



New York's Hate Crimes Law: An Assessment

August 2013
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New York State Senator Brad Hoylman

Ranking Member, Judiciary Committee

Ranking Member, Investigations & Government Operations Committee

Note from Senator Hoylman

This report was initially published in August 2013 to present the findings of a legislative forum I held examining the implementation and enforcement of New York's Hate Crimes Law. In the wake of the report's publication, New York State Comptroller Thomas DiNapoli ordered his office to conduct an audit of the New York City Police Department (NYPD) and the New York State Division of Criminal Justice Services (DCJS), ultimately finding several areas of improvement for local and state law enforcement agencies to accurately record, monitor, and report the occurrence of hate crimes.

While hate crime incidents hit a five-year low in New York State and New York City in 2015¹, there are several indications that when official statistics for 2016 are released, they will show an increase. In the days immediately following the 2016 presidential election, the Southern Poverty Law Center saw a sharp increase in reported hate crimes rivaling the spike of such incidents after the 9/11 terrorist attacks in 2001.² Here in New York, preliminary statistics from the NYPD show a 23% increase in reported hate crimes in the five boroughs in 2016³, with much of the increase comprised of anti-Jewish, anti-Muslim, and anti-LGBT incidents.

Notable incidents since the November 2016 elections include:

- An off-duty Muslim police officer wearing a hijab was harassed by a man who called her an "ISIS b---h" and threatened to cut her throat.⁴
- A black transgender man was slashed in the face on a subway train by a woman who made racist statements toward him.⁵
- Swastikas were drawn on a subway bench and advertising poster on a 1 train subway car.⁶

In light of the apparent increase in hate crime incidents we have seen over the past year, I have updated my 2013 report to note the progress that has been made on the recommendations of the original report and to highlight the work that remains. For ease of reading, updates to the original report are in red print.

¹ Source: <http://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2015-annual-report.pdf>

² Source: <http://usat.ly/2fJT9KU>

³ Source: <http://politico.pro/2jq6o4B>

⁴ Source: <http://bit.ly/2jq80eC>

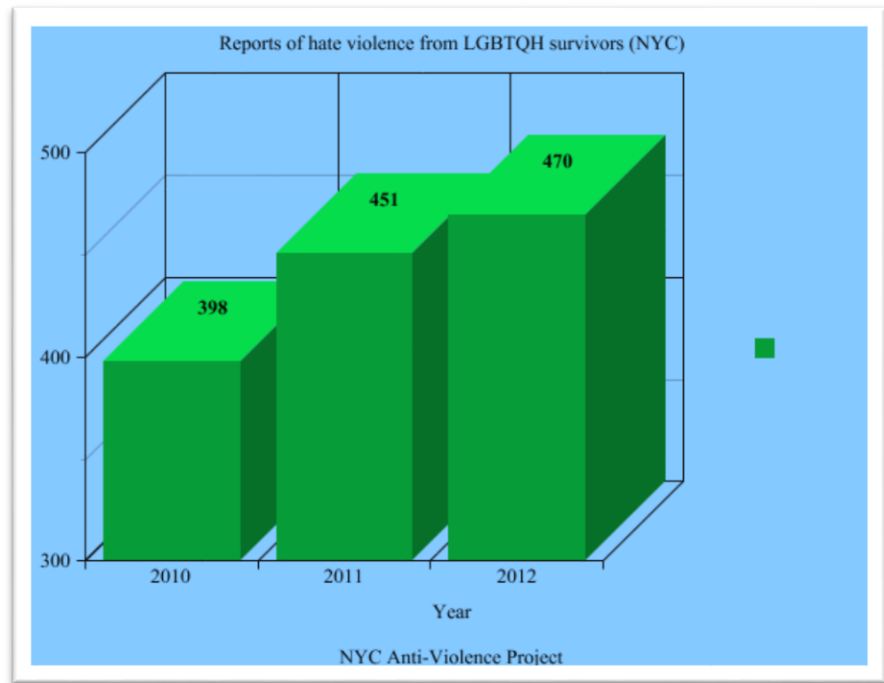
⁵ Source: <http://bit.ly/2hsvSyV>

⁶ Source: <http://nydn.us/2fv4fdc>

Introduction

On June 14, 2013 a public forum was held on New York State's Hate Crimes Law (Chapter 107, Laws of New York, 2000) to assess its implementation and efficacy and whether amendments should be considered.

The forum was precipitated by a series of alleged anti-Lesbian, Gay, Bisexual and Transgender (LGBT) hate crimes in May 2013, during which there were nine suspected bias-motivated attacks against members of the LGBT community in Manhattan, including a murder. These incidents seem part of a larger trend. A recent report by the National Coalition of Anti-Violence Programs (NCAVP) found that anti-LGBT hate crimes have been on the rise in New York City for four years, with a 4% increase from 2011 to 2012 following double-digit increases of 11% and 13% in the prior two years.



UPDATE: Subsequent reports by the NCAVP showed a 27% spike in reports of anti-LGBTQ hate violence in New York City in 2013, followed by a 39% decrease in 2014, and a 4% uptick in 2015 (the most recent data available).⁷

Attacks against the LGBT community are not unique among minority groups, however. Across New York, there have been numerous bias incidents against other communities. The Anti-Defamation League recently reported that in 2012, there was a 27% increase in anti-Semitic incidents across the state. According to data collected by the New York State Division of Criminal Justice Services (DCJS), there have been thousands of hate

⁷ Source: www.avp.org/resources/reports

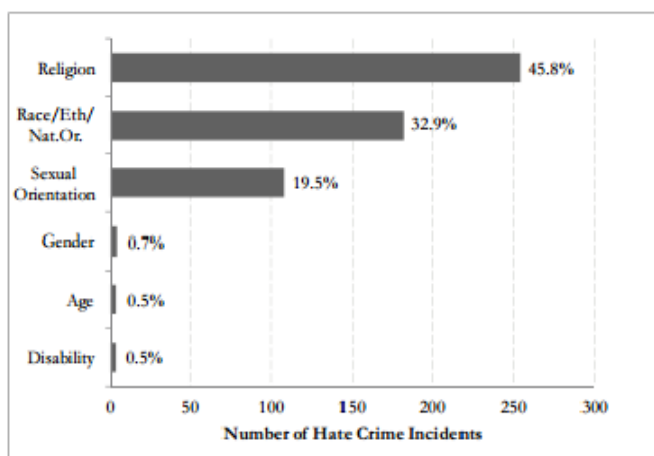
crimes in New York over the last **sixteen** years, defined as such because their victims were targeted due to their real or perceived race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation.

UPDATE: DCJS's most recent annual report on hate crimes in New York State found that while hate crimes committed against property declined 24.3% in 2015, hate crimes committed against individuals increased 7% in 2015, with the most frequently reported bias motivations for hate crimes being anti-male homosexual (26.2%), anti-Jewish (24%), and anti-black (15.6%).⁸

Hate crimes have a pervasive effect. As the Legislative Findings of New York's Hate Crimes Act of 2000 state, "Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes."

Combating hate crimes requires a multi-pronged approach. Strategies include implementing anti-hate policies and programs in schools; asking religious and community leaders to promote diversity and acceptance; and educating individuals about violence prevention, safety and self-defense strategies. Well-crafted, strongly enforced hate crimes laws have a crucial role, too, by creating a deterrent effect and promoting police-community relations.

New York State enacted its Hate Crimes Act over **sixteen** years ago. The goal of this



report is to assess its implementation by reviewing testimony from the public forum. While not definitive, the conclusions suggest areas of improving implementation of the statute and for further study.

Summary of New York State's Hate Crimes Law

New York State's Hate Crimes Law, Article 485 of the New York Penal Law – included in the appendix – defines a hate crime as a certain crime committed when an offender selects a victim because of a belief or perception about the victim regarding race, color, national origin, ancestry, gender, religion, religious practice, age,

⁸ Source: <http://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2015-annual-report.pdf>

disability or sexual orientation, or commits a certain crime because of a belief or perception regarding race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. The sentencing section of the law requires harsher sentences for offenders convicted of committing a hate crime. Additionally, New York State's Executive Law includes a hate crimes data reporting and collection requirement, although the public forum raised questions about its effectiveness and implementation.

Testimony

Among the guiding questions posed to witnesses, which included government officials, experts and community advocates, were:

- Should the Hate Crimes Law mandate law enforcement training?
- Does New York State's hate crimes data collection requirement need to be strengthened?
- Are there changes that should be made to the Law that would increase reporting of hate crimes by victims and law enforcement?

Data Collection & Reporting

As required by law, all state, city and local police agencies must report hate crime data to DCJS. These data include number of victims, type of victims, number of offenders, type of bias motivation, type of crime and crime location. DCJS has a separate database within its criminal history repository for information on hate crimes arrests and the dispositions of those arrests. It was suggested that the data reporting requirement is not lacking but that there is no enforcement mechanism, potentially resulting in some police agencies not reporting their hate crimes data. An audit by the New York State Comptroller of state and local law enforcement agencies could help identify deficiencies in and improve the collection and reporting of hate crimes data as well as law enforcement training programs on identifying, investigating and reporting hate crimes.

Training of Law Enforcement

Having law enforcement officials well trained in identifying and reporting hate crimes is crucial to assisting victims, prosecuting hate crimes, and maintaining accurate data on hate crimes. If a responding or investigating officer does not identify a crime as a hate crime or document a bias motivation in the official incident report, the crime will not be reported to the New York State Department of Criminal Justice Services (DCJS) as a hate crime. This hinders the ability of DCJS to accurately collect, analyze and report hate crimes data in New York.

New York State General Municipal Law Section 209-q mandates that every police officer undergo a course in basic officer training and that every supervising officer complete a training course for supervisors in every municipality except New York City. However, state law does not specify that training be provided in identifying, responding to and investigating hate crimes.

Although not required by existing law, in 2011 DCJS included a hate crimes component on identifying and responding to hate crimes incidents in the required basic and supervisory officer training. New York State also adopted a hate crimes model policy in 2009 that agencies can adopt as a best practice for responding to, and investigating, these incidents.

Codifying mandatory law enforcement training in identifying, responding to and reporting hate crimes would ensure that such training remains a part of the training curriculum. Such training should also include instruction on New York's diverse cultural groups, which would allow law enforcement to better assist victims and engage community leaders and organizations.

Periodic Review

It was suggested that in order to evaluate the ongoing effectiveness of the Hate Crimes Law, state law should mandate periodic systematic reviews of its impact on deterrence, punishment, enforcement, training and reporting. Law enforcement, victims' groups, community organizations and other stakeholders could be engaged by a designee, such as DCJS, to conduct such reviews at regular intervals. Such reviews should also attempt to isolate factors that have an impact on hate crimes; analyze trends across time and location; and determine the effects of hate crime prevention training, education measures and other community efforts to stop hate crimes.

Education

Another theme discussed at the forum was the need for classroom education in tolerance and diversity, promoting multiculturalism and understanding of other cultures and identities. Witnesses said that this kind of instruction, along with anti-bullying and anti-hate programs in schools, will begin to change youth perspectives on LGBT people and other minority communities.

It was stated that the average hate crime offender in New York City is between 13 and 22 years old and juveniles are more likely to be victims of hate crimes. This underscores the need for additional educational programs.

The New York State *Dignity for All Students Act*, which went into effect in June 2012, incorporates tolerance, anti-bullying and anti-harassment education into existing

civility education for public school grades K-12. It further requires that schools report bullying and harassment to the New York State Department of Education and have at least one staff member trained in recognizing and addressing bullying, harassment and discrimination.

In addition to classroom education, witnesses argued for community education on the Hate Crimes Law in order to raise public awareness and help individuals and communities devise strategies to address hate violence and provide guidance to victims.

Scope of Protected Classes

Gender identity or expression is currently not a protected category under New York's Hate Crimes Law. Passage of New York's *Gender Expression Non-Discrimination Act* (GENDA) (S 195/A 4226) would remedy this and result in coverage for crimes against transgender and gender non-conforming individuals, in addition to the other categories. GENDA has passed the State Assembly six consecutive times, but has never come to the floor of the State Senate for a vote. In addition to including gender identity or expression as a protected category, several witnesses suggested including immigration status and personal appearance.

Michael Sandy Act

Several witnesses testified in support of the *Michael Sandy Act* (A 7549), which would bar trial evidence that the defendant and accuser are from the same protected category, unless a judge determines the evidence is relevant. Currently, judges are free to permit evidence that could nullify hate crimes prosecutions. The bill is modeled after the Rape Shield Law, which limits a defendant's ability to use past sexual behavior as a way to discredit the accuser.

In addition to the *Michael Sandy Act*, witnesses expressed the need for legislation that disqualifies gay and transgender panic defenses used to justify their violence against individuals upon learning that they were gay or transgender. These panic defenses allow defendants to undermine the intent of the Hate Crimes Law.

Restorative Justice

Several witnesses testified on the usefulness of restorative justice programs for non-violent hate crimes offenders. Restorative justice programs help young people and other non-violent offenders avoid the criminal justice system, allow offenders to learn about and embrace ideas of tolerance and strengthen a community's efforts to create awareness around and prevent hate crimes.

A recent example of a restorative justice program was administered by the Kings County District Attorney after a minor painted swastikas on property. In conjunction with the Holocaust Park Museum and with the cooperation of the minor's family, the District Attorney's office arranged for community service for the minor to learn about the Holocaust, Jewish culture and the impact of hate speech.

Police - Community Relations

There was widespread consensus among witnesses that hate crimes are underreported in New York. It was explained that mistrustful relations between the police and minority communities could be a reason for the underreporting. Policies that could improve police relationships with minority communities include barring police and prosecutors from using possession of condoms as evidence of prostitution; prohibiting police from engaging in profiling based on sexual orientation, gender identity or expression, and race; and permitting religious dress for police officers, as is allowed for Sikh officers in the Washington, D.C. police force.

Support for Victims

Testimony revealed that victim counselors can help assist prosecutors and police to create a supportive environment for hate crimes victims. An increase in their number and use would help aid victims.

Recommendations

- The New York State Comptroller should conduct an audit of state law enforcement agencies to examine their compliance with the Executive Law's hate crimes reporting requirement and to assess the training they are providing in identifying, responding to and investigating hate crimes.

UPDATE: At the request of Senator Hoylman, New York State Comptroller Thomas P. DiNapoli conducted the first-ever audit of the Hate Crimes Law, evaluating how the New York City Police Department (NYPD) and the New York State Division of Criminal Justice Services (DCJS) record, report, and monitor hate crimes.

State auditors found that, based on existing NYPD record-keeping practices, it was impossible to confirm that all reported hate crimes were properly captured, recorded and reported, as evidenced by data disparities between individual incident reports and summaries of annual incidents. The auditors also found that the NYPD had "no formal central office analysis of, or corresponding action plan for," hate crime data that was collected. As a result of its findings, the

Comptroller's office issued a report in September 2014 recommending that the NYPD do the following:

- Develop a document tracking system to properly account for all bias-related incidents. Ensure that all official summary records of hate crime-related data are reconciled and supported by the properly accounted for incident reports.
- Periodically analyze the captured hate crime-related summary data and make inquiries or take action as appropriate.
- Develop a training-related recordkeeping system that can be easily accessed by NYPD management to ensure that all officers receive required training.
- Consider requiring periodic hate crime-related training as part of the regular NYPD training curriculum.⁹

The Comptroller noted at the time of the audit that "NYPD officials generally agreed with the audit's recommendations and have begun taking steps to implement them."

The audit of DCJS found that the agency "adequately monitors hate crime reporting" and "accurately and completely reports hate crime data that it receives."¹⁰ The Comptroller identified a limitation with DCJS's reporting system, however - the agency's system only allows a hate crime reported by a local law enforcement agency to be identified as one type of bias. (For example, a hate crime committed on the basis of both religion and sexual orientation would only be recorded by DCJS as either a religious or sexual orientation-based hate crime).

Our office will continue to monitor the progress the NYPD and DCJS make in addressing the Comptroller's concerns.

- Periodic, systematic reviews of the Hate Crimes Law should be required by law to ensure ongoing monitoring of data collection and reporting, law enforcement training, and the impact of the Law on deterrence, punishment, and enforcement.

UPDATE: The Comptroller's audit of the NYPD found a number of deficiencies in the way the agency handled identifying, recording and reporting hate crimes. Undoubtedly, a close examination of the over 500 law enforcement agencies in New York State would turn up additional deficiencies. I am currently

⁹ Source: <http://osc.state.ny.us/audits/allaudits/093014/14n2.pdf>

¹⁰ Source: <http://osc.state.ny.us/audits/allaudits/093014/13s67.pdf>

considering legislation that would require such period, systematic reviews of the Hate Crimes Law.

- Rather than leaving it at the Executive's discretion, New York State should mandate police training in identifying, responding to and reporting hate crimes, and training in cultural competency – understanding different cultural groups in order to best handle cases of people from diverse groups in the state. The State should engage with community organizations to assist with police training in cultural understanding.

UPDATE: The continuing prevalence of hate crimes underscores the importance of training law enforcement officers to appropriately identify, respond to, and report hate crimes. I am considering introducing legislation to require cultural competency training of police officers.

- The State Legislature should expand the scope of protected categories to include gender identity or expression by passing and enacting New York's *Gender Expression Non-Discrimination Act* (S 195/ A 4226).

UPDATE: GENDA (S.502 of 2017), which I co-sponsor, continues to languish in the Republican-controlled New York State Senate. As a result, despite executive actions taken by the Cuomo Administration to clarify protections for transgender New Yorkers from discrimination, the Hate Crimes Law still does not apply to crimes committed with a bias based on gender identity or expression.

Further Study

- Develop, and prescribe the use of, restorative justice programs for those who commit non-violent hate crimes to promote tolerance and embrace diversity through rehabilitation.
- Mandate community education on the Hate Crimes Law in order to raise public awareness of the law and how to report a hate crime.
- Pass the *Michael Sandy Act* (A.7549) to prevent the defense in hate crimes cases from using the fact that the offender is the same protected category as the victim to avoid hate crime charges.

UPDATE: Since the initial publication of this report, I have introduced the *Michael Sandy Act* (S.281 of 2017) in the State Senate. The bill is currently in the Senate Codes Committee.

- Pass legislation disqualifying gay and transgender panic defenses in order to prevent defendants from undermining the intent of the Hate Crimes Law.

UPDATE: I have also introduced legislation to ban so-called “gay panic” or “trans panic” defenses since issuing this report. The bill (S.50 of 2017) is also currently in the Senate Codes Committee.

- Ensure full enforcement of the *Dignity For All Students Act* to ensure our public schools are educational environments that promote diversity and understanding, and are free from discrimination and harassment.
 - Integration of tolerance, anti-bullying and anti-harassment education into the civility curricula for grades K-12
 - Active reporting by schools of bullying and harassment to the New York State Department of Education
 - Active investigating of schools that report a high number of incidents and addressing the problems at these schools by the Department of Education
 - Have at least one trained staff member in recognizing and addressing bullying, harassment and discrimination at all schools
- Increase the number and encourage use of victim counselors by police forces and district attorneys for hate crimes victims to help them through the recovery process.

**Appendix of
Statutory References**

New York Penal Law

Title Y – Hate Crimes Act of 2000

Article 485 – Hate Crimes

§ 485.00 Legislative findings.

The legislature finds and determines as follows: criminal acts involving violence, intimidation and destruction of property based upon bias and prejudice have become more prevalent in New York state in recent years. The intolerable truth is that in these crimes, commonly and justly referred to as "*hate crimes*", victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. *Hate crimes* can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. In a democratic society, citizens cannot be required to approve of the beliefs and practices of others, but must never commit criminal acts on account of them. Current law does not adequately recognize the harm to public order and individual safety that *hate crimes* cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of *hate crimes* and the compelling importance of preventing their recurrence.

Accordingly, the legislature finds and declares that hate crimes should be prosecuted and punished with appropriate severity.

§ 485.05 Hate crimes.

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

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

(b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national

origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

2. Proof of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim does not, by itself, constitute legally sufficient evidence satisfying the people's burden under paragraph (a) or (b) of subdivision one of this section.

3. A "specified offense" is an offense defined by any of the following provisions of this chapter: section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.12 (aggravated assault upon a person less than eleven years old); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); subdivision one of section 130.35 (rape in the first degree); subdivision one of section 130.50 (criminal sexual act in the first degree); subdivision one of section 130.65 (sexual abuse in the first degree); paragraph (a) of subdivision one of section 130.67 (aggravated sexual abuse in the second degree); paragraph (a) of subdivision one of section 130.70 (aggravated sexual abuse in the first degree); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.20 (kidnapping in the second degree); section 135.25 (kidnapping in the first degree); section 135.60 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.10 (criminal trespass in the third degree); section 140.15 (criminal trespass in the second degree); section 140.17 (criminal trespass in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree); section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 150.05 (arson in the fourth degree); section 150.10 (arson in the third degree); section 150.15 (arson in the second degree); section 150.20 (arson in the first degree); section 155.25 (petit larceny); section 155.30 (grand larceny in the fourth degree); section 155.35 (grand larceny in the third degree); section 155.40 (grand larceny in the second degree); section 155.42 (grand larceny in the first degree); section 160.05 (robbery in the third degree); section 160.10 (robbery in the second degree); section 160.15 (robbery in the first degree); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); or any attempt or conspiracy to commit any of the foregoing offenses.

4. For purposes of this section:

(a) the term "age" means sixty years old or more;

(b) the term "disability" means a physical or mental impairment that substantially limits a major life activity.

§ 485.10 Sentencing.

1. When a person is convicted of a hate crime pursuant to this article, and the specified offense is a violent felony offense, as defined in section 70.02 of this chapter, the hate crime shall be deemed a violent felony offense.

2. When a person is convicted of a hate crime pursuant to this article and the specified offense is a misdemeanor or a class C, D or E felony, the hate crime shall be deemed to be one category higher than the specified offense the defendant committed, or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit a specified offense, whichever is applicable.

3. Notwithstanding any other provision of law, when a person is convicted of a hate crime pursuant to this article and the specified offense is a class B felony:

(a) the maximum term of the indeterminate sentence must be at least six years if the defendant is sentenced pursuant to section 70.00 of this chapter;

(b) the term of the determinate sentence must be at least eight years if the defendant is sentenced pursuant to section 70.02 of this chapter;

(c) the term of the determinate sentence must be at least twelve years if the defendant is sentenced pursuant to section 70.04 of this chapter;

(d) the maximum term of the indeterminate sentence must be at least four years if the defendant is sentenced pursuant to section 70.05 of this chapter; and

(e) the maximum term of the indeterminate sentence or the term of the determinate sentence must be at least ten years if the defendant is sentenced pursuant to section 70.06 of this chapter.

4. Notwithstanding any other provision of law, when a person is convicted of a hate crime pursuant to this article and the specified offense is a class A-1 felony, the minimum period of the indeterminate sentence shall be not less than twenty years.

5. In addition to any of the dispositions authorized by this chapter, the court may require as part of the sentence imposed upon a person convicted of a hate crime pursuant to this article, that the defendant complete a program, training session or counseling session directed at hate crime prevention and education, where the court determines such program, training session or counseling session is appropriate, available and was developed or authorized by the court or local agencies in cooperation with organizations serving the affected community.

New York State Executive Law
Section 837(4)(c)
Reporting Requirements

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

Acknowledgements

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Thanks to **Burton Phillips**, my Counsel and Policy Director, who assisted with the 2017 update to this report.

Cover photo: A spontaneous memorial for Mark Carson, who was shot to death in Greenwich Village on May 23, 2013 allegedly because he was gay. **UPDATE: In March 2016, Elliot Morales was found guilty of second-degree murder as a hate crime for the 2013 killing of Carson.**