

Dissenting Statement of Commissioner Gail Heriot

I voted against publishing this report in its present form. It needs work.

Perhaps its most troubling aspect is its failure to acknowledge—much less address—many of the most serious issues relating to the enforcement of hate crimes laws. Among those issues are the large numbers of hoaxes and false alarms as well as the overbroad statutory definitions of “hate crime,” all of which may inflate the statistics. These things need to be discussed. I worry that these statistics may have given many Americans a false sense of how common hate crimes are.¹

Also among the serious issues that need to be discussed is the potential for double jeopardy abuse. Not all hate crimes laws have this potential. It’s the federal statute—the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009—that does.² Like all federal criminal statutes that duplicate what state criminal statutes already cover, that law makes it possible to re-prosecute defendants who have been acquitted in state court. But since hate crimes tend to cause emotions to run high, the danger of abuse is particularly acute.³

In the unusually limited time allotted to me to write this statement, I can discuss these issues only very briefly.⁴ They deserved much more extended treatment in this report.

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Dr. Wilfred Reilly, a professor of political science at Kentucky State University, a historically black university, has studied the hate crimes phenomenon extensively.⁵ In his 2019 book, *Hate Crime Hoax*, he came to conclusions that will likely be unpopular in some quarters. Those conclusions can be summarized this way: *There is no rising tide of hate crimes. But there are people who want to scare others into believing there is. Sadly, their motivations are not always as pure as one might hope for.*⁶

¹ See *infra* at p. 262-63.

² 18 U.S.C. § 249. See *infra* at 277-81. See also Gail Heriot, Civil Rights: Lights!, Camera!, Legislation!: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy, *Engage* (February 2009) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096.

³ See *infra* at p. 273-277.

⁴ Ordinarily Commissioners, who are part-time officials, are given 30 days to respond to a report after it is adopted by the Commission. This month, we have three reports going at the same time. In the past, the Commission has staggered the due dates when two reports were approved close in time.

⁵ Wilfred Reilly, “Hate crime hoaxes, like Jussie Smollett’s alleged attack, are more common than you might think,” *USA Today*, February 22, 2019, available at <https://www.usatoday.com/story/opinion/2019/02/22/jussie-smollett-empire-attack-fired-cut-video-chicago-fox-column/2950146002/>.

⁶ Wilfred Reilly, *Hate Crime Hoax* (2019). Another possible useful source is the web site fakehatecrimes.org, which purports to have compiled a comprehensive database of the publicly known false reports of hate crimes in the United States. Currently, it lists 368. It does not, of course, purport to list hate crimes that were never revealed to the public or that were never determined to be hoaxes by the authorities.

If Dr. Reilly is even partially right, this report may be part of the problem. It encourages Americans to believe that potentially violent racial, ethnic and religious hatred is simmering below the surface in every corner of the country. I believe the Commission's time would have been better spent if it had looked at the aggregate hate crimes statistics with a bit more skepticism. Rather than being too low as the report suggests, they may be too high.

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Almost thirty years ago, in their book, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, Jack Levin and Jack McDevitt argued in lurid tones that a hate crimes epidemic was sweeping the country:

It has become nearly impossible to keep track of the shocking rise in brutal attacks directed against individuals because they are black, Latino, Asian, white, disabled, women, or gay. Almost daily, the newspapers report new and even more grotesque abominations. These “hate crimes” have become a growing threat to the well-being of our society—on the college campus, in the workplace, and around our neighborhoods. As ugly as this situation is now, it is likely to worsen throughout the remainder of the decade and into the next century as the forces of bigotry continue to gain momentum.⁷

The foreword to the book was by Morris Dees, the now-disgraced former head of the Southern Poverty Law Center⁸—an advocacy organization that famously raises millions and millions of dollars each year to fight “hate groups” (but spends little of what it raises actually doing so). The authors’ sensationalized prose reads a bit like one of the SPLC’s fundraising letters.⁹

In the final chapter, entitled “The Coming Crisis,” Levin & McDevitt acknowledged that polls indicated that Americans were becoming increasingly *tolerant* of differences rather than *intolerant*. They nevertheless predicted that things would get increasingly nasty. As proof of their fears, they offered only that “almost every advocacy organization reports that hate crimes are on the rise.” It apparently did not occur to them that advocacy organizations, whose funding

⁷ Jack Levin & Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* ix (1993).

⁸ Katherine Hignett, Morris Dees and His History of Alleged Racism: Ousted SPLC Chief Has a Controversial Past, *Newsweek*, March 15, 2019; Michael Brice-Saddler, Southern Poverty Law Center Fires Co-Founder, Declines to Say What He’s Alleged to Have Done, *Washington Post*, March 14, 2019; A Shocking Shake-Up at the Southern Poverty Law Center, *N.Y. Post*, March 14, 2019 (“In recent years, though, its listing of hate groups in particular has seemed unhinged—putting the socially conservative Family Research Council on the same level as the Klan.”)

⁹ Unfortunately, “hate group” is a description the SPLC promiscuously gives to organizations whose views its leaders disagree with. See *infra* at p. 268-9. See also Joe Simonson, Southern Poverty Law Center Pays Millions to Group It Wrongly Labeled Bigoted, *Daily Signal*, June 18, 2018 (SPLC pays \$3.375 million to settle claim for wrongly naming Quilliam and its founder as anti-Muslim extremists when in fact Quilliam is a respected anti-extremist Muslim group); Dennis Prager, The Southern Poverty Law Center’s Smear Campaign Against PragerU, *Daily Signal*, June 19, 2018; Greg Scott, How a “Far-Left Propaganda Machine” Got a Respected Legal Group Expelled by Amazon, *Daily Signal*, May 3, 2018 (SPLC defamed Alliance Defending Freedom, a public interest law firm supporting religious freedom, which has won nine cases before the Supreme Court).

depends on frightening donors, might not be the most trustworthy sources. Or if it did, they did not say so.

James B. Jacobs and Kimberly Potter debunked Levin & McDevitt's claim of a hate crimes explosion in the 1998 book, *Hate Crimes: Criminal Law & Identity Politics*. Unlike Levin & McDevitt, Jacobs & Potter wrote in a scholarly and measured tone. As they demonstrated, it was simply not true that hate crimes were increasing during that period.¹⁰

By 1998, however, the “epidemic” story had been repeated so often in the media that it was difficult to dislodge from the public consciousness. Sensational stories about a rising tide of prejudice-based violence sell newspapers and magazines much better than the truth—that such violence was actually much reduced over its historic highs.

In recent years, the claim of skyrocketing numbers of hate crimes has again been made. Is it true this time? It is not clear to me how the Commission—or any other body—can determine the truth or falsity of that claim without a serious examination of the problem of hoaxes and false alarms. If the claim is not true, those who promote it are doing a great disservice to the country. They are exacerbating divisions within the country rather than helping to heal them.¹¹

None of this is to say that there are no horrific crimes motivated by racial, ethnic or religious hatred or by misogyny. Of course there are, but it is important to remember that there always have been. The crimes of Dylann Roof and Robert Bowers are particularly stunning examples. Both were merciless killers, motivated by ancient hatreds,¹² the former targeting African Americans,¹³ the latter Jewish Americans.¹⁴

¹⁰ See also Laird Wilcox, *Crying Wolf: Hate Crime Hoaxes in America* (1994).

¹¹ In 1998, Jacobs and Potter warned of the possible effects of the widespread belief that hate crimes were rising. “The uncritical acceptance of stories of an epidemic may well have sociopolitical ramifications,” they wrote. Among the consequences they discuss is worsening societal divisions. See *id.* at 64. Later in their book, Jacobs & Potter caution against hate crimes statutes as a response to hate crimes for much the same reason:

The proponents of bias crime laws believe that their symbolic impact will be to teach Americans that prejudice is wrong and, in the long run, lead to less prejudice and less prejudice-motivated crime. ... [T]his belief may be misguided. Breaking down generic criminal law into new crimes and punishment hierarchies depending on the prejudices of offenders and the demographic identities of victims may exacerbate rather than ameliorate social schisms and conflicts.

Id. at 144.

¹² On the other hand, had Dylann Roof been born into a country in which everyone was of the same race or had Robert Bowers been born in a country with only one religion, they may well have found others to blame for their troubles—the rich, payday lenders, lawyers, bureaucrats, oil & gas executives, women, elected officials, the Masons, or even their own families. There are many kinds of hatred, ancient and modern. Roof and Bowers were driven by a rage born of mental illness, and mental illness can find its reasons.

¹³ Alan Blinder & Kevin Sack, Dylann Roof Sentenced to Death in Charleston Church Massacre, *N.Y. Times*, January 17, 2017.

¹⁴ Julie Turkewitz & Kevin Rose, Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting?, *N.Y. Times*, October 27, 2018.

Other mass killers may not be motivated by precisely the same kinds of hatred, but their crimes as well as their mental states are more like those of Roof and Bowers than they are different. For example, Seung-Hui Cho, who killed 32 persons at Virginia Tech in 2007, claimed to be outraged by “rich” students.¹⁵ One day we may better understand the demons that drove these grotesque crimes. But I am not expecting it to happen anytime soon.¹⁶

One thing we know for certain is that mass murders do not escape notice. Whether motivated by racial hatred or something entirely different and unrelated, there is never a case in which, without hate crimes statutes, the perpetrator would have gone unnoticed or unprosecuted. In the cases in which the perpetrator survives, he can expect to be charged with first-degree murder, which ordinarily carries with it a maximum punishment of either death or life in prison.

Nor are grotesque “hate murders” involving only one victim likely to slip by unnoticed.¹⁷ The federal hate crimes statute—the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009—is named for two victims thought to have been targeted by their assailants for their sexual orientation and their race respectively. As far as I am aware, no one denies that James Byrd’s assailants—Shawn Berry, Lawrence Brewer, and John King—were motivated at least in large part by race. But there is no suggestion that the State of Texas failed to prosecute them vigorously. King and Brewer were tried and convicted of capital murder. They were duly executed by lethal injection. Berry was sentenced to life imprisonment in an 8’ x 6’ cell. He is allowed out only for one hour of exercise per day.

There is a dispute over whether Matthew Shepard was targeted on account of his sexual orientation or of a drug deal gone bad.¹⁸ But it is not at all clear why it should matter. Shepard’s

¹⁵ Alex Johnson, *College Gunman Disturbed Teachers, Classmates*, *NBCNews.com*, April 17, 2007.

DeWayne Craddock, who killed 12 at a Virginia Beach municipal complex in 2019 appears to have been a disgruntled employee whose wife had left him, but no one is really sure what motivated him. Lee Brown, *DeWayne Craddock was Violent with Co-Workers Before Virginia Beach Shooting: Report*, *N.Y. Post*, June 2, 2019; Neighbors Recall Virginia Beach Gunman’s Ex-Wife as Questions of Motive Linger, *NewsOne*, June 1, 2019. The Sandy Hook killer—Adam Lanza—had longstanding psychiatric problems and there is some evidence that his 2012 rampage may have been connected to a tendency toward pedophilia. Dave Collins, *Sandy Hook Shootings: FBI Files Reveal Mass Killer Adam Lanza Had Paedophilic Interest in Children*, *The Independent*, October 25, 2017.

¹⁶ In Malaysian and Indonesian cultures, they have a word for an otherwise inexplicable mass murder—*meng-â muk*—from which English speakers derive their term “running amok.” According to Wikipedia, in those cultures, it was “believed that amok was caused by the *hantu belian*, which was an evil tiger spirit that entered one’s body and caused the heinous act.”

¹⁷ If it could be shown that state prosecutors systematically under-prosecute violent crimes that victimize individuals of a particular race, color, religion, sex or national origin, then Congress would certainly have the power to remedy this problem under its Section 5 power of the Fourteenth Amendment. But there is no such claim.

¹⁸ See Stephen Jimenez, *The Book of Matt: Hidden Truths About the Murder of Matthew Shepard* (2013). Journalist Stephen Jimenez went to Wyoming two years after the murder hoping to do research for a screenplay about what he thought was an obvious hate crime. After interviewing more than a hundred witnesses, he changed his mind. I shouldn’t have to mention that Jimenez is gay himself, but in the current climate some find research conducted by

life was sacred in either event. And the State of Wyoming treated it that way. Shepard's murderers—Aaron McKinney and Russell Henderson—are each serving two consecutive life sentences in prison. While Wyoming has the death penalty, Shepard's parents reportedly didn't wish to pursue it against their son's killers.¹⁹

My point is that hate crimes statutes—whether at the federal or state level—are largely superfluous in heinous cases like these. The main thing that the federal statute does is add the possibility that a defendant can be re-prosecuted if the jury acquits. Prosecutors can have a second bite at the apple. In other words, the Constitution's protection against double jeopardy does not apply to cases filed by "separate sovereigns." Under current constitutional doctrine at least, a failed state prosecution cannot oust federal prosecutors from jurisdiction; nor can a failed federal prosecution prevent a subsequent state prosecution. I will touch on whether the potential for double prosecutions is a good thing or a bad thing (or a little of both) further into this statement.²⁰ My point right now is that we don't need special hate crimes statutes to prosecute cases of murder.

At the other end of the spectrum are the minor "hate crimes." These are much more common than the cases involving murder. Here sometimes state and federal crimes laws do add greater penalties than would otherwise be applicable to the crime. It is therefore here that hate crimes statutes have to justify themselves. One important question is this: Are we better off treating these crimes as special or would we be better off treating them the same way we do crimes motivated by other kinds of hatred (e.g. hatred of the homeless or the perpetrator's competitors in business) or by greed or envy?

That is a complicated question that I cannot fully take on in this short Statement. Instead I will focus on asking about one or two corners of it: Is our current focus on hate crimes fueling the rash of hoaxes and false alarms? Are broadly worded definitions of hate crimes causing crimes to be included as "hate crimes" that the average American would not view as hate crimes? Are Americans being led to believe that there is more hatred out there than there is? These are issues that I would have liked the Commission to try to shed light on.

False Alarms and Broadly Worded Hate Crimes Statutes: These days, some people appear to be seeing sinister actions when none is there. For example, reports of seeing a threatening "noose" are common. Almost always, such a report turns out to be either a false alarm or an outright hoax.²¹ Somehow our fears have gotten out of hand.

anyone whose "identity" (as that term is defined in the modern world) differs from the subject of his or her research to be suspect.

¹⁹ Michael Janofsky, Parents of Gay Obtain Mercy for His Killer, *N.Y. Times*, November 5, 1999.

²⁰ See *infra* at p. 277-81.

²¹ See Dave Huber, Facebook Friends Each Reported Nooses at Different Colleges: One Was a Damaged Power Cable, *The College Fix*, July 26, 2019; Dave Huber, Not a Hate Crime: "Noose" at U. Michigan Hospital Was a Fishing Knot, *The College Fix*, July 17, 2019; Sarah Elms, No Noose Found at Toledo Sewer Facility, *The Toledo Blade*, June 28, 2018; Megan Moser, Report About Noose on Campus in May Unravels, *The Mercury* (Manhattan, Kansas), November 11, 2017; Dave Huber, "Noose" that Turns Out to be Lost Shoelace Causes Uproar at Michigan State, *The College Fix*, October 5, 2017; No Noose, But UD Group Proceeds to Protest "Unsatisfactory Racial Curriculum and General Racist Tone," *The College Fix*, September 26, 2015 (the "noose" reported at the University

Real but ordinary crimes are easily mistaken for hate crimes, especially when police officers are being encouraged by reports like this one to report more hate crimes, and prosecutors are being encouraged to prosecute them more. For example, when people who lack self-control get angry, they often throw out whatever insults they can. Sometimes all they know about the person they are arguing with is that person's race, ethnicity or sex, so that's what they use. It doesn't mean they are racists or sexists.²² It means they are idiots.²³

Consider, for example, a conflict over a parking space: The argument escalates to the trading of ethnic slurs and then, briefly, becomes somewhat physical. The cause of the conflict wasn't racial animus. The cause was frustration over not getting a parking space. The story would have unfolded in the same way without the racial element.

It is worth pointing out that this appears to have actually happened, perhaps many times.²⁴ In 2018, in a parking structure at Santa Monica College Performing Arts Center, an African-American woman parked her car in two spaces and an 80-year-old white man got into an argument with her. The argument boiled over when the man began engaging in childish name-calling and kicking.²⁵ The combatants were strangers, and while they knew each other's race, they didn't know

of Delaware turned out to be the remnants of lanterns that had been hanging in a tree); Lindsay Welbers, Length of Rope Identified; Not a Noose, *Hyde Park Herald* (Chicago), July 31, 2013; Daniel De Vise, Georgetown U.: Rope Found on Campus Not a Noose, *Washington Post*, October 1, 2010; Kate Hessling, Police Determine Hanging Rope in Chandler Twp. Is Not a Noose, *Huron Daily Tribune*, September 16, 2008; Laurie Willis, Hate-Crime Case Closed as Family Learns Rope in Yard Was Not a Noose, *Baltimore Sun*, May 12, 2000 (rope was remnant of an old swing). Other nooses have also turned out not to be what they seem. See Robby Soave, Duke Student Who Hung A Noose on a Tree Made a Bad Pun. Expel Him Anyway?, *Reason.com*, May 4, 2015 ("The student wished to invite his friends to join him outside, and so he tied a piece of yellow cord around a tree branch, snapped a picture of it, and texted it to them as a request to 'hang out.'"). Other nooses have turned out to be hoaxes, often perpetrated by the individual who reported them to the authorities. See Wilfred Reilly, Hate Crime Hoaxes Like Jussie Smollett's Alleged Attack, Are More Common Than You Think, *USA Today*, February 22, 2019; Justin Fenton, Firehouse Incident with a Noose Was a Hoax, *Baltimore Sun*, December 2, 2007; Black Students Connected to [Salisbury University] Racist Drawing, *DelmarvaNow.com*, April 28, 2016. See also Becket Adams, Student Arrested in Yet Another Suspected Campus Hate Crime Hoax, *Washington Examiner*, October 22, 2018.

²² In the novel *The Godfather* and the movie based on it, movie producer Jack Woltz insults lawyer Tom Hagen by calling him a "dago guinea wop greaseball goombah." Hagen replies, "I'm German-Irish." Without missing a beat, Woltz switches to referring to Hagen as "my kraut-mick friend." His choice of insults seems here not springing from deep-seated animus against Italian, German, and/or Irish Americans, but by the need to land whatever punch on Hagen that would work. Though this example is fictional, ethnic insults have been tossed off in similar, non-animus-driven ways in real life.

²³ That leads to an interesting hypothetical: Imagine two otherwise identical simple batteries. In one, the perpetrator uses an ethnic slur as he slaps the victim's face. In the other, he calls the victim ugly or stupid. Is the first really more hurtful than the other? Ugly and stupid are negative qualities. Membership in a particular racial or ethnic group is not.

²⁴ Note that I am not saying that parking disputes can never result in serious crimes or that they can never result in clear hate crimes. Of course they can.

²⁵ See Melissa Etehad, Fight Over Santa Monica Parking Spot Turns Into What Campus Police Call a Hate Crime, *L.A. Times*, May 3, 2018, available at <https://www.latimes.com/local/lanow/la-me-ln-santa-monica-parking-lot-fight-20180503-story.html>.

many other facts about each other that could be used to injure. While the man used a well-known racial epithet, there was no evidence that he harbored actual ill feelings toward African Americans as a group. The “group” he really had a beef with was people who take up two spaces with one car. But Santa Monica College police took him into custody (rightly, since he committed a battery) and the act was classified as a hate crime (without more facts, perhaps wrongly).

What would have happened if the Commission had undertaken the hard work of looking at the minor crimes reported to federal authorities as hate crimes for statistical purposes? How many would have fallen into the category of “Well ... maybe, maybe not” in terms of the proof that the crime was motivated by hatred of one of the specially protected groups? Without careful study we have no way of knowing. That is why I would have liked such an effort to be undertaken.

Another underappreciated problem here is that the federal hate crimes statute, for one, does not prohibit crimes based on “hate” or even crimes based on bias or prejudice.²⁶ It is much more loosely worded than that. It requires only that the crime be committed “*because of*” someone’s (not necessarily the victim’s) actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability. Hatred is not required (despite the statute’s misleading title, the Matthew Shepard and James Byrd, Jr. *Hate Crimes* Prevention Act of 2009). So consider:

- Rapists are seldom indifferent to the gender of their victims. They are almost always chosen “because of” their gender.
- A thief might well steal only from the disabled because, in general, they are less able to defend themselves. Literally they are chosen “because of” their disability.²⁷
- An employer might become violent and irate when an employee fails to complete a task on time, but the reason for the employee’s lack of speed may be a disability.

Indeed, large numbers of crimes occur “because of” somebody’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability that the average person would not regard as a “hate crime.” A good lawyer can frequently make a plausible argument that a particular ordinary crime was a hate crime under such a loose definition.

This was not just sloppy draftsmanship. The language was chosen deliberately. Administration officials wanted something susceptible to broad construction. As a staff member of the Senate Committee on the Judiciary back in 1998, I had several conversations with DOJ representatives about an earlier version of the bill. They repeatedly refused to disclaim the view that all rape would be covered, and resisted efforts to correct any ambiguity by re-drafting the language.²⁸ They *liked* the bill’s broad sweep. The last thing they wanted was to limit the scope

²⁶ I have not made a study of state hate crimes statutes.

²⁷ I have used precisely these hypotheticals before. See Gail Heriot, *Civil Rights: Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy*, *Engage* 4, 5 (February 2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096.

²⁸ This inclusion of all rape as a “hate crime” would be in keeping with at least one previous Congressional statement. For example, Senate Report 103-138, issued in connection with the Violence Against Women Act, stated

of the statute's reach by requiring that the defendant be motivated by ill will toward the victim's group.²⁹

It would have been useful for the Commission to look into the question of whether the "hate crimes" being prosecuted always involved actual hatred or sometimes involved something less than that. Are federal prosecutors taking advantage of the statute's loose wording or not?

Hoaxes: This is surely a touchy subject. But it's one that the U.S. Commission on Civil Rights needs to get out into the open. Our job is to get the truth out, not to toe a particular party line.

Dr. Reilly reports in *Hate Crime Hoax* that he "put together a fairly large database of hate crime allegations—346 of them—by searching for relevant terms such as 'hate crime,' 'campus hate crime,' 'hate crime allegation,' and 'hate crime controversy' on Google, JSTOR, and Google Scholar." Here is what he found:

Over several years I was able to confirm that *fewer than a third of these cases could even possibly have been genuine hate crimes*. . . . The literal majority of these incidents, which were almost all initially reported with a great deal of fanfare and breast-beating, were later exposed as hoaxes. Well, in truth, "exposed" is a gross exaggeration. Evidence demonstrated that they were fake hate crimes. But that fact got very little exposure in the press—particularly in comparison with the initial publicity for the supposed hate crimes. The initial headlines that had touted each case as a horrific example of contemporary bigotry vanished from the internet, replaced by either nothing at all or by low-key rueful acknowledgements that a hoax had taken place.³⁰

Reilly's figure is extraordinary--fewer than a third of cases were even *possibly* genuine. If the genuine cases were twice that, we would still have an enormous problem on our hands. Have we somehow focused so intently on hate crimes as a "special" problem that we are encouraging attention seekers to claim falsely to be victims? Are these hoaxes frightening people into believing

that "[p]lacing [sexual] violence in the context of civil rights laws recognizes it for what it is—a hate crime." See Kathryn Carney, Rape: The Paradigmatic Hate Crime, 75 ST. JOHN L. REV. 315 (2001)(arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act, HARV. WOMEN'S L. J. 157 (1994)(arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution in Transforming a Rape Culture* 47, 52 (Emilie Buchwald, et al, eds. 1993)("Rape is a hate crime, the logical outcome of an ancient social bias against women.")

²⁹ In response to the argument that all rape could arguably fit under the statute, Senator Edward Kennedy seems to have disclaimed any intention of covering classifying all rape that way. See Edward Kennedy, Hate Crimes: The Unfinished Business of America, 44 BOSTON BAR J. 6 (Jan./Feb. 2000)("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes"). Instead he argued that it should take something more. He suggests "such aggravating factors as a serial rapist." But the statutory language as passed does not easily support such a distinction.

³⁰ Reilly at xxii (emphasis added).

that hatred of this kind is more common than it is? It would have been useful for the Commission to try to determine how common these hoaxes are, how much publicity they get both before and after they are revealed to be hoaxes, and what effect they have on Americans. I am disappointed that the Commission did not do so.

After the Jussie Smollett case, it is hard to imagine that anyone in the country hasn't heard of hate crime hoaxes. Smollett's story was extremely difficult to believe from the start for those who knew the facts and the context. He is a resident of Streeterville, one of the toniest neighborhoods in the city (and indeed the country). Chicago's Magnificent Mile is just steps from Smollett's residence. Yet he claimed to have been attacked by two thugs wearing MAGA hats.

Only 12.5% of Chicagoans voted for Trump,³¹ and the ones that did ordinarily do not hang out in Streeterville wearing MAGA hats at 2:00 a.m. on a bitter cold January night armed with a hangman's noose in hopes that an African American or gay individual might walk by alone at a moment during which no witnesses (and no cameras) would catch the incident. It was an implausible story. Crimes happen in Chicago. But not *that* crime. Not in Streeterville ... at 2:00 a.m. ... with MAGA hats and a cheesy noose made of clothesline ... when it's colder than the hinges of hell ... and with cameras on every corner.

Thugs can't even easily tell a potential victim's race or sex on a cold Chicago night when nearly every inch of his or her body is likely to be covered in coat, a hat, gloves, a hood and a scarf. But to add to the unlikelihood of it all, Smollett claimed that his attackers recognized him as one of the actors in the Fox television series *Empire*. That series depicts an African American family in the hip hop entertainment business. Smollett plays the gay, middle son of the family. Somehow his attackers were not just familiar with the show and able to identify him as one of its supporting players. They also presumed that Smollett himself is gay and not just the character he played.³²

As a former Chicagoan, I thought that Smollett's story would likely unravel. In the meantime, however, many Americans understandably assumed Smollett's story was true and expressed their solidarity with him.

While most Americans are now aware of how the Smollett story turned out (including the lenient treatment he received), there are many hundreds of hoaxes that are less well known but nevertheless documented. And, of course, the number of hoaxes that have never been determined definitively to be hoaxes is likely many times larger.

Dr. Reilly listed a number of examples that I had never heard about. Like this one at Kean University:

³¹ Luke Seeman, How Chicago Voted for President, *Chicago Magazine*, November 9, 2016, <https://www.chicagomag.com/city-life/November-2016/Chicago-Election-Results-President/>.

³² *Empire* is a popular show, but even popular shows do not make their supporting players instantly recognizable on a cold winter night to everyone. According to Nielsen ratings at or near the time of the Smollett hoax, the show had a little more than 4 million viewers. In other words, by far, most Americans *don't* watch it. Travis Clark, "Empire" Ratings Hit Series Low After Jussie Smollett's Arrest, *Business Insider*, March 21, 2019, available at <https://www.businessinsider.com/empire-ratings-fall-after-jussie-smolletts-arrest-nielsen-2019-3>.

In 2016, at Kean University, the now-suspended Twitter account @keanuagainstblk was used to tweet out multiple disturbing messages such as “I will kill all the Blacks (who) go to Kean University,” tauntingly tagging the campus police department in some of the tweets. This was taken as evidence that the university president, himself a minority activist named Dawood Farahi, had failed to “(do) enough to address racial tensions,” and massive demonstrations swept the campus. The state police and Department of Homeland Security were involved, and the total bill for restoring order and identifying the maker of the threats ran to \$100,000. In the end, however, an IP-address trace by police showed that every one of the tweets came from the computer of one Kayla McKelvey, a leader of anti-administration protests with past grievances against Kean.³³

McKelvey, an African American, said her intent was to expose racism on campus. She was sentenced to 90 days in the county jail.³⁴ Note that her story was a hoax only in the sense that the perpetrator was not a racist as had been assumed. The students she was threatening were not less terrorized when she made her threats.

Reilly reports that “[i]t would not be hard at all to fill a full-length book simply with campus incidents” like this. Some are frighteningly similar to the Kean incident:

In late 2012, a remarkable and disturbing string of “hate incidents” swept the pleasant three-lined campus of the University of Wisconsin-Parkside, about one hour’s drive due north of Chicago. First an object resembling a hangman’s noose, woven out of rubber bands, was found on campus by a group of students. The very next day, an honor student named Aubriana Banks was sent a second noose made of corded string in the mail. Later that night, students came across professionally made flyers posted around campus, reading “Nig[***]s will DIE in two days,” with the names of thirteen Black students written on the bottom of each. Finally, after a great deal of shouting and some detective work, most of the apparently anti-Black incidents were traced back to Black student Khalilah Ford. ... Incredibly, Ford defended her racist flyers and death threats by claiming that the Parkside administration has not responded quickly enough to the first “noose” found on campus—for which she rather implausibly denied responsibility—and needed to be prodded away from such unacceptable “racism.”³⁵

But many of the incidents Reilly reports took place off campus. Like this one:

³³ Reilly at 7-8.

³⁴ Kean Student Sentenced for Sending Threatening Tweets, *NewJersey.News12.com*, (undated) available at <http://newjersey.news12.com/story/34864813/kean-student-sentenced-for-sending-threatening-tweets>.

³⁵ Reilly at 8.

... Yasmin Seweid—the Muslim student who garnered headlines worldwide after claiming to have been accosted on New York City’s Line 6 train by three drunken white men who called her a terrorist and yanked at her hijab—claimed that her assailants were yelling “Donald Trump.” After being confronted by police about multiple inconsistencies in her story, however, Seweid broke down and admitted to making the whole thing up in order to avoid confessing to her strict Muslim parents that she had been out late enjoying a night of underage drinking with her boyfriend.³⁶

Many of the hoaxes—like Smollett’s and Seweid’s—involve accusations that Trump supporters had committed the crime. A historic African American church in Greenville, Mississippi was torched with the words “Vote Trump!” scrawled on the wall. The perpetrator turned out to be an African American parishioner with a history of problems. He was not a Trump supporter. In Indianapolis, the individual who defaced a church with swastikas and the words, “Heil Trump” turned out to be the organist who was seeking to discredit Trump. Dr. Reilly devotes a whole chapter of his book to Trump-related hate crime hoaxes. Suffice it to say there are a lot of them.³⁷

But there have been plenty of other examples, dating back decades: in 1997, two African American Duke University students were discovered to have hung a black baby doll from a tree near the spot where the Black Student Alliance was planning a protest. A year later, a St. Cloud University student slashed her own face and claimed that two men had done it while yelling anti-gay insults. In 2004, a visiting professor at Claremont McKenna College painted a swastika on her own car and slashed its tires.³⁸ Frequently, these incidents have provoked dramatic responses on the campuses where they occur ... until they are found to be hoaxes.

Cui Bono?

Beyond individual attention seekers, who benefits from trying to convince decent Americans that the level of racial, ethnic, and religious hatred is worse than it is? One possibility is the Southern Poverty Law Center, an organization that currently has about 254 employees and an endowment of \$471 million.³⁹ An examination of its web site could easily lead some to believe that the nation is chock full of white supremacists and Nazi stormtroopers. But, while the SPLC doesn’t say so, among the real “hate groups” it identifies, most have only a miniscule membership.

³⁶ Reilly at 11.

³⁷ See also Peter Hasson, “19 ‘Hate Crimes’ That Were Hoaxes or Different Than Media Suggested,” *Daily Signal*, February 19, 2019, available at <https://www.dailysignal.com/2019/02/19/19-hate-crimes-in-trump-era-that-were-hoaxes-complicated/>.

³⁸ Bradley Campbell and Jason Manning, “Hate Crime Hoaxes Are More Common Than You Might Think,” *Quillette*, February 22, 2019, available at <https://quillette.com/2019/02/22/hate-crime-hoaxes-are-more-common-than-you-think/>.

³⁹ Ben Schreckinger, Has a Civil Rights Stalwart Lost Its Way?, *Politico*, July/August 2017, available at <https://www.politico.com/magazine/story/2017/06/28/morris-dees-splc-trump-southern-poverty-law-center-215312>.

Some apparently have only one member.⁴⁰ The rest are not hate groups at all; they are victims of an SPLC smear.

For example, the Alliance Defending Freedom is a public interest law firm that defends religious freedom. It has argued nine cases before the Supreme Court and won all nine. Yet the SPLC has condemned it as some sort of menace. Other individuals and organizations the SPLC has slimed in recent years include popular radio personality Dennis Prager's Prager U, feminist author Ayaan Hirsi Ali, Vanderbilt University law professor Carol Swain, U.S. Senator Rand Paul, and HUD Secretary Ben Carson.⁴¹

The SPLC does not agree with these individuals and organizations. Fine. I don't always agree with them myself. Some (but by no means all) of them have said things that I have considered over the top or needlessly unkind. But that doesn't make them into a modern day Ku Klux Klan.

I am disappointed that the staff-generated part of this report extensively cites the SPLC for its supposed expertise in hate crimes. The Commission appears to be among the last to learn about the SPLC's methods.

Note that it is by no means just conservatives who come to be skeptical of the SPLC. To the contrary, over the years, most of penetrating criticisms have come from left-of-center publications. *The Progressive*, *The Nation* and *Harper's* have all taken on the organization. Up until recently, most newspapers and most conservative publications have been too timid to criticize such an organization—much to their discredit. It has only been since co-founder Morris Dees and

⁴⁰ Nathan J. Robinson, The Southern Poverty Law Center Is Everything that is Wrong With Liberalism, *Current Affairs*, March 26, 2019. Robinson wrote:

In fact, when you actually look at the hate map [on the SPLC's web site], you find something interesting: Many of these "groups" barely seem to exist at all. A "Holocaust denial group in Kerrville, Texas called carolynyeager.net appears to just be a woman called Carolyn Yeager. A "male supremacy" group called Return of the Kings is apparently just a blog published by pick-up artist Roosh V and a couple of his friends, and the most recent post is an announcement from six months ago that the project was on indefinite hiatus. Tony Alamo, the abusive cult leader of "Tony Alamo Christian Ministries," died in prison in 2017. (Though his ministry's web site still promotes "Tony Alamo's Unreleased Beatles Album.") A "black nationalist" group in Atlanta called "Luxor Couture" appears to be an African fashion boutique.

If the SPLC's assertion that hate groups are on the rise means anything, it is that everybody seems to have a web site these days, even nut cases. But it isn't that these nut cases didn't exist before.

⁴¹ As a result of criticism, the SPLC later walked back its statements about Ayaan Hirsi Ali and Ben Carson. Hemant Mehta, The SPLC Has Removed Its Controversial Page Listing "Anti-Muslim Extremists", *Friendly Atheist*, April 19, 2018, available at <https://friendlyatheist.patheos.com/2018/04/19/the-splc-has-removed-its-controversial-page-listing-anti-muslim-extremists/>; SPLC Statement on Dr. Ben Carson, February 11, 2015, available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/splc_statement_carson_feb2015.pdf.

president Richard Cohen were fired without explanation that criticisms have rained down on the organization.

Writing for *The New Yorker* in 2019, Bob Moser, a former SPLC staff member, told this story:

In the days since the stunning dismissal of Morris Dees, the co-founder of the Southern Poverty Law Center, on March 14th, I've been thinking about the jokes my S.P.L.C. colleagues and I used to tell to keep ourselves sane. Walking to lunch past the center's Maya Lin-designed memorial to civil-rights martyrs, we'd cast a glance at the inscription from Martin Luther King, Jr., etched into the black marble—"Until justice rolls down like waters"—and intone, in our deepest voices, "Until justice rolls down like dollars." The Law Center had a way of turning idealists into cynics.⁴²

The SPLC may have started off well-intentioned enough. But its campaign to sue the Ku Klux Klan out of existence didn't require as much legal skill and financial support as some of its donors may have thought. By the 1980s, when the SPLC's assault began, the KKK was a tiny group of losers with no more influence on public affairs than the typical town drunk. As one of the SPLC's staff attorneys admitted, suing them was a bit like shooting fish in a barrel.⁴³

What the SPLC excelled at was fundraising. Founder Morris Dees is an excellent salesman—*so good that he has been inducted into the Direct Marketing Association's Hall of Fame*.⁴⁴ And he is not ashamed to describe himself in terms of his salesmanship:

"I learned everything I know about hustling from the Baptist church," he once told a reporter. "Spending Sundays sitting on those hard benches listening to the preacher pitch salvation—why, it was like getting a Ph.D. in selling."⁴⁵

With his KKK project he found a product that would sell well to well-meaning donors. In his 1988 exposé entitled *Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan*, journalist John Egerton quoted a former SPLC staffer:

"The money poured in," [the staffer] says. "Everybody, it seems, was against the Klan. We developed a whole new donor base, anchored by wealthy Jewish contributors on the East and West Coasts, and they gave big bucks. Our budget

⁴² Bob Moser, The Reckoning of Morris Dees and the Southern Poverty Law Center, *New Yorker*, March 21, 2009.

⁴³ John Egerton, Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan, *The Progressive* 14, 17 (July 1988).

⁴⁴ Daniel Schlozman, How the SPLC's Co-Founder Morris Dees and the Conservative Richard Viguerie Changed American Politics, *Washington Post*, April 2, 2019.

⁴⁵ John Egerton, Poverty Palace: How the Southern Poverty Law Center Got Rich Fighting the Klan, *The Progressive* 14, 15 (July 1988).

shot up tremendously—and still, we were sometimes able to raise as much as \$3 million a year more than we could spend.”⁴⁶

How did all of that money get spent? Part of it went to build the SPLC’s 150,000 square foot office building, which was designed by a New York architecture firm and is located in Montgomery, Alabama. Dubbed the “Poverty Palace,” it cost \$15 million to build. Part of it went to high salaries for its top employees. Morris Dees and Richard Cohen each earned over \$300,000 just in salary from the SPLC.⁴⁷ Much of it was socked away in the SPLC’s “endowment.”

Of course, most of the publicity Morris Dees got during these early decades was complimentary, even celebratory. In 1991, there was a NBC made-for-television movie entitled *Line of Fire: The Morris Dees Story*. By 2000, however, things began to change and much less flattering treatment started to dominate. In that year, Ken Silverstein, writing in *Harper’s*, delivered a devastating critique:

Ah, tolerance. Who could be against something so virtuous? And who could object to the Southern Poverty Law Center, the Montgomery, Alabama-based group that recently sent out [a] heartwarming yet mildly terrifying appeal to raise money ...? Cofounded in 1971 by civil rights lawyer cum direct-marketing millionaire Morris Dees, a leading critic of "hate groups" and a man so beatific that he was the subject of a made-for-TV movie, the SPLC spent much of its early years defending prisoners who faced the death penalty and suing to desegregate all-white institutions like Alabama's highway patrol. That was then. Today, the SPLC spends most of its time—and money—on a relentless fund-raising campaign, peddling memberships in the church of tolerance with all the zeal of a circuit rider passing the collection plate. "He's the Jim and Tammy Faye Bakker of the civil rights movement," renowned anti-death-penalty lawyer Millard Farmer says of Dees, his former associate, "though I don't mean to malign Jim and Tammy Faye." The center earned \$44 million last year alone--\$27 million from fund-raising and \$17 million from stocks and other investments—but spent only \$13 million on civil rights programs, making it one of the most profitable charities in the country.⁴⁸

⁴⁶ Egerton at 17.

⁴⁷ Nathan J. Robinson, The Southern Poverty Law Center Is Everything that is Wrong With Liberalism, *Current Affairs*, March 26, 2019.

⁴⁸ Ken Silverstein, The Church of Morris Dees: How the Southern Poverty Law Center Profits from Intolerance, *Harper’s*, November 2000, available at <https://rkeefe57.files.wordpress.com/2015/01/church-of-morris-dees.pdf>.

Several years later, Silverstein published a letter in his *Harper’s* blog with the following message:

Many of you out there have no doubt received in the mail desperate cries for help from the Southern Poverty Law Center (SPLC), the do-gooder group that does very little good considering the vast sums of money it raises. But before you pull out your checkbook, make sure to read the following letter that Stephen Bright, an Atlanta-based civil rights and anti-death penalty attorney, recently wrote in declining an invitation to an event that honors Morris Dees, head of the SPLC.

Kenneth C. Randall, Dean and

Several years later, in 2009, Alexander Cockburn, writing in *The Nation*, wondered what the SPLC would do after the election of Barack Obama as President and a Democratic Congress to boot:

What is the archsalesman of hatemongering, Morris Dees of the Southern Poverty Law Center, going to do now? Ever since 1971, US Postal Service mailbags have

Thomas L. McMillan, Professor of Law
School of Law
University of Alabama
249 Law Center
Box 870382
101 Paul W. Bryan Drive
Tuscaloosa, AL 35487-0382

Dear Dean Randall:

Thank you very much for the invitation to speak at the law school's commencement in May. I am honored by the invitation, but regret that I am not able to accept it due to other commitments at that time.

I also received the law school's invitation to the presentation of the "Morris Dees Justice Award," which you also mentioned in your letter as one of the "great things" happening at the law school. I decline that invitation for another reason. Morris Dees is a con man and fraud, as I and others, such as U.S. Circuit Judge Cecil Poole, have observed and as has been documented by John Egerton, *Harper's*, the Montgomery Advertiser in its "Charity of Riches" series, and others.

The positive contributions Dees has made to justice—most undertaken based upon calculations as to their publicity and fund raising potential—are far overshadowed by what *Harper's* described as his "flagrantly misleading" solicitations for money. He has raised millions upon millions of dollars with various schemes, never mentioning that he does not need the money because he has \$175 million and two "poverty palace" buildings in Montgomery. He has taken advantage of naive, well-meaning people—some of moderate or low incomes—who believe his pitches and give to his \$175-million operation. He has spent most of what they have sent him to raise still more millions, pay high salaries, and promote himself. Because he spends so much on fund raising, his operation spends \$30 million a year to accomplish less than what many other organizations accomplish on shoestring budgets.

The award does not recognize the work of others by associating them with Dees; it promotes Dees by associating him with the honorees. Both the law school and Skadden are diminished by being a part of another Dees scam.

Again, thank you for the invitation to participate in your commencement. I wish you and the law school the very best.

Sincerely,

Stephen B. Bright

cc: Morris Dees
Arthur Reed
Dees award committee

Ken Silverstein, The Southern Poverty Business Model, The *Harper's* Blog, November 2, 2007, available at <https://harpers.org/blog/2007/11/the-southern-poverty-business-model/>.

bulged with his fundraising letters, scaring dollars out of the pockets of trembling liberals aghast at his lurid depictions of a hate-sodden America in dire need of legal confrontation by the SPLC.⁴⁹

The SPLC has occasionally had to pay a price for smearing legitimate organizations as “hate groups.” For example, last year it paid \$3.375 million to Maajid Nawaz's Quilliam Foundation after admitting to falsely labeling that organization as an anti-Muslim extremist group. In fact, the Quilliam Foundation is anything but that. It is an organization of moderate Muslims seeking to discourage extremism. In connection with the settlement, the SPLC apologized for its defamatory statements.⁵⁰

Weirdly enough, one of the SPLC's most dangerous overreaches itself led to a crime of hatred. On August 15, 2012, a gunman attempted to enter the offices of the Family Research Council. He brought with him a number of Chick-Fil-A sandwiches. His intent was to kill as many FRC staff members as possible and smear the Chick-Fil-A over their bodies. A heroic unarmed security guard saved them, but only at the cost of taking a bullet in the arm himself.⁵¹

⁴⁹ Alexander Cockburn, King of the Hate Business: With Haters on the Wane, What Will the Hate Seekers Do?, *The Nation*, April 29, 2009.

⁵⁰ Greg Price, Southern Poverty Law Center Settles Lawsuit After Falsely Labeling “Extremist” Organization, *Newsweek*, June 18, 2018.

⁵¹ FRC staff member Jessica Prol Smith described that day this way:

I'll never forget the moment I learned we were on lockdown. It was Aug. 15, 2012. My frustration mingled with fear. Trapped on the sixth floor, we knew someone had been shot. We knew we couldn't leave yet. We knew little else.

While I was missing lunch, a crime scene played out in the office lobby below me. My coworker and friend Leo wasn't armed, but he had played the quick-thinking and inadvertent hero, disarming a young man on a mission to kill me and as many of my colleagues as possible. The gunman had packed his backpack with ammo and 15 Chick-fil-A sandwiches—later admitting that he had planned to smear them on our lifeless faces as a political statement. Leo took a bullet in the arm but managed to hold the attacker until law enforcement arrived.

I wrote and edited for the Family Research Council, a public advocacy organization that promoted the principles I have cared about since childhood: protecting the family, promoting the dignity of every human life and advocating for religious liberty. It reads like a tagline, but it's also just what I believed and the way I chose to match my career with my convictions.

I never expected that everyone would celebrate or share my beliefs. But I did expect to be able to discuss and debate these differences without becoming a political target in an act of terrorism, the first conviction under Washington, D.C.'s 2002 Anti-Terrorism Act.

It was the type of violent incident that one could expect a group that purportedly monitors “hate” like the Southern Poverty Law Center, to notice, research and decry. In fact, we were on the center's radar but for all the wrong reasons. The assailant acknowledged later in FBI testimony that he had selected our office precisely because the SPLC had labeled my employer a “hate group.”

As it turned out, the gunman had learned about the FRC from the Southern Poverty Law Center, which had labeled the organization a hate group. In fact, the FRC is a socially conservative Christian organization that opposes pornography, abortion, and same-sex marriage. The SPLC condemned the gunman's action, but continues to view the FRC as a hate group though its positions are quite mainstream among conservative evangelicals and certainly in no way violent.

The SPLC's many overreaches are by no means harmless.

Potential for Double Jeopardy Abuse:⁵² A final issue I believe the report should have addressed is the potential for double jeopardy abuse posed by the *federal* hate crimes statute.⁵³ This is not a potential that is unique to the federal hate crimes statute (as opposed to other federal criminal statutes), but owing to the hate crimes statute's broad wording and to the emotional response that the term "hate crime" tends to trigger, the potential for abuse is particularly significant.

Here are the outlines of the story: Like many federal criminal laws, the federal hate crimes statute only criminalizes actions that are already criminalized by state law. In other words, it does not prohibit any activity that wasn't prohibited already.⁵⁴

The main legal ramification of this double coverage is to make it possible for federal

It has always been easier to smear people rather than wrestle with their ideas. It's a bully who calls names and spreads lies rather than thoroughly reading a brief's legal arguments or challenging the rationale underlying a policy proposal. The SPLC has chosen to take the easy path—to intimidate and mislead for raw political power and financial benefit.

Jessica Prol Smith, The Southern Poverty Law Center is a Hate-Based Scam that Nearly Caused Me to Be Murdered, *USA Today*, August 17, 2019.

⁵² I have previously made these points in Gail Heriot, Civil Rights: Lights!, Camera!, Legislation!: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy, *Engage* (February 2009) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891096.

⁵³ I believe that the statute is also unconstitutional in part. See Brief Amicus Curiae of Gail Heriot and Peter N. Kirsanow, in Support of Petitioner in *Metcalfe v. United States*, No. 17-9340 (filed July 16, 2018). The brief argues that the portion of the Act that relies on the Thirteenth Amendment for its authorization is unconstitutional.

⁵⁴ What justification exists for this redundancy? Back in 1998, Administration officials argued that it was needed, because state procedures often make it difficult to obtain convictions. They cited a Texas case involving an attack on several black men by three white hoodlums. Texas law required the three defendants to be tried separately. By prosecuting them under federal law, however, they could have been tried together. As a result, admissions made by one could be introduced into evidence at the trial of all three without falling foul of the hearsay rule.

One might expect that argument to send up red flags among civil libertarian groups like the ACLU. But political correctness seems to have caused them to abandon their traditional role as advocates for the accused. See ACLU Applauds Senate Introduction of Hate Crimes Legislation, available at www.aclu.org/lgbt/gen/29340prs20070412.html (April 12, 2007). Still, the argument cries out: Isn't this just an end-run around state procedures designed to ensure a fair trial? The citizens of Texas evidently believe that separate trials are necessary to ensure innocent men and women are not punished. No one is claiming that Texas applies this rule only when the victim is black or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

authorities to re-prosecute a defendant after a state jury has declined to convict. Indeed, it is overwhelmingly likely that this was the reason some wanted the law. This creates obvious problems.⁵⁵

School children are taught that the Double Jeopardy Clause of the Constitution guarantees that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”⁵⁶ They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. As the Supreme Court put it in *United States v. Lanza*, a defendant who violates the laws of two sovereigns has “committed two different offenses by the same act, and [therefore] a conviction by a court [of one sovereign] of the offense that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy.”⁵⁷ A state cannot oust the federal government from jurisdiction by prosecuting first; similarly the federal government cannot oust the state. Indeed, New Jersey cannot oust New York from jurisdiction over a crime over which they both have authority, so in theory at least a defendant may face as many of 51 prosecutions for the same incident.⁵⁸

The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the “prosecutorial punch,” it can, in effect, veto the implementation of federal policy (and vice versa). In 1922, the Court in *Lanza* put it in terms of Prohibition, which was then hotly controversial. Allowing a state to “punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines,” it wrote, will lead to “a race of offenders to the courts of that State to plead guilty and secure

⁵⁵ The ACLU endorsed the bill without any discussion of the potential double jeopardy issues it raises. See *supra* at n. 53. Professor Paul Cassell reports that the ACLU was split on the federal prosecution on the police officers accused of using excessive force against Rodney King following their acquittal on state charges. Although the ACLU’s Board of Directors ultimately mustered a vote of 37 to 29 to support the proposition that re-trials constitute double jeopardy, several chapters continued to demand that federal civil rights law be employed to prosecute the Rodney King defendants, notably the Southern California chapter, where the conduct took place. See Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU’s Schizophrenic Views of the Dual Sovereign Doctrine*, 41 *UCLA L. REV.* 693, 709-15 (1994). See Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 *UCLA L. REV.* 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights “Exception,”* 41 *UCLA L. REV.* 649 (1994) (Legal Director of the ACLU Foundation of Southern California makes argument in favor of re-prosecutions in cases involving “civil rights”).

⁵⁶ U.S. CONST. AMEND. V.

⁵⁷ 260 U.S. 377, 382 (1922). See *Abbate v. United States*, 359 U.S. 187 (1959) (federal prosecution upheld following state conviction); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852) (dictum); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 424-35 (1847) (dictum).

⁵⁸ At the time of *Lanza*, the Double Jeopardy Clause was thought not to apply to the states and some arguments for the dual sovereignty doctrine rely on that view. But the Supreme Court has held steadfastly to the dual sovereignty doctrine even after *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Clause had been incorporated through the Fourteenth Amendment. See *Heath v. Alabama*, 474 U.S. 82, 87-89 (1985) (case involving the dual sovereignty of Alabama and Georgia); *United States v. Wheeler*, 435 U.S. 313 (1978); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 *COLUM. R. REV.* 1, 11-18 (1995).

immunity from federal prosecution.”⁵⁹

But the dual sovereignty doctrine is still at best troubling. And its most troubling aspect is that it applies even when the defendant has been *acquitted* of the same offense in the first court and is now being re-tried.⁶⁰ Prosecutors in effect have two bites at the apple (or in a case in which two or more states are concerned, three, four, or five bites). The potential for abuse should be of concern to all Americans.

In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last couple of decades, this is no longer true.⁶¹ The nation is facing the very real possibility that double prosecutions could become routinely available to state and federal prosecutors who wish to employ them.

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act added substantially to the problem in two ways. By declining to require that the defendant be motivated by hatred or even malice in order to establish a “hate crime,” it vastly expanded the reach of the federal criminal code. A creative prosecutor will be able to charge defendants in a very broad range of cases—cases that ordinary users of the English language would never term “hate crimes.” And it makes the most controversial cases—those that were arguably motivated by race, color, religion, national origin, gender identity, sexual orientation, or disability—front and center on the federal stage.

It should come as no surprise that re-prosecutions are more common in cases that are emotionally-charged—cases like the Rodney King prosecutions and the Crown Heights murders (both of which brought under statutes that were previously existing). As Judge Guido Calabresi put it in 1995:

Among the important examples of successive federal-state prosecution are (1) the federal prosecution of the Los Angeles police officers accused of using excessive

⁵⁹ 260 U.S. at 385. See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995)(expressing concern over the doctrine while noting that “[t]he danger that one sovereign may negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence, is ... obvious”)(separate opinion of Calabresi, J.). See also Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986).

⁶⁰ See *Bartkus v. Illinois*, 359 U.S. 121 (1959)(state prosecution following federal acquittal upheld); *United States v. Avants*, 278 F.3d 510, 516 (5th Cir.), cert. denied 536 U.S. 968 (2002)(under the “dual sovereignty doctrine,” “the federal government may ... prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical”); *United States v. Farmer*, 924 F.2d 647, 650 (7th Cir. 1991)(a “double jeopardy claim based on [a] prior state acquittal of murder is defeated by the ‘dual sovereignty’ principle”).

⁶¹ See generally James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese, III, Chair of the American Bar Association’s Task Force on Federalization of Criminal Law, there are at least 3,000 federal crimes. See Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 FED. SENTENCING REP. 129, 129 (1998).

force on motorist Rodney King after their acquittal on state charges, (2) the federal prosecution of an African-American youth accused of murdering a Hasidic Jew in the Crown Heights section of Brooklyn, New York, after his acquittal on state charges, and (3) the Florida state prosecution—seeking the death penalty—of the anti-abortion zealot who had been convicted and sentenced to life imprisonment in federal court for killing an abortion doctor.⁶²

While Judge Calabresi expressed no opinion about the merits of these cases, he noted that “there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts” and that it was “to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted.” It “is especially troublesome,” he stated, “that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern.”⁶³

Hate crimes are perhaps the most emotionally-charged criminal issue in the nation today. According to CNN’s Kyra Phillips, “Thousands of people converg[ed] on the U.S. Justice Department” on November 16, 2007 “demanding more federal prosecutions of hate crimes.”⁶⁴ It is not easy to argue that political pressure of this sort will have no effect on the judgment of federal officials.

Supporters of federal hate crimes legislation argued that the actual risk of abuse at the Department of Justice is quite minimal. DOJ has its own internal guidelines, known as the “Petite Policy,” under which it limits double prosecutions to cases that meet certain standards. Unfortunately, the standards are vague. For example, they authorize double prosecutions whenever there are “substantial federal interests demonstrably unvindicated” by successful state procedures. These federal interests are undefined and indefinable. Moreover, courts have consistently held that a criminal defendant cannot invoke the Petite policy as a bar to federal prosecution.⁶⁵

I would like to have seen the Commission examine any and all cases—such as the George Zimmerman case—in which public or private pressure was brought to bear on the Department of Justice to re-prosecute pursuant to the federal hate crimes statute a person who had been acquitted under state law. The potential for abuse here is too important to ignore.

⁶² *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995).

⁶³ *Id.* at 499.

⁶⁴ Thousands Protest Hate Crimes, CNN Newsroom Transcript (November 16, 2007) (available on LexisNexis). According to the report, the Department of Justice spokesman said that the Department of Justice was aggressively pursuing hate crimes. One of the reasons cited for the failure to prosecute more hate crimes was the narrowness of the applicable statutes.

⁶⁵ See, e.g., *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir.), cert. denied, 440 U.S. 976 (1979) (noting that the Petite policy is “a mere housekeeping provision”); *United States v. Musgrove*, 581 F.2d 406, 407 (4th Cir. 1978) (stating the rule that “a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with [Petite] policy on dual prosecutions.”); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978) (“Our view that [the Petite policy] is at most a guide for the use of the Attorney General and the United States Attorneys in the field”); *United States v. Wallace*, 578 F.2d 735, 740 (8th Cir. 1978).

Conclusion:

The current Commission is composed of eight lawyers. We should have done more to pay attention to the problems with the current federal hate crimes law including the increased risk of double prosecutions that it brings and the constitutional issues that are raised by it. We also have largely succumbed to a panic about an alleged surge in hate crimes, when we should have cast a more critical eye. I had hoped for better.