases. Most offices train local police officers to recognize and investigate hate crimes. As noted above, discovering evidence of bias can be difficult if there is no physical evidence. Training police officers to ask the correct questions and to be sensitive to the personal issues of hate crime victims will increase the number and quality of cases the office can bring. Furthermore, attorneys' general offices commonly reach out to the public to educate and to publicize pending cases. In Maine, assistant attorneys general travel to offices and rotary clubs to train the public on how to recognize and prevent hate crimes. When filing a claim, most offices work with the media to publicize the details of the incident and any punishment with the hope that it will educate and deter future crimes. This approach seems to be effective because those states, such as Maine and Massachusetts, who publicize the resources and activities of their offices, receive far more complaints than those that do not, such as West Virginia and New Hampshire.

On balance, these trends offer compelling reasons to other states interested in giving their attorney general similar authority. The unique institution of the attorney general is well-suited to prosecute such crimes because of its ability to use precious resources as efficiently as possible and to combine prosecutions, education and publicity to accomplish a broad policy goal.

V. THE CONSTITUTIONALITY OF HATE CRIME INJUNCTIONS

Having examined how attorneys' general offices are using their authority, this Part will address whether underlying hate crimes laws enacted by the states are permissible regulations of speech and conduct under the First Amendment. It will first examine the laws under the hate speech, fighting words, and hate crimes doctrine of the Supreme Court in *R.A.V. v. City of St. Paul*,¹⁵⁸ *Wisconsin v. Mitchell*,¹⁵⁹ and *Virginia v. Black*.¹⁶⁰ The Part will then focus on whether the use of injunctions for civil rights enforcement is an unconstitutional prior restraint on free speech. Lastly, this Part will explore the extent to which the government can enter into an agreement with a defendant to prohibit future conduct under the unconstitutional conditions doctrine.

158. 505 U.S. 377 (1992).

159. 508 U.S. 476 (1993).

160. 538 U.S. 343 (2003).

A. May States Enact Laws that Specifically Target Hate Crimes?

The U.S. Supreme Court first considered the constitutionality of hate crime legislation under the First Amendment in *R.A.V. v. City of St. Paul*. This case involved a St. Paul ordinance that made it a crime to use any speech that could reasonably arouse anger or resentment in others on the basis of race, color, creed, religion, or gender.¹⁶¹ The Court held that the statute was facially unconstitutional because it prohibited speech solely on the basis of the viewpoint expressed.¹⁶² However, the Court drew a distinction between content-based and viewpoint-based discrimination, noting that while viewpoint-based discrimination is always unconstitutional, there are certain types of content-based restrictions that have long been recognized as constitutional.¹⁶³ Thus, content-based discrimination is permissible when the speech at issue is part of a class of speech that is normally proscribable, and the discrimination is based on the “very reason the entire class of speech at issue is proscribable.”¹⁶⁴ As an example, the Court noted that a state could prohibit only the most offensive obscenity, but it could not prohibit only the most offensive political obscenity.¹⁶⁵ On this basis, the Court held that the St. Paul statute was unconstitutional because it applied only to fighting words that insult or provoke violence, due to the fact that they express a view on a “disfavored subject.”¹⁶⁶

Although the *R.A.V.* Court struck down a law that criminalized speech based on its viewpoint, the Court shortly thereafter upheld a law increasing a criminal penalty where the victim was chosen because of a personal characteristic in *Wisconsin v. Mitchell*. This case involved a Wisconsin statute that increased the penalty for a crime where the victim was selected because of their “race, religion, color, disability, sexual orientation, national origin or ancestry.”¹⁶⁷ The Court distinguished *R.A.V.* on the grounds that the statute there was explicitly directed at expression, whereas the Wisconsin law was directed at conduct unprotected by the First Amendment—here, physical assault.¹⁶⁸ Moreover, the Court noted that the State singled out hate crimes because they are thought “to inflict greater individual and societal harm . . . [and] are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”¹⁶⁹ Therefore, the Court held that the State had an adequate justification for its penalty-enhancing provision in order to redress these harms.

Taken together, *R.A.V.* and *Mitchell* hold that although states may enact laws that provide for greater punishment of bias-motivated crimes, states may not enact laws that punish otherwise non-criminal speech. Thus, if the state laws cited above are constitutional, it must be because civil penalties for criminal acts are analogous to the criminal penalties in *R.A.V.* This analogy seems especially appropriate because every

161. *R.A.V.*, 505 U.S. at 379-80.

162. *See id.* at 382.

163. *See id.* at 387-88.

164. *Id.* at 388.

165. *Id.*

166. *Id.* at 391.

167. *Mitchell*, 508 U.S. at 481-82 (citing WIS. STAT. § 939.645 (1989-1990)).

168. *See id.* at 487.

169. *Id.* at 487-88.

state, excluding New Jersey, provides that a violation of a hate crime injunction is a crime.¹⁷⁰ Additionally, the Court's rationale in *Mitchell*, that a penalty-enhancement statute was constitutional because it focused on conduct rather than expression, seems applicable in these cases. The laws cited above follow two general models. The first model generally prohibits damage or trespass to property and the use of physical force or violence against a person when motivated by hate.¹⁷¹ The second model prohibits threats, intimidation, and coercion intended to prevent a person from enjoying or exercising their constitutional rights.¹⁷² The first model is an easier fit with the jurisprudence of *R.A.V.* and *Mitchell* and is, therefore, likely constitutional. However, the second model seems to punish certain types of speech based on its effects on the listener, which has far less support in First Amendment jurisprudence.

Because second model laws regulate speech rather than conduct, their constitutionality is much more questionable than the first model. The Supreme Court has long recognized that there are certain types of speech, including insulting or fighting words, which may be prevented and punished without offending the First Amendment.¹⁷³ Over time, the Court has limited the fighting words doctrine to allow regulation only of "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."¹⁷⁴ In the context of hate crimes, *R.A.V.* creates an additional restriction that a statute punishing or prohibiting fighting words may not be limited to certain types of fighting words, such as racial epithets. There, the Court held that "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."¹⁷⁵

In determining the constitutionality of the second model laws, the first question to be answered is whether threats, intimidation, and coercion qualify as fighting words and are subject to proscription. As a subset of fighting words, the Court has consistently held that states can proscribe "true threats."¹⁷⁶ As articulated in *Virginia v. Black*, a true threat "encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."¹⁷⁷ In *Black*, the Court upheld a

170. See, e.g., CAL. CIV. CODE § 52.1(d) (West 2006), ME. REV. STAT. ANN. tit. 5 § 4681(6) (2002), MASS. GEN. LAWS ANN. ch. 12, § 11J (West 2007), N.H. REV. STAT. ANN. § 354-B:4 (2006), 42 PA. CONS. STAT. § 8309(b) (2006), VT. STAT. ANN. tit. 13 § 1465 (2007), W. VA. CODE § 5-11-20(e) (2008).

171. See, e.g., W. VA. CODE § 5-11-20(a) (2008) (providing that "[a] person has the right to engage in lawful activities without being subject to" violence or damage to property).

172. See CAL. CIV. CODE § 52.1(d) (West 2006); MASS. GEN. LAWS ch. 12, § 11J (West 2007); N.J. STAT. ANN. § 2A:53A-21 (West 2006).

173. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.")

174. *Cohen v. California*, 403 U.S. 15, 20 (1971); see also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[F]ree speech and free press do not permit a State to forbid or proscribe 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.")

175. *R.A.V.*, 505 U.S. at 386.

176. See *Watts v. United States*, 392 U.S. 705, 708 (1969); see also *R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment.").

177. 538 U.S. at 359.

Virginia statute banning cross-burnings with the intent to intimidate, reasoning that intimidation is a type of true threat because intimidation places the hearer in fear of bodily harm or death.¹⁷⁸ One can also use this reasoning to place coercion into the category of true threats or fighting words, but only to the extent that coercion intimidates the hearer into doing something against her will because she fears bodily harm. With that proviso, the second model laws discussed above can be understood to regulate fighting words.

Having determined that the second model laws regulate fighting words, the next question is whether they permissibly do so. As discussed above, the *R.A.V.* Court invalidated a St. Paul, Minnesota, law that prohibited fighting words—specifically cross-burnings and Nazi swastikas—where the person should have reasonably known it would cause alarm in a person based on “race, color, creed, religion or gender.”¹⁷⁹ The Court distinguished the cross-burning in *R.A.V.* from those in *Black* on the ground that it did not matter in *Black* what reason the perpetrator had for trying to intimidate the victim.¹⁸⁰ Therefore, if the second model hate crimes laws enumerate protected classes, they are likely unconstitutional. The California and Massachusetts Civil Rights Acts do not contain a list of protected classes within its text and are, therefore, likely constitutional.¹⁸¹ The New Jersey hate crimes law, on the other hand, punishes those who intend to intimidate people or engage in criminal conduct “because of race, color, religion, gender, . . . sexual orientation or ethnicity.”¹⁸² This is similar to the statute struck down in *R.A.V.*, and to the extent it criminalizes intimidation of certain groups of people, it is likely unconstitutional. If the intimidation language can be severed from the law, the provision allowing for punishment for criminal conduct motivated by hatred of a characteristic is similar to the first model of laws and would likely be held constitutional.

On balance, the hate crimes laws enacted by the eight states examined in this Article—with the possible exception of New Jersey—are likely constitutional attempts by states to prevent and proscribe hate crimes. The Court’s decisions in *R.A.V.*, *Mitchell*, and *Black* make clear that hate crime penalty-enhancing laws and content-neutral regulations of fighting words are constitutionally permissible.

B. Are Hate Crime Injunctions an Unconstitutional Prior Restraint?

As discussed above, states may enact hate crimes laws that allow their Attorney General to civilly prosecute those people who committed criminal acts motivated by bias or hatred of a victim’s characteristic. The more difficult question is to what extent the Attorney General and the court may enjoin a perpetrator from future actions. Because most hate crimes involve speech elements as well as actions, injunctions crafted by courts necessarily prohibit or regulate both. However, the strong

178. *Id.* at 360. However, the Court ultimately reversed the conviction on the ground that Virginia’s statutory provision unconstitutionally considered cross burning to be prima facie evidence of intent to intimidate. *Id.* at 363-64.

179. *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

180. *Black*, 538 U.S. at 362.

181. See CAL. CIV. CODE § 52.1 (2008); MASS. GEN. LAWS ANN. ch. 12 § 11H (West 2007).

182. N.J. STAT. ANN. § 2A:53A-21 (West 2008).

presumption against prior restraints on speech requires that courts be very careful in tailoring injunctions.

The Supreme Court established the general presumption against prior restraints on speech in *Near v. Minnesota*,¹⁸³ where the Court struck down a permanent injunction against publication of a newspaper. The Court held that the prohibition against prior restraint applies in all but exceptional cases, such as where national security is at risk.¹⁸⁴ Because injunctions are prior restraints, they are, therefore, presumptively unconstitutional when applied to speech. However, the Court has also held that not all injunctions are impermissible.¹⁸⁵ Injunctions will stand up to First Amendment scrutiny if the order is “based on a continuing course of repetitive conduct[,] . . . is clear and sweeps no more broadly than necessary,” and has not gone into effect before the court has determined that the conduct in question is illegal.¹⁸⁶ The requirements for injunctions on speech enunciated in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,¹⁸⁷ operate to limit injunctions to situations where the court has had a chance to hear evidence and is therefore in a better position to craft an appropriately narrow injunction.¹⁸⁸ Using the *Pittsburgh Press* test, courts must evaluate injunctions on a case by case basis.

Under *Near* and its progeny, hate crime injunctions like those discussed in this Article run into constitutional issues only to the extent they regulate speech independent of action.¹⁸⁹ The West Virginia case of *State v. Dailey*, discussed above, illustrates the prior restraint question. Although *Dailey* actually ended in a consent decree, for the purposes of illustration, I will suppose it ended in an injunction. In that case, Dailey was enjoined from committing hate crimes against the victims or anyone else in the future, contacting the victims, using the term ‘nigger’ to refer to the African-American neighbor he assaulted or the term ‘nigger lover’ to refer to the neighbor’s Caucasian fiancée or her family members, and ordering Dailey to attend anger management classes.¹⁹⁰ Although the injunction was, in fact, based on a continuing course of conduct because Dailey had violated previous injunctions, the requirements that Dailey not use the terms ‘nigger’ or ‘nigger lover’ likely sweep more broadly than necessary to ensure that Dailey refrain from committing hate crimes in the future, thus failing the *Pittsburgh Press* test.¹⁹¹ One can easily imagine a case where Dailey could commit a hate crime without using any offensive speech, or a situation where he uses offensive speech which results in no hate crime. Furthermore, the *Near* Court

183. 283 U.S. 697 (1931).

184. *Id.* at 715-16.

185. *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

186. *Id.*

187. 413 U.S. 376, 390 (1973).

188. This narrow and careful tailoring is important given the collateral bar rule’s requirement that a party obey a court order until the court has invalidated it, or the party loses the chance to challenge the order. *See United States v. United Mine Workers*, 330 U.S. 258 (1947).

189. As discussed above, most actions brought by attorneys general offices actually end in consent decrees, rather than injunctions. Although this Note discussed the two as if they were analogous in preceding sections, they are discussed separately here because the constitutional questions are slightly different.

190. Consent Decree, *State v. Dailey*, No. 04-C-2248 (W. Va. Cir. Ct., Kanawha, Aug. 22, 2006).

191. *See Pittsburgh Press*, 413 U.S. at 390.

established a very narrow window in which speech injunctions are constitutional, and hate speech does not threaten national security or present any great danger of the type contemplated by the Court.¹⁹² Finally, the injunction runs afoul of the Court's decision in *R.A.V.* because a person cannot be punished solely for using racial epithets.¹⁹³ A prosecution for a violation of an injunction prohibiting speech protected under *R.A.V.* would be unconstitutional.

Thus, courts and attorneys general face a constitutional roadblock in prohibiting hate speech with injunctions. The Court's jurisprudence places a very high presumption against prior restraints on speech that one would be hard pressed to think of a situation where the prohibition would survive *Pittsburgh Press*, *Near*, and *R.A.V.* Therefore, unless a court can tie speech to a specific crime, such as threatening or coercing someone, injunctions on speech will likely be struck down as unconstitutional.

C. When Do Consent Decrees Impose Unconstitutional Conditions?

In most hate crime cases brought by attorneys' general offices, the office comes to an agreement with the defendant on a set of prohibitions on future conduct, rather than proceeding through the full adjudicatory process. In these consent decrees, defendants agree to cease their hateful conduct and sometimes to undergo some sort of therapy or counseling. Although consent decrees contain many of the same conditions and terms that courts put into an injunction, the analysis of their constitutionality turns on slightly different grounds because the defendant is entering into a quasi-contract with the government. Therefore, the question then becomes what conditions the defendant is allowed to agree with and what rights he may waive. The doctrine of "unconstitutional conditions" broadly holds that the government may not offer anyone "a benefit that it is constitutionally permitted but not compelled to offer, on condition that the recipient undertake (or refrain from) future action that is legal for him to undertake (or to refrain from) but that government could not have constitutionally compelled (or prohibited) without especially strong justification."¹⁹⁴ In practical terms, the doctrine of unconstitutional conditions forbids the government from doing indirectly what it cannot do directly. Thus, the court generally may not allow the government to impose conditions on a defendant in a consent decree that it could not impose in an injunction.

When applying the doctrine of unconstitutional conditions to government action, the Supreme Court has drawn a distinction between penalties for exercising a right and a mere refusal to subsidize the exercise of a right.¹⁹⁵ Although the latter is allowed, the former must meet a higher standard of review to escape invalidation. For example, in *Regan v. Taxation With Representation of Washington*,¹⁹⁶ the Court upheld a ban on lobbying for tax-exempt organizations on the basis that the government could choose

192. See *Near*, 283 U.S. at 715-16.

193. See *R.A.V.*, 505 U.S. at 381.

194. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1427 (1989).

195. See *id.* at 1420.

196. 461 U.S. 540 (1983).

not to subsidize lobbying.¹⁹⁷ Although the Court's jurisprudence in this area is arguably not a model of clarity, it seems as though in order for a penalty to survive a constitutional attack, the government regulation must be "narrowly tailored to serve a substantial governmental interest."¹⁹⁸ Therefore, the Court held that an FCC regulation banning all editorializing from government subsidized public television stations was an unconstitutional condition because the ban was overbroad relative to the government's interest in disavowing association with editorial content.¹⁹⁹

In the context of criminal law, the Court has broadly interpreted what qualifies as a benefit. For example, the Court has held that a plea bargain is a benefit, either to receive a lesser sentence²⁰⁰ or to escape criminal liability completely.²⁰¹ Hate crime consent decrees are analogous to plea bargains in that the defendant benefits from not going through the adjudicatory process in favor of a definite and immediate outcome. Therefore, courts may treat consent decrees like plea bargains and hold them to be benefits. However, this issue remains undecided, as no court has been presented with this issue. If consent decrees are treated like plea bargains, the Supreme Court has held that defendants can only waive constitutional rights if the waiver is the product of an informed and voluntary decision.²⁰² In terms of which constitutional rights may be waived, the Court has been more willing to allow defendants to waive rights related to trial, such as the right to appeal²⁰³ and the right to file a federal claim,²⁰⁴ rather than rights which are unrelated or "not germane" to the benefit offered.²⁰⁵

If challenged, hate crime consent decrees are more likely to be categorized as penalties for exercising a constitutional right. However, the constitutional right only extends to the protected aspects of a hate crime, such as hate speech, not the violent or illegal acts themselves. Therefore, the government would have to meet the higher burden and show that an agreement—for example, not to call anyone a "nigger"—is narrowly tailored to achieve a significant government interest.²⁰⁶ As discussed in the previous section with regard to *R.A.V.*, the Court has been unreceptive to government claims that prior restraints on speech are necessary. Therefore, an agreement not to say certain words because of their offensiveness is unlikely to be upheld by any court. In addition, the requirement that a person refrain from using certain types of speech would likely fail a germaneness test, as that applied in *Nollan*,²⁰⁷ because waiving the right to freedom of speech is unrelated to trial. Thus, as with injunctions, consent decrees that require defendants to waive their right to freedom of speech are likely unconstitutional conditions that would be struck down by courts. However, to the

197. *Id.* at 540-41; *see also* *Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991) (holding that the federal government could refuse to give federal funds to family planning organizations that offered abortion-related information and services).

198. *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

199. *See id.* at 402.

200. *See Brady v. United States*, 397 U.S. 742, 752-53 (1970).

201. *See Newton v. Rumery*, 480 U.S. 386, 394 (1987).

202. *See id.* at 393.

203. *See Brady*, 397 U.S. at 752-53.

204. *See Newton*, 480 U.S. at 383.

205. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

206. *See id.*

207. *See id.*

extent that consent decrees merely prohibit future illegal conduct or the exercise of other rights not based in the Constitution, they are consistent with the Supreme Court's jurisprudence.

VI. RECOMMENDATIONS FOR STATES INTERESTED IN ENACTING SIMILAR LEGISLATION

Based on the many benefits to victims and communities, this Article recommends that every state enact legislation allowing its attorney general to seek injunctive and equitable relief when a hate crime occurs. The benefits include faster awards of injunctions, injunctions awarded in cases where the private victim would otherwise be unable to secure private counsel, increased media attention because of the state's involvement and press activities, potentially lower burdens of proof, and higher rates of success because of the attorney general's expertise.

However, the states discussed in this Article have encountered pitfalls that future states could avoid. First, it is important to work closely with police officers to identify and investigate possible hate crimes. In the Maine case discussed in the Introduction, a Lewiston police officer allegedly incorrectly informed the perpetrator that he would only be guilty of littering if he threw a pig's head into a mosque. Law enforcement officers should receive hate crime trainings on a routine basis—if they are unable to recognize the signs, they are unable to sufficiently protect the public from such injustices.

Second, it is important to keep publicizing prosecutions and advertising the attorney general's resources to the public. The West Virginia Attorney General's Office has seen a decrease in the number of complaints received by the Office, even though they believe hate crimes are occurring in the same numbers, because few victims know to contact the Office. This is a result of almost no outreach to the public, an unpublished hate crime hotline, and less training for police officers or school officials in recent years. Because so many prosecutions by the attorney general's office occur in cases where the victim is otherwise unable to seek relief, it is important for the office to advertise its availability to these victims.

Attorneys general looking to take on a new role in combating hate crimes in their state can look to the eight states that currently have hate crime legislation for model language. However, because of the possible First Amendment issues with the second model of hate crime legislation, this Article recommends that states adopt language similar to that used in Maine, New Hampshire, and Vermont.

In addition to statutory language, states should also take into consideration the enforcement lessons learned by the five states with operating programs. First and most importantly, the statute should explicitly provide the attorney general with the authority to proceed on the behalf of the victim to the same extent that the victim could proceed with a private attorney. For example, if the attorney general is unable to seek damages where a private attorney could, fewer victims will bring their complaints to the office.

Second, the statute should specify the burden of proof to be a preponderance of the evidence, rather than clear and convincing. The higher burden required by the New Hampshire hate crime statute has resulted in fewer cases being brought by the Attorney General's Office because the evidence in many hate crimes is circumstantial and equivocal. The preponderance of the evidence standard appropriately balances the

interests of the perpetrator receiving a fair trial with the reality of the difficulty inherent in proving a crime motivated by bias.

Third, the statute should provide for several remedies, including injunctions, attorneys' fees, compensatory and punitive damages, and any other appropriate equitable relief. Without a financial incentive, many victims will not report hate crimes to the office, preferring to deal with the incident informally. In addition, an award of attorneys' fees to the office can help reduce the financial strain under which many of the offices operate. The ability to seek punitive damages is also important because some hate crimes are heinous and offensive but do not result in significant property or personal damage.

Finally, the five states discussed above have made extensive use of their ability to seek other types of equitable relief. Allowing attorneys general to order students to write papers or require adults to undergo sensitivity training can help prevent future hate crimes in a way that an injunction cannot. In sum, a statute that incorporates these elements will be a powerful tool for attorneys general who want to become involved in reducing hate crimes in their states.

Unfortunately, enacting a statute is only half of the solution. As this Article discussed, a vital element of any successful hate crime program is education and training. In terms of education, attorneys' general offices should work with schools, offices, community organizations, and the press to educate citizens about what a hate crime is and what options victims have. Because there have been an increasing number of hate crimes in schools, it is especially important to educate students about their liability and rights under the law. In terms of training, states should implement a program that mandates hate crime training for police officers during their initial training and on routine intervals thereafter. Though it may be helpful to appoint a single officer to be in charge of recognizing hate crimes, it is the average police officer responding to a call in the community who is best positioned to recognize bias-indicators in an incident or a pattern of incidents. Therefore, it is imperative that all officers understand how to recognize and investigate hate crimes. An Attorney General's Office that includes education and training in its program will, therefore, be far more successful in enforcing its hate crimes statute.

VII. CONCLUSION

State attorneys general can play a valuable role in preventing and punishing hate crimes by seeking injunctive and equitable relief. There are many benefits to giving the attorney general the authority to act on behalf of a hate crime victim, the most important of which is providing legal services to a person who may not be able to hire a private attorney. But, there are additional benefits. Intervention by the Attorney General can help bring publicity to a crime in a way that a private suit may not, increasing the public awareness of the prevalence of hate crimes and the concomitant penalties.

The experiences of the five states using this type of hate crime legislation have been universally positive, if not perfect. But the success of any hate crime program depends on the extent to which an office can get cases in the door. As states have discovered, the keys to getting victims to bring their complaints to the attorney general's office are the ability to get damages, publicity of the office's capabilities, and

training of law enforcement officers to recognize hate crimes when they occur. Attorneys general in other states who are looking for a way to reduce hate crimes in their jurisdiction would benefit from adopting such a program and should look to the experience of these states.