

SYMPOSIUM

HATE-CRIMES LEGISLATION: LOCAL, STATE AND FEDERAL PERSPECTIVES

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I. Introduction

On March 31, 2000, the SETON HALL LEGISLATIVE BUREAU hosted its Symposium, entitled *Hate-Crimes Legislation: Local, State and Federal Perspectives*. In attendance was a distinguished panel of legislators, legal scholars, and practitioners who offered their insight into the practical and theoretical issues that have arisen as legislators around the country attempt to enact more effective hate-crimes legislation. What appears in the following pages are reproductions of the speakers' presentations supplemented with footnotes by the SETON HALL LEGISLATIVE BUREAU.

II. *Speakers' Biographies*

Richard McNally, Esq.

***Trial Attorney, United States Department of Justice,
Civil Rights Division, Criminal Section***

Mr. McNally became a trial attorney for the Department of Justice, Civil Rights Division in 1988. Previously, he served as a Special Agent with the Federal Bureau of Investigation in Newark, New Jersey where he specialized in Civil Rights investigations. From May 1997 to June 1998, he also served as the Chief Division Counsel for the FBI Newark Division.

Mr. McNally graduated from the University of Pittsburgh in 1987. Thereafter, he received his J.D. from Syracuse University in 1990.

Allan Tananbaum, Esq.

Assistant United States Attorney, Criminal Division

Mr. Tananbaum has been an Assistant United States Attorney for the District of New Jersey since September 1994. Mr. Tananbaum served as Assistant United States Attorney at the Criminal Appeals Division until 1998. In November of 1998, he was assigned to the Criminal Trial Division and since March 2000, Mr. Tananbaum has been with the Special Prosecutions Division.

Mr. Tananbaum graduated *magna cum laude* from Brown University in 1984 and received his J.D. in 1989 from Columbia Law School. Mr. Tananbaum is also an Adjunct Instructor at Fordham University Law School.

Robin Parker, Esq.

***Deputy Attorney General, State of New Jersey,
Division of Criminal Justice***

Since 1994, Mr. Parker serves as Chief of the Office of Bias Crime and Community Relations. The Office of Bias Crime is the

only one of its kind in the nation and functions to investigate and prosecute bias crimes. The Office also sponsors community relations programs, which aid both New Jersey Law Enforcement and local communities in attacking and diminishing the effects of racism, prejudice, and bigotry.

In addition, Mr. Parker currently facilitates diversity and bias crime training for schools, human relations commissions, and law enforcement and sponsors workshops on cultural diversity and violence reduction. He also lectures on the subject of bias and crime and advocates the need for community intervention to solve the problem of prejudice. Mr. Parker is the liaison for community groups in their dealings with law enforcement agencies and state government.

Prior to joining the Office of Bias Crimes, Mr. Parker was a Supervising Deputy Attorney General in the Appellate Bureau of the Division of Criminal Justice. In the Appellate Bureau, Mr. Parker litigated a wide range of matters in both state and federal court, including cases upholding the constitutionality of New Jersey's comprehensive Drug Reform Act.

Mr. Parker graduated from Rutgers University in 1980, receiving a B.A. in English. In 1983, he received a J.D. from the University of Illinois Law School.

Joseph O'Neill, Esq.

On March 28, 2000, Mr. O'Neill argued before the United States Supreme Court on behalf of the petitioner in *Apprendi v. New Jersey*. Mr. O'Neill challenged the constitutionality of the New Jersey statute that provides penalty-enhancement provisions for bias crimes.

Mr. O'Neill has published extensively in the areas of medical malpractice, products liability, criminal law, and negligence. In addition, Mr. O'Neill is affiliated with the Association of Trial Lawyers of America, the National Association of Criminal Defense Lawyers, and the American Judicature Society. Mr. O'Neill received an A.B. at Allegheny College and a J.D. from New York Law School.

Fred Margulies
Distinguished Lecturer

Mr. Margulies is a distinguished lecturer who speaks on contemporary views toward racism and prejudice. He regularly speaks throughout the country on college campuses, private and public schools, and before civic and community organizations. Topics of his lectures include the dangers of contemporary anti-Semitism and historic revisionism, prejudice reduction, the courage and heroism of the Righteous Gentiles, and the Holocaust. Mr. Margulies is a volunteer speaker for the UJA-Federation, State of Israel Bonds, the Simon Wiesenthal Center, the Museum of Jewish Heritage, the Jewish Foundation for the Righteous, and the Queensborough Community College Holocaust Education Center.

Mr. Margulies currently serves on the New York State Commission of Holocaust Education and the Jewish Advisory Committee of Nassau County. He has also served as President of the Conference of Jewish Organizations of Nassau County and the Long Island Regional Board of the Anti-Defamation League. Further, Mr. Margulies was former Vice-President of the Long Island Committee for Soviet Jewry and Executive Vice-President of Temple Sholom in Westbury.

Mr. Margulies was born in Berlin, Germany in 1927 and is a survivor of the Holocaust. In 1938, his family was torn apart, and he, along with his young sister, were smuggled out of Germany into Holland. Mr. Margulies escaped to England and eventually traveled to the United States in 1947, as the only member of his family to survive the Holocaust.

Clay Constantinou, Esq.
Dean, Seton Hall University School of
Diplomacy and International Relations

Former American Ambassador to Luxembourg, Mr. Constantinou has served as Dean of Seton Hall's School of Diplomacy and International Relations since May of 1999. During his five-year tenure as Ambassador to Luxembourg, Mr. Constantinou served as the principal advocate of U.S. diplomatic

interest, both bilateral and multilateral. In 1997, while Luxembourg held the presidency of the European Union, Mr. Constantinou also managed U.S.-European Union relations.

Mr. Constantinou has also assisted in furthering international relations between American and European courts. Mr. Constantinou is a co-founder of the Dean Acheson Legal Internship Program, which enables American law students to clerk for members of the European Court of Justice. In July 1999, he also organized the first visit of the U.S. Supreme Court to the European Court of Justice.

Mr. Constantinou graduated from Jersey City State College, receiving a B.A. in political science. He received his J.D. from Seton Hall School of Law, and later his LL.M. from New York University's Graduate School of Law. At Seton Hall, Mr. Constantinou served as the managing editor of the SETON HALL LEGISLATIVE JOURNAL. Before being appointed Ambassador in 1994 by President Clinton, Mr. Constantinou was a partner in the New Jersey law firm of Wilentz, Goldman & Spitzer. He practiced business transactions, and corporate and commercial law at the Woodbridge-based law firm.

The Honorable William L. Gormley
Senator, New Jersey State Senate

Senator Gormley is serving his sixth term as state senator for the Second Legislative District. He serves as Chairman of the Senate Judiciary Committee, and is a member of the Senate Education Committee, the Joint Committee on Public Schools, and the Special Study Committee on the Federal Telecommunications Act of 1996. Senator Gormley is also a partner in the firm of Youngblood, Corcoran, Aleli, Lafferty, Stackhouse, Grossman, and Gormley in Egg Harbor Township, New Jersey.

Senator Gormley began his career as a legislator in 1977 when he was elected to the New Jersey General Assembly. While in the Assembly, he became the Assistant Minority Leader for the Republican Party. Senator Gormley was first elected to the New Jersey Senate in 1982, and was subsequently reelected in 1983, 1987,

1991, 1993, and 1997.

Senator Gormley graduated from Notre Dame University in 1968 and received his J.D. from Villanova University in 1971. Prior to becoming a state legislator, Senator Gormley served as an Atlantic County Freeholder from 1975 to 1977.

Raymond M. Brown, Esq.

Mr. Brown is a partner in the law firm of Brown and Brown and host of the Emmy Award winning New Jersey Network Program, *Due Process*. Mr. Brown also serves as a legal analyst for MSNBC and has appeared as a guest on several television programs and networks including Court TV, ABC, Rivera Live, and America's Talking.

In addition, Mr. Brown has been a lecturer and panelist at conventions and symposia on over 200 occasions and throughout the entire world. He has also taught International Criminal Law at the Seton Hall School of Diplomacy and for the American University program in Cairo, Egypt.

Mr. Brown will be a Consulting Professor at Seton Hall Law School commencing in September 2000. He graduated from Columbia University and received his J.D. from the Boalt Hall School of Law, University of California at Berkeley.

The Honorable William J. Pascrell Jr.
*Congressman, United States House of
Representatives, State of New Jersey*

Congressman Pascrell was elected to the United States House of Representatives in 1996, representing the Eighth Congressional District. He serves as a member of the Transportation and Infrastructure Committee and the Small Business Committee. Moreover, Congressman Pascrell is a ranking member of the Regulatory Reform Subcommittee, and serves as a member of the Ground Transportation, Water Resources, and Environment Subcommittees.

Prior to being elected to federal office, Congressman Pascrell served as a state and municipal official in his hometown of Paterson, New Jersey. In 1987, he was elected to the New Jersey General Assembly and was soon elevated to the position of Minority Leader Pro Tempore. Thereafter, Congressman Pascrell was elected Mayor of the City of Paterson, New Jersey's third largest city. In 1996, he was voted "Mayor of the Year" by his fellow Mayors, and "Legislator of the Year" by the New Jersey Chamber of Commerce.

Congressman Pascrell graduated from Fordham University, receiving a B.A. in journalism. He then continued his education at Fordham, receiving a M.A. in philosophy from the graduate school.

III. Symposium

A. Remarks of Richard McNally, Esq.

I am a trial attorney with the United States Department of Justice in Washington, D.C. I am currently assigned to the Civil Rights Division, Criminal Section. The Criminal Section is comprised of approximately thirty attorneys who have nationwide enforcement responsibility for federal statutes dealing with hate crimes, police misconduct, freedom of access to clinic entrances and slavery. Our investigations are typically conducted by the FBI, sometimes with the assistance of the Bureau of Alcohol, Tobacco and Firearms. We work hand-in-hand with the U.S. Attorney's Offices in each district in which our cases are prosecuted.

First and foremost, when you talk about hate crime and federal legislation, you should be aware that there is no general federal criminal statute covering hate crimes. There is no federal statute which outlaws violence based upon someone's race or religious choice, wherever and whenever it occurs. Federal jurisdiction is limited. Typically, when we talk about the statutes and what is required, we must demonstrate that a particular defendant used force or threats of force and that he intended to interfere with the victim's ability to participate in some specified federally protected

activity.¹ He must also have actually used force or threat of force.²

What I want to do today is talk a little about a case we handled in 1992 so as to demonstrate the theories behind federal legislation and federal enforcement of civil rights statutes with regard to hate crimes. In 1992, I was a special agent with the FBI assigned in the Newark, New Jersey Division. We were investigating a hate crime that occurred in Jersey City a number of years earlier involving a man who had immigrated to the United States from India.³ The victim was a physician by training. He left an emergency room, a local emergency room where he worked, just after midnight and walked home along a main street, a very well-lit street, where he felt safe walking. He approached the park. The street ran along the park and in that area of the sidewalk that was adjacent to the park, a large group of teenagers, estimated to be at least two dozen, was congregating. When they saw him, they began to yell slurs at him, and they began to taunt and threaten him with racial epithets and insults.

At that time, there had been a marked increase in the number of minor violence, minor assaults and harassment against members of the Asian and Indian communities. The doctor was well aware of this and he did what he always did in this situation, he ignored it and he continued to walk home, which was about five blocks away. Three people from this group ran across the street and ran up behind him. The first two began to punch him and kick him. The doctor, in an effort to protect himself, covered up his head and tried to run. The third man, based upon what we were able to piece together, had a baseball bat and with all his might swung it and struck the doctor in the head. The doctor collapsed to the ground. The crowd that was waiting across the street was cheering these men on. They moved closer and then surrounded him, with the three men continuing to beat him and kick him while he was still laying on the ground. When this incident was over, the three men responsible got into a car and drove away into the night. They were proud of what

¹ See 18 U.S.C. § 245(b)

² See *id.*

³ See Pamela Wilson, *Dismissal in Beating of Indian MD Stirs Outrage*, THE STAR-LEDGER, June 20, 1993, available in 1993 WL 3946927. The incident occurred in the early morning of September 24, 1987, in the Heights section of Jersey City. See *id.* The doctor, a 36-year-old naturalized citizen, suffered permanent neurological damage due to this attack. See *id.*

they had done. They were proud of the statement they made to this man and they were proud of the example they made of this man to the Asian-Indian community in their area.

We prosecuted this case under two different statutes and these are the two statutes we typically use on the federal level to address hate crime.⁴ The first is the criminal provision of the Fair Housing Act, which is found in Title 42 of the United States Code.⁵ The limitation of this Act is that it protects only that activity related to housing.⁶ Although this man was not close to his house at the time of the attack, the statements made by the defendants both before and while committing these acts of harassment, and the general statements that they did not want Asian Indians living in their neighborhood, were used as the basis for utilizing this statute.⁷

The statute provides broad coverage of protected classes.⁸ It includes race, color, religion, sex, handicap, familial status, and national origin.⁹ You will note that sexual orientation is not included.¹⁰ Again, we have to show that the defendants used force or threats of force, that they were motivated by these factors and

⁴ See Fair Housing Act, 42 U.S.C. § 3631 (1999); Civil Rights Act of 1968, 18 U.S.C. § 245 (1999).

⁵ See 42 U.S.C. § 3631.

⁶ See *id.* § 3631(a). The statute expressly states the circumstances under which its provisions are applicable:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with. . .any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings[.]

Id.

⁷ See *Dismissal Sought in Race Case*, THE STAR-LEDGER, June 18, 1993, available in 1993 WL 3944505. The defendants were accused of beating and intimidating Sharan to force him out so as "to intimidate Asian Indians from living in the area." *Id.*

⁸ See 42 U.S.C. §§ 3604(b) through 3604(f).

⁹ See *id.* § 3604(b) ("[I]t shall be unlawful [t]o discriminate against any person in the terms, conditions, or privileges. . .because of race, color, religion, sex, familial status, or national origin.").

¹⁰ See *id.* § 3604(b) through 3604(f).

lastly, that they intended to interfere with the activity of this victim in relation to housing.¹¹

It is very broad when you talk about housing rights. It includes the right to occupy a house, to sell a house, to buy a house, to rent a house, and even to finance a house or home.¹² The statute also protects people who help others participate in this activity, including realtors, landlords, and landowners who are selling property.¹³ The statute also includes a right of people to associate with others in their home.¹⁴ Typically, the incidents we prosecute under this statute

¹¹ See *id.* § 3617. The Fair Housing Act states that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section[s]. . . of this title.

Id.; see also *id.* § 3604 (prohibiting discrimination in the sale or rental of housing); *id.* § 3605 (prohibiting discrimination in residential real estate-related transactions).

¹² See *id.* §§ 3605, 3631. The statute states that

[I]t shall be unlawful. . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

Id. § 3631. The statute also addresses discriminations involving business transactions:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin. . . As used in this section, the term "residential real estate-related transaction" means. . . [t]he making or purchasing of loans or providing other financial assistance. . . for purchasing, constructing, improving, repairing, or maintaining a dwelling.

Id. § 3605.

¹³ See 42 U.S.C. § 3606. The statute mandates that:

[I]t shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

Id.

¹⁴ See *id.* § 3604 ("[I]t shall be unlawful. . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of. . . any person associated with that buyer or renter.").

include arson, cross burnings, assaults that occur much closer to the home than the one we had in this case, written or phone threats and vandalism.

The other statute and the theory we used, which is far more controversial than the statute set out above, and is one we still use today, comes under the prohibition of interference with federally protected activities under Title 18 of the United States Code, section 245.¹⁵ This statute refers to a defendant who uses force or threats of force to interfere with specified, federally protected activities.¹⁶ The motivating factor is limited to race, national origin and religious beliefs.¹⁷ No other motivation is included at this time.¹⁸ The protected activities include applying for and enjoying employment,

¹⁵ See 18 U.S.C. § 245(b).

¹⁶ See *id.* Federally protected activities include:

(A) enrolling in or attending any public school or public college; (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof; (C) applying for or enjoying employment, or any requisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency; (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror; (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air; (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.

Id. § 245(b)(2).

¹⁷ See *id.* § 245 (b)(2).

¹⁸ See *id.*; but see Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. § 2(1) (1999). The bill defines a "hate crime" as "a crime in which the defendant intentionally selects a victim. . .because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." See *id.*; see also 145 CONG. REC. E422-01 (1999).

public or private, or joining a labor organization.¹⁹

This particular facet of the statute was used in 1987 to prosecute a group of White Supremacists who murdered a radio talk show host named Alan Berg in Denver, Colorado.²⁰ The scope of the statute also includes service as a juror in state court, travel in or using a facility of interstate commerce, or use of any common carrier.²¹ We typically use this statute along with another statute for those victims who were attempting to use "public accommodations."²² The term, public accommodations, refers specifically to the following:

[A]ny inn, hotel, motel or other establishment which provides lodging to transient guests or of any restaurant, cafeteria, lunch room, lunch counter, soda fountain or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises or of any gasoline station or of any motion picture house, theatre, concert hall, sports arena, stadium or any other place of exhibition or entertainment which serves the public.²³

This is pretty broad and we have used it in instances when victims were attacked at hotels, restaurants, bars, convenience stores and gas stations.

¹⁹ See *id.* § 245 (b)(2)(C).

²⁰ See Jim Kerksey and Marilyn Robinson, *Crimes of the Century Top 10 List Reveals Dark Days in Colorado*, DENVER POST, Dec. 31, 1999, at B1. Alan Berg, a Jewish radio talk show host in Denver, was shot, execution style, in the driveway of his Denver home. See *id.* The case eventually drew national attention when it was discovered that a white-supremacist group, "The Order," had targeted and then killed Berg. See *id.* Denver's District Attorney at the time, Norm Early, refused to bring murder charges in the case. See *id.* The United States Justice Department, however, charged several members of the group, Bruce Carroll Pierce, David Lane, Richard Joseph Scutari and Jean Margaret Craig, with violating Berg's civil rights. See *id.* Though Scutari and Craig were ultimately acquitted, the triggerman, Pierce, and the getaway car driver, Lane, were convicted and sent to federal prison for 150 years. See *id.*

²¹ See 18 U.S.C. §§ 245(b)(2)(D), 245(b)(2)(E).

²² See *id.* § 245(b)(2)(F).

²³ *Id.*

The last federal statute we use, and this is the most controversial one, also protects those who are “participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof.”²⁴ This was enacted in the early 1990s, and the case I just told you about was one of the first that attempted to utilize this statute. The Department of Justice has used what they refer to as the “Streets Theory” or the “Streets and Sidewalks Theory” to prosecute people under the statute who commit acts of violence like the one I just described. The theory is that a victim who is using a public street or a public sidewalk is in fact using a facility, which is administered and provided by the state. Streets are created and regulated, and they have traffic signs, traffic lights, and lanes painted on them. They have safety devices installed by the state, including guardrails, streetlights, and police. Based upon that, the Department of Justice has prosecuted cases in which people have been attacked on public streets and thoroughfares.

We have been successful in other cases, although we were not successful in the one I described to you, and these cases are still going through the Appellate process. Most notably in this area, this was the statute and the theory that was used to prosecute the person responsible for the murder of Yankel Rosenbaum in Crown Heights, New York.²⁵ The theory has been upheld by a number of appellate courts but has yet to be ruled upon by the Supreme Court.

To that end, this statute was also involved in the most recent attempt to amend the Civil Rights laws to allow the federal government to respond more effectively to hate crimes. This past summer, the Hate Crime Prevention Act of 1999 was introduced.²⁶

²⁴ *Id.* § 245(b)(2)(B).

²⁵ See Joseph P. Fried, *2 Guilty in Fatal Crown Hts. Violence*, N.Y. TIMES, Feb. 11, 1997, at A1. Yankel Rosenbaum, a 29-year-old Hasidic Jew from Australia, was doing research in New York as part of a doctorate program in history when he was fatally stabbed in Crown Heights on August 19, 1991. See *id.* A Hasidic motorist had four days earlier struck and killed a black youth, thus setting off riots and general unrest in the area. See *id.* Mr. Rosenbaum’s murder occurred on the first day of the riots, only hours after the automobile accident. See *id.* After a federal inquiry, two men were convicted for violating Rosenbaum’s civil rights. See *id.* One of the two men convicted, Lemrick Nelson Jr., had been acquitted of state murder charges in 1992. See *id.*

²⁶ See H.R. 1082, 106th Cong. (1999). This is the second version of the Hate Crimes Prevention Act of 1999. The first was introduced into the House of Representatives on March 11, 1999, by John Conyers (D-14th Dist. Mich.). As of

If passed, it would both amend section 245 and criminalize any act based upon race, national origin, or religion if bodily injury occurred or if the attempt to injure included the use of a firearm, fire, or explosives.²⁷

Congress's belief, according to what I have read in the resolution, was that regardless of the intent of the attacker, these types of crimes affected the targeted minority community's ability to participate in interstate commerce.²⁸ It minimized their ability to get goods and services from the community. It minimized their ability to get housing in the community.²⁹ It minimized their ability to enjoy employment in that community.³⁰ And to that end, it would not be necessary for us to prove that the attacker intended to interfere with those activities.

The second part of the statute would add sexual orientation, disability and gender as motivating factors.³¹ A limitation, however, is that we would have to demonstrate a nexus with interstate commerce.³² The act itself had to involve or affect interstate commerce. As it stands today, I do not think that the amendment

March 31, 2000, this bill has over 192 co-sponsors. *See Issues and Legislation* (visited Apr. 2, 2000) <<http://congress.nw.dc.us/cgi-bin/issue.pl?dir=hrc>>. Senator Edward Kennedy (D-Mass.) introduced into the Senate an identical version and, as of March 31, 2000, there were 42 co-sponsors of this Senate bill. *See id.*; S. 622, 106th Cong. § 1 (1999).

²⁷ *See* H.R. 1082, 106th Cong. § 4(2) (1999). The bill proposes the following:

Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.

Id.

²⁸ *See id.* The Congress found that hate crimes affect interstate commerce in a number of ways including two ways specifically: (1) "by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence," and (2) "by preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity." *Id.*

²⁹ *See id.* § 2(4)(B).

³⁰ *See id.*

³¹ *See* Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. § 2(1) (1999). The Act defines a hate crime as "a crime in which the defendant intentionally selects a victim...because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." *Id.* (emphasis added).

³² *See id.* § 4 (1999).

has passed.

Although federal law is limited, the benefits to it are the penalties, from the law enforcement perspective, that is. The statutes that I have described to you will include or impose life imprisonment or the death penalty if a death results as a result of the act of the defendant.³³ If there is an attempt to kill, a kidnapping, or an aggravated sexual abuse, life imprisonment or the death penalty can be imposed.³⁴ If none of these are involved and bodily injury results or it is an attempt that uses firearms, fire, or explosives, then it is a ten-year felony.³⁵ Lastly, if none of these are involved, it is a misdemeanor punishable by up to one-year imprisonment.³⁶

One example of the benefits of these penalties is apparent in the cross-burning cases, which we regularly prosecute. Some states have to rely upon statutes criminalizing vandalism or trespass in order to prosecute cross-burning cases. However, when we can tie cross-burning into one of these statutes, it becomes a felony. We have done this on a regular basis throughout the country.

In conclusion, ladies and gentlemen, I just want to note that I have continued to work Civil Rights now as a prosecutor and formerly as an FBI agent because of that first case that I described to you. It was the most compelling case I ever worked on and it was the most disappointing one in that we were unsuccessful in prosecuting the people involved.³⁷ That case, however, is

³³ See 18 U.S.C. § 245(b) (“[I]f death results from the acts committed in violation of this section. . . [the defendant] shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.”); 42 U.S.C. § 3631 (“[I]f death results from the acts committed in violation of this section. . . [the defendant] shall be fined. . . [or] imprisoned for any term of years or for life, or both.”).

³⁴ See 18 U.S.C. § 245 (“[I]f such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse. . . [the defendant] shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.”).

³⁵ See *id.* (“[I]f bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire [the defendant] shall be fined under this title, or imprisoned not more than ten years, or both.”); see also 42 U.S.C. § 3631.

³⁶ See 18 U.S.C. § 245(b); 42 U.S.C. § 3631.

³⁷ See Wilson, *supra* note 3. Though the incident occurred in 1987, federal charges were not brought until September 1992. See *id.* The defendants, Mark Evangelista, Martin Riccardi, and Thomas Kozak, were tried in January 1993. See *id.* They were acquitted on one civil rights charge, the jury deadlocked on a second charge, and a mistrial was declared. See *id.* Kozak was tried alone the second time, on the second charge, and was acquitted on May 28, 1993. See *id.* On June 18, 1993, the second

responsible for me being here today and continuing to work the cases.

Thank you very much.

B. Remarks of Allan Tananbaum, Esq.

Good morning. My name is Allan Tananbaum. I am an Assistant United States Attorney working in this district. As of today, I am in the Criminal Division of our office where I am the Civil Rights/Hate Crimes Intake Coordinator. I would like to follow up from where Rick McNally left off and talk a little bit more about some federal hate-crime provisions and how they work. I will also try to give you some examples of how they have worked in the past.

As Mr. McNally pointed out, and it bears stressing again, federal law is pretty limited in the hate-crimes area. There is no general hate-crimes statute, for better or worse, that prohibits violence or threats of violence that were motivated by hate. There are, however, some fairly specific, somewhat limited statutes that the federal government could bring into play. Rick McNally described two of the statutes: the provision under the Fair Housing Act and section 245. However, because of limited federal jurisdiction in this area, one thing that has been true, and that remains to be true, is that most hate crimes do tend to get prosecuted at the state level and as you are going to hear, we are fortunate to live in a state that has a particularly strong hate-crime statutory scheme. But let me fill in a little bit more with what can be done under federal law.

Ironically, probably the broadest hate-crime provision under federal law is not itself a substantive criminal statute under which somebody can be indicted and convicted. It is actually a sentencing provision.³⁸ As many of you are undoubtedly aware, in federal

charges were dismissed against Evangelista and Riccardi. *See id.*

³⁸ *See* 18 U.S.C. § 245 (1999); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3 A1.1 (1999). The sentencing guidelines provide in part:

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any

court, once the jury convicts, it is then up to the judge to sentence and the judge has to sentence within certain guidelines that are set forth by the United States Sentencing Commission, pursuant to congressional mandate. These guidelines limit the discretion that any particular sentencing judge can exercise to impose a sentence, and there are many formulas that are used. There is one penalty provision under the guidelines that specifically addresses hate crime.³⁹

The broadest provision under federal law is two-fold. First of all, this penalty provision would escalate the offense level of a crime, thus resulting in higher punishment.⁴⁰ The provision applies to any federal crime that is motivated by hate.⁴¹ So, it could be for anything that is prosecuted in federal court.

The second reason why this provision is so broad is because it covers the largest number of groups who could be the targets of hate. It covers any case where the victim is selected on the basis of religion, gender, race, ethnicity, disability, national origin, ethnicity, and even sexual orientation, which none of the substantive federal statutes actually covers. This is a very broad, powerful provision.

What is interesting about this provision is that most sentencing provisions in federal court get applied by the judge as opposed to the jury at sentencing. That is true of this provision as well, but most sentencing provisions get applied by the judge by a mere preponderance of the evidence standard which, as most of you are undoubtedly aware, is sort of the civil standard where you just have to tip the scale a little bit. This provision, however, has to be found by the judge beyond a reasonable doubt, which is the identical standard by which the jury itself has to convict the defendant.⁴² It is an extremely exacting standard and it may well be that in the future the fact that that standard is so exacting will help keep this provision in play. On the other hand, the federal guidelines can increase a

property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by three levels.

U.S. SENTENCING GUIDELINES MANUAL § 3 A1.1(a) (1999).

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

defendant's sentence quite dramatically based on evidence that was never presented in front of a jury. The sentencing provision may come under increasing attack as the courts indicate more frequently that they are concerned about things occurring at sentencing and not in front of the jury.

I would now like to talk a little bit about a couple substantive statutes different than those addressed by Rick McNally. They both involve arson.⁴³ One is, for lack of a better term, a statute devoted specifically to hate crimes and the other one is a general federal arson statute which I will talk about because I think it is instructive. Sometimes under federal law, if you cannot find a really good hate-crime statute, you might be able to prosecute under a more general provision.

The first arson statute I would like to talk about is found at Title 18 of the United States Code, section 247, which has been around for a while but in 1996 was amended significantly as part of the Church Arson Prevention Act of 1996.⁴⁴ In and around that period of time, there was a spate of church arsons throughout the countries and, in response, Congress amended the statute.⁴⁵

There are really two hate crimes that can be prosecuted under section 247.⁴⁶ The first one is a hate crime directed against religion

⁴³ See 18 U.S.C. § 247 (2000); see also 18 U.S.C. § 844 (2000).

⁴⁴ See *id.* § 247. Section 247 state in part that"

(a) Whoever, in any of the circumstances referred to in subsection b of this section (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; or (2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so; shall be punished as provided in subsection d. (b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce. (c) Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished as provided in subsection (d).

Id.

⁴⁵ See, e.g., Michael Dorman, *Two Plead Guilty in Church Arson Case*, NEWSDAY, Dec. 11, 1996, at A37; 2 *Ex-Klansmen Plead Guilty in Church Fires*, FLA. TODAY, Dec. 11, 1996, at A3; Gary Heinlein, *Faith Brings Congregation Closer After Devastating Fire*, THE DETROIT NEWS, Dec. 23, 1996, C1.

⁴⁶ See 18 U.S.C. §§ 247(a), 247(c).

or particular religious groups.⁴⁷ The elements for that crime are as follows: First, if the defendant must have defaced, damaged, or destroyed any religious real property; second, the defendant must have done so intentionally; and third, the defendant must have acted "because of the religious character of that property."⁴⁸ If these conditions are met, then you have got a hate crime that can be prosecuted, provided that the offense is in or affects interstate commerce.⁴⁹

There is another portion of the statute that makes it criminal to obstruct the free exercise of religious beliefs by force or threats of violence. Only one case had ever really been prosecuted under that portion of the statute, in part because of the very strict interstate commerce requirement that required that the defendant himself moved in interstate commerce personally or used an instrumentality of interstate commerce. I do not want to get us bogged down in a discussion of the interstate commerce requirements but that was fairly onerous. Moreover, the property damage had to exceed \$10,000 in value.

As of 1996, the interstate commerce requirement of the religious component of this statute was watered down. It was made more manageable and the requirement of \$10,000 or excess in damage was done away with entirely. The other thing I should say about this portion of the statute, as well as the next portion I am going to discuss, is that the federal government can bring only one of these prosecutions if the Attorney General herself, or one of her designees, first certifies in writing that bringing such a case would be in the public's interest.⁵⁰ As you can see, section 247(a)(1) is directed against violence against religious real property, churches, houses of worship and the like that are motivated by, as I said, the religious character of the property.⁵¹

The second portion of section 247 is really somewhat of a new offense.⁵² It has three elements.⁵³ The first will seem similar to the first portion of the statute. The defendant has to deface, damage or

⁴⁷ See *id.* § 247(a).

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See *id.* § 247(e).

⁵¹ See 18 U.S.C. § 247(a)(1).

⁵² See *id.* § 247(c).

⁵³ See *id.*

destroy religious real property.⁵⁴ Second, we have another similar element as the last provision I mentioned: the defendant had to act intentionally.⁵⁵ Third, instead of the defacement or the destruction being motivated because of the religious character of the property, we can prosecute where the defendant acted as he did because of the race, color or ethnic characteristics of any individual associated with the religious property.⁵⁶ That gives the federal government another tool.

Under this provision, there is no interstate nexus requirement at all. It therefore has proven to be a more powerful tool and there have been some prosecutions brought under it. More importantly, there have been local, state and federal task forces put together in the wake of this statute coming to pass whereby there has been a lot of cooperative effort between different law enforcement communities to investigate church arsons. Again, most of those cases have been and continue to be prosecuted at the state level, but there has been federal input.

In our district, the District of New Jersey, there have been church arsons in the last few years that have been investigated as potential hate crimes. In some of those cases, we determined that we really did not have an arson at all. In one case, for example, there was a fire in a historically African-American church in Jersey City. Ultimately, the investigation revealed that it really was not a hate crime. Instead, it was an arson committed by somebody associated with the church and a guilty plea was subsequently entered by this individual, not to the section 247 crime, but to another offense. It continues to be an area into which we take a look.

The second statute I want to talk briefly about is the general federal arson provision which you can find at Title 18 of the United State Code, section 844.⁵⁷ The specific provision I am going to talk about is section 844(i), under which people are prohibited from using fire or an explosive to damage any real or personal property that is used in interstate or foreign commerce or that is used in an

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See* 18 U.S.C. § 247(c).

⁵⁷ *See id.* § 844.

activity affecting interstate commerce.⁵⁸ Again, that interstate commerce element is fairly broad and is usually fairly easily met.

My office prosecuted a case in 1996 that was originally investigated as a potential hate crime where, for various reasons, the charge ultimately brought was under the general arson provision. One reason the general arson provision had to be resorted to was that the events in question, that is the crime itself, was committed some twenty years earlier. As it stood back in 1977, the statute of limitations had long since run on the crime I am about to discuss, although when the case was actually brought by my office, the general arson statute was used. Again, unfortunately, this was a case without a very successful result, but I think it is an interesting case and it highlights how, even when we cannot use a specific hate-crime statute, we can attempt to vindicate the interest associated with hate-crime provisions by turning to the more general statutes.

Back in 1977, there was an arson committed in the Monmouth County small town of Sea Bright, New Jersey. In the summer of 1977, a woman rented her home to four men. Each of them had varying degrees or forms of mental illness. One of the men was mildly mentally retarded. The others suffered from depression or were recovering from substance abuse. None posed any real danger to the community at all. Perception, nonetheless, grew in the town in the summer of 1977 that these men proposed all sorts of threats to the community and there was a lot of heated discussion, including comments made at a municipal council meeting and letters to the editor in a local paper. Within two weeks of the house being rented

⁵⁸ See *id.* § 844(i). Section 844 state that:

Whoever maliciously damages or destroys, or attempts to destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

Id.

out, in the early morning hours of June 23, 1977, two local teenagers set fire to the house. The motivation was apparently to scare these men into leaving, but what happened was that the house was immediately consumed in flames and the men died.

The two people involved in this were not immediately brought to justice. In fact, nobody talked about this offense for the longest time. Though Monmouth County investigated the crime originally, no charges were brought. The State then, some fifteen years later, convened a special grand jury, no charges were brought. Finally, a third investigation came about. It was a federal investigation involving the FBI and the Bureau of Alcohol, Tobacco and Firearms.

At that point, one of the participants in the original arson, a person who was fourteen years old at the time of the crime, and who was much older at the time of this investigation, confessed. He had a guilty conscience for many years and he confessed to his participation in the offense and to the participation of a second individual who was nineteen years old at the time. Based upon that investigation, as well as the cooperation of that other individual, the second individual was prosecuted under the arson statute that I just mentioned. The result, however, was not entirely satisfactory because the second individual was acquitted at trial. The office nevertheless felt that it was a very important case to follow up on and to try.

The lessons of the Sea Bright case are perhaps three-fold. First, as we noted, federal jurisdiction is limited in the hate-crimes area. If the federal government is going to be involved, we sometimes have to turn to a more general statutory provision to vindicate the interest. Here, it was a general arson provision that could be applied for any arson, not just a hate crime. Second, the story behind this case shows how the federal government can, in certain circumstances, step into cases when local or state investigations either are not brought or for some reason fail. This was an instance where coming on the heels of two other investigations, the federal government became involved and was able to bring charges and get a conviction, at least against one of the participants. Third, because of the fairly unsuccessful result, the situation of the Sea Bright case helps show that these are difficult cases. They are not always the easiest cases to make, particularly in a case involving twenty-year-old facts.

C. *Remarks of Robin Parker, Esq.*

Thank you and good morning. My name is Robin Parker and I am a Deputy Attorney General of New Jersey and Chief of New Jersey's Office of Bias Crime and Community Relations. It is a particular pleasure for me to be here today to give you what I think is a New Jersey perspective on bias crime. I think that this is particularly important because, although certainly in New Jersey there are some things that we need to work on very hard, one of the areas in which I think we can be particularly proud is in our efforts regarding bias crime in New Jersey. As I am going to explain to you in a few minutes, New Jersey really leads the nation in our efforts on bias crime, not simply in legislation pertinent to bias crime, but in the way we handle bias crime.

I think it is also particularly poignant to have a group of young people here today in the audience because one of the facts that is not often known about bias crime is that it is young people who are the primary perpetrators of bias crime, not only in New Jersey, but across the nation. I want to quickly point out that one of the things that is amazing about bias crime, and I have witnessed this by traveling around the state and across the nation, is that there is a dissonance that occurs when we talk about bias crime. What comes to mind to most people when we talk about bias crime is someone dressed in a hood because they are a Ku Klux Klan member, someone who is a Skinhead, someone who has tattoos all over their body espousing something anti-Semitic or racially motivated. In fact, bias crimes are committed by ordinary people in ordinary circumstances and most often by young people, especially age eleven to seventeen. That can cause problems for us as we begin to look at the issue of bias crime and try to combat it as a state and as a nation.

I think it is also important for me to give you a few statistics about bias crime so that we can really frame the issue in terms of what we are talking about here today. As I am sure all of you know, bias crimes are crimes that are committed against people because they are different, and in New Jersey in particular, those differences are race, color, religion, gender, ethnicity, disability and sexual orientation.⁵⁹ It can vary from state to state. Not all states cover

⁵⁹ See, e.g., N.J. STAT. ANN. § 2C:44-3(e) (West 1999).

those same categories.⁶⁰ In general, however, bias crimes or hate crimes, the terms are used interchangeably, are crimes committed against people because of those bases.

Another thing that you need to know about New Jersey is that New Jersey has the highest number of reported bias crimes per capita in the nation. That has always been the case and for many years, although not in the current year, we have also had the highest number of bias crimes in terms of actual numbers. I have often been trapped by reporters who get that information. They say well, that must mean, of course, that we must be the most prejudiced and awful state in the nation. I quickly rejoin that by saying that in truth, you need to look at the entire number system across the state to get a notion of what's going on in New Jersey. Many states, especially those in the southern part of our nation, will report twelve, twenty, ten bias crimes whereas New Jersey will report, in its current reporting system, about 800 or 1,000.⁶¹ Our high numbers are often representative of the different job that we do in collecting bias crime information through our law enforcement agencies and, of course, our members of the community. As I said before, bias crimes are, in large part, committed by young people. They make up 24% of our New Jersey population but commit 40% of our bias crimes. People in the minority of this state represent 24% of our population and commit 40% of our bias crime; a highly disproportionate number.

In general, bias crimes can be separated into three main categories that I think that you also need to know about. The most common is what is generally called the "thrill" category. This is the person, often a young person, that wants to get a rise out of an individual or a group of individuals. Soaping someone's window on Halloween, for example. Calling them names, pushing and shoving, for the fun of it, for the thrill of it. These tend to be the most common bias crimes in New Jersey and across the nation.

⁶⁰ See, e.g., OHIO REV. CODE ANN. § 2927.12(A) (West 1999) (covering victims targeted on the basis of their "race, color, religion, or national origin," and known as an "ethnic intimidation" statute); IOWA CODE ANN. § 729A.2 (West 2000) (including as protected classes "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age [and] disability").

⁶¹ See, e.g., Federal Bureau of Investigations, *Uniform Crime Reports-Hate Crime Statistics, 1995* (visited Apr. 22, 2000) <<http://www.fbi.gov/ucr/hatecm.htm>>; FBI, *Hate Crime* (visited Apr. 22, 2000) <http://www.fbi.gov/ucr/Cius_98/98crime/98cius16.pdf>.

The second category comprises what we call the “defensive” bias crime. These are crimes committed by people who feel threatened in some way. Someone different moves into the neighborhood, for example. A Jewish person moves into a neighborhood where there were not any Jews previously. A black person moves into an all-white neighborhood. A gay or lesbian couple moves into a neighborhood where someone does not like the fact that they are gay or lesbian. They may be attacked in some way, and hateful letters will be sent out. These are defensive bias crimes and they make up about 12% of the total bias crime.

The smallest number of bias crimes that we experience in New Jersey are what are called “mission” bias crimes. These are crimes that are carried out by people who have a real mission of hate. These are the types of bias crimes, when there is enough hatred involved, that sometimes result in murder, kidnapping and the like. Fortunately, they represent actually less than 2% of the total number of bias crimes in our state and in the nation. So, that perspective, I think, is important because as we begin to think about bias crimes and what they look like, I would like you to adjust your lens. The more typical bias crime is going to be carried out by a young person, sometimes in school, and will not be reported to the police. There are a myriad of reasons as to why such victims do not report the crimes to the police, such as the victim will feel intimidated, school districts may want to keep it quiet, or a community may want to keep it quiet. Nevertheless, the people who are victims of those crimes feel particularly isolated.

Over and over again in my office, we get calls from people who say “this has happened to my kid. It’s a relatively small crime but I feel that everybody’s against me. I feel hurt in a way that I can’t describe.” These are very urban and sophisticated people. That is why I believe that bias crime is important. They, in fact, make up a very small percentage of the total crimes, but they have a devastating impact on the community. People feel isolated. Whole neighborhoods come apart and at their worse, we actually have communities fighting each other because of their devastating impact.

Having said that and having given you some statistics on our fight against bias crime, one of the things I would like to comment on is what our bias crime legislation in New Jersey is about. What does it say about our diversity and how we are willing to handle it? Let me first say that in New Jersey, with a couple of exceptions, bias

crimes are handled through a penalty-enhancement statute which is subject to constitutional attack.⁶² The penalty-enhancement provision says that after someone has been convicted of a crime, the judge can make a determination by a preponderance that the person has been intimidated because of race, color, creed, religion, ethnicity, etc., and if that finding is made, the crimes are more or less raised by one degree and the maximum penalty is raised by one degree.⁶³ Again, this has been subject to constitutional attack before the United States Supreme Court very recently. I know we have a panelist, Joseph O'Neill, who will talk about that soon and it is not my purpose to debate that here.

Let me say this, that no matter whether New Jersey's penalty enhancement statute is held constitutional or not, what New Jersey does as an entire community, law enforcement, human relations commissions and the like will not change. New Jersey will move very quickly to make our statute constitutional if it is held unconstitutional. All law enforcement agencies are required to report bias crime. That will not change if our legislation is held unconstitutional.

We have a New Jersey Bias Crime Victim Support Service where people can call in if they have been victims of bias crimes. That will not change. We also have the only Office of Bias Crime in the nation. That will not change. Indeed, the many human relations commissions on the county and municipal level that address issues of discrimination and bias crime will not change, no matter how our legislation adjusts.

I think that because we are, in fact, the most diverse state in the nation, that in some senses what we do in regards to the issue of bias crime is going to be a real signal to the nation about where we are going in terms of interacting with each other well. Unlike many other states, everybody in the nation is here. This includes not just people who are black and white, but also Latinos and people from all over the globe of various races, creeds, religion and the like. We are, in fact, the most densely populated state in the nation.

What does that really mean in terms of issues of civility? In his book, which is called *Civility: Manners, Morals and the Etiquette*

⁶² See, e.g., *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485, cert. granted, 120 S. Ct. 525 (1999).

⁶³ See N.J. STAT. ANN. § 2C:44-3(e).

of *Democracy*, Stephen Carter defines civility in this way and I want you to make sure that you get this definition.⁶⁴ He says that civility is “the sum of the many sacrifices we are called to make for the sake of living together.”⁶⁵ We should make those sacrifices, not simply because doing so makes social life easier, but as a signal of our respect for our fellow citizens, marking them as full equals.

Therefore, you get the idea that civilities are really laws of morality.⁶⁶ Carter described civility in this way: “if you think of the American train 200 years ago, the train was mostly filled with people who were male and often white.” In other words, in order to get along, the people who were on that train who were really considered the operatives would be the people in power and those were often male and white. So rules of civility had to do with them, more or less.

Today, however, we live in a world and we live in a state in which we have to all get along. That is, if I am a woman, if I am a gay or lesbian individual, or if I am a Latino, I want my voice to be heard. I want to talk about the issue about whether we should have bilingual education. I want to talk about the issue of equal rights if I am a gay or lesbian man or woman. I want to talk about the issue about what it means to talk about multi-cultural education. The big experiment today has a lot to do with how do we honor all of those people in New Jersey, not simply ignore them. In other words, what do we do as a multi-cultural society?

Well, I think that bias crime has a lot to do with our issues of civility. One of the principles of civility that comes from that definition that Carter talks about is that our duty to be civil toward others does not depend on whether we like them or not, and that we must sacrifice for strangers, not simply for persons that we know. If you think about it, most of the people on the planet are strangers to us and, especially in a state as diverse as New Jersey, it is very unlikely that most of us are going to be well-acquainted with all of the differences that come from race, color, creed, gender, and the like. I think that our efforts in bias crime, not simply the legislation,

⁶⁴ See generally STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (1998). Professor Carter is the William Nelson Cromwell Professor of Law at Yale University.

⁶⁵ See *id.* at 11.

⁶⁶ See *id.*

but all of the efforts, speaks volumes to what we are willing to do in order to accommodate and to welcome people who are very diverse.

One of the huge debates raging in the nation today is why we need bias-crime legislation at all. There are very strong arguments being made today that we do not really need such laws because all bias crime offenses are already covered by other legislation. Some people will even ask why we should have a bias crime murder law? If the victim is dead, he is just as dead whether the motivation had to do with their color or not. If I am kidnapped because I am African- American, I am just as kidnapped as if I were kidnapped for some other reason.

Part of that question has to do with civility. One of the really important issues having to do with civility is the right to be able to define the issue. Let me say that again. One really important issue having to do with civility is the right to define the issue. Often, people without power, which includes the group that I belong to, African-American people, have found themselves in a society in which they have not been in a position to be able to define the issue.

Bias-crime legislation, because of its victim orientation, allows people that are most frequently victims of bias crime, and that includes African-Americans, Latinos, gays and lesbians and other persons of color, to define the issue. That is not important simply because of theory, but because it makes society answerable. In other words, if I am a victim of bias crime, I now have someplace to turn. I have some basis to complain about the fact that I have been victimized simply because of who I am. It is a part of beginning to turn over societal power to all of the people in our society, not just people who have traditionally held power.

Another art of democracy that Carter alludes to, and that I think is very important, has to do with the issue, not simply of defining the issue, but naming the issue. If you think about some of our most virulent societal debates, for example, abortion, it should come as no surprise to you that as people line up on the abortion issue, they will throw around terms like pro-life, anti-choice, abortion activist, or pro-choice. This is simply not by accident. It is because the ability to name the issue often determines its outcome. And so I say to you that the ability to name bias crimes as "bias crimes," not simply crimes that happen to people because they are different, has significant societal power and begins to speak volumes about who we are as a nation.

Finally, what I would like to say to you in this regard has to do with my own particular background. I come from a group of people, and a particular family, that throughout its 300-year history in the United States has been subject to bias crimes at times when those crimes were not called "bias crimes." I have aunts, uncles, grandmothers and grandfathers that were harassed, that were beaten and, in fact, that were even lynched. This was simply because of who he or she was. These were not even treated as crimes, but they certainly were not treated as bias crimes. As you begin to think about the importance of bias-crime legislation, I would like you to continue to remember how important it is to people who are less empowered that those crimes are things that are in the forefront of your mind and are accessible to people of color. It makes a world of difference in their lives.

Carter says, and this is my last remark, that civility requires that we express ourselves in ways that demonstrate our respect for others.⁶⁷ I think that in many ways bias crime legislation, and the many things that we do in New Jersey regarding bias crime, is a tribute to all of us. It shows our respect for the many people that make up our State.

Thank you very much.

D. Remarks of Joseph O'Neill, Esq.

The case that I argued before the United States Supreme Court this past Tuesday had to do with this very issue that these speakers have been discussing today. The particular part of the statute involved in the case reads as follows: "The defendant, in committing the crime, acted with a purpose to intimidate an individual because of race."⁶⁸ That is the issue that came before the Court.

Originally, my client, the defendant, was charged with twenty-three separate crimes stemming from a shooting.⁶⁹ My client is a

⁶⁷ See *id.*

⁶⁸ See N.J. STAT. ANN. §2C:44-3(e) (West 1999) ("The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.")

⁶⁹ See *State v. Apprendi*, 159 N.J. 7, 10 (1999). A Cumberland County grand jury returned a twenty-two count indictment against defendant which included charges of

white man who fired shots toward a black household on his street. He pled guilty to three of these crimes and the other twenty were dismissed.⁷⁰ The New Jersey laws that now exist state that a person who is convicted either by a jury or by a plea of guilty for an underlying crime that has to do with a racial purpose may be sentenced to up to double the amount of time mandated by the crime for which he was convicted.⁷¹ We are fighting the constitutionality of this law.⁷²

Now, let me familiarize you with the case's background. In December of 1994, my client got drunk and he also had some drugs. While driving along the street, he came upon the aforementioned household. He did not know the people. Apparently, the door had a black Santa decoration on it. My client went back to his house and obtained a 22-caliber rifle. He drove up to the house of this black family that he did not know and fired some shots into the house. Somebody then saw his pick-up truck. The police came and questioned him, and he admitted his actions.⁷³ He was arrested and brought to court on these charges.

In January of 1995, he was indicted. The trial, however, did not take place until May of 1995. The Prosecutor decided to implement this hate-crime law to obtain a much stiffer sentence. A guilty plea was returned in July of 1995.

While we admit that my client committed the underlying crime of possession of a weapon for an unlawful purpose, we disagree that

possession of a firearm for an unlawful purpose, possession of a prohibited weapon, attempted murder, attempted aggravated assault, harassment, and possession of a destructive device. *See id.*

⁷⁰ *See id.* Defendant pleaded guilty to two second-degree crimes of possession of a firearm for an unlawful purpose on September 24 and December 22, 1994. *See id.* In addition, defendant pleaded guilty to possession of a prohibited weapon, an anti-personnel bomb. *See id.*

⁷¹ *See* N.J. STAT. ANN. § 2C:43-7 (West 1999).

⁷² *See generally* State v. Apprendi, 159 N.J. 7 (1999). Justice O'Hern, writing for the majority opinion, stated that "the constitutional question is whether a jury must find that purpose [to intimidate an individual or group of individuals because of race] to have existed beyond a reasonable doubt before a court may impose an extended sentence for a hate crime." *Id.* at 9.

⁷³ *See id.* at 10. The facts of this case indicate that defendant, during police questioning, admitted firing four or five rifle shots into the home. *See id.* Defendant also stated that although "he does not know the . . . victims or the family, but because they are black in color he does not want them in the neighborhood." *Id.* He said that he was "just giving them a message that they were in his neighborhood." *Id.*

the crime was a result of racial hate. During a September hearing, we elicited testimony from various people, both black and white. These people testified that my client did not harbor any racial bias. A psychologist testified that my client, while not insane, was not fully capable of completing this crime based upon racial bias.⁷⁴ The judge, however, did not accept this, and instead of sentencing my client to a term of five to ten years for the commission of the underlying crime, he sentenced him to twelve years.

We took an appeal to the Appellate Division and were unsuccessful.⁷⁵ We were claiming that this law is unconstitutional because it allows a judge, as opposed to a jury, to hear evidence and make a decision based on only a preponderance of the evidence.⁷⁶ We were again unsuccessful in front of the New Jersey Supreme Court.⁷⁷

Our next step was the United States Supreme Court. My associate down there on the end of the table, Chuck Cohen, performed a lot of helpful work in preparing the legal papers to file

⁷⁴ See *id.* The psychologist concluded that defendant has “an obsessive-compulsive disorder, a cyclothymic disorder, (a type of temperament alternating moods of elation and depression), kleptomania (a tendency to steal), drug dependence, and alcohol abuse.” *Id.* at 11. The psychologist further stated that while defendant knew that he was firing shots at the house, and that it was wrong, defendant’s judgment was greatly impaired. See *id.*

⁷⁵ See generally *State v. Apprendi*, 304 N.J. Super. 147, (App. Div.1997).

⁷⁶ See N.J. STAT. ANN. § 2C:44-3 (“The court [may] sentence a person who has been convicted of a crime. . .to an extended term if it finds, by a preponderance of the evidence the grounds in subsection e.”).

⁷⁷ See *State v. Apprendi*, 159 N.J. 7, 27-28 (1999). The Court observed the following:

[A] statutory argument can be made that the actor’s biased purpose to intimidate establishes a required kind of culpability, an element of the offense that must be determined by a jury. However, the biased purpose is not an element of the weapons possession charge. It sufficed to establish that offense that defendant intended to shoot at the victim’s home, an unlawful purpose in itself. . . .The claim that the statute here conflicts with a constitutional right is far from clear beyond a reasonable doubt. . . .The hate-crime enhancer obviously requires a delicate balance of constitutional rights. We do not punish thought. We do punish more severely crimes involving particularly vulnerable victims. We are certain that the law will not be abused. The requirements of the act are strict. It is not enough to show that during the commission of a crime the actor may have exhibited bias. The question is whether the purpose of the crime was to exhibit bias.

Id.

our petition for a writ of certiorari. A professor told me that some 7,000 petitions for a writ of certiorari are filed every year with the United States Supreme Court and only about 85 to 90 are granted. Thus, it almost never happens that a lawyer gets to argue a case in front of the United States Supreme Court. Ours, however, was granted. I was also told by a couple of other professors that it would take a couple of years to get to Washington. It did not happen that way here. We filed this petition in September, and on November 29, the highest court in the country decided to grant our petition and hear our case.

At oral argument, I basically told the Justices that this was a case involving the erosion of jury power by virtue of this New Jersey law.⁷⁸ I said that the words of the statute “with purpose to intimidate because of race” are the actual essence of the law.⁷⁹ I argued that this was not merely a sentencing factor, as other lawyers here today have suggested. Instead, this was an element of an actual crime, since the person who is convicted of that other crime, racial bias, stood to go to jail for up to double the time that he or she normally would face.⁸⁰ I argued that the constitutional safeguards of due process, such as the right to a jury trial and proof beyond a reasonable doubt, should apply to my client.⁸¹

The Supreme Court will likely not hand down an opinion until sometime in July of this year. But I say to you this, in the courts of this nation, whether federal or state, the government always wins

⁷⁸ See N.J. STAT. ANN. § 2C:44-3(e).

⁷⁹ See *id.*

⁸⁰ See *id.* § 2C:1-14(h). The statute defines an element of an offense as:

(1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; (b) establishes the required kind of culpability; (c) negatives an excuse or justification for such conduct; (d) negatives a defense under the statute of limitations; (e) establishes jurisdiction or venue.

Id. Interestingly, the *Apprendi* Court commented that these definitions do not expressly apply to section 2C:44-3(e). See *Apprendi*, 159 N.J. at 19.

⁸¹ See, e.g., *In Re Winship*, 397 U.S. 358 (1970) (holding that the Due Process Clause requires that essential elements of a crime be proven beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227 (1999). In *Jones v. United States*, the Supreme Court stated that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” See *Jones*, 526 U.S. at 243.

when justice is done. So, if a person should not be found guilty for commission of a crime, then that person should not be punished. But, the only way we can prevent an innocent person from being found guilty is to employ the safeguards of the United States Constitution so that everybody gets a right to defend him or herself from the law. If the person cannot be proven guilty beyond a reasonable doubt, then that person should not be convicted.

There is something else that is involved here. It is a certainty that when a person is convicted of a racially biased crime, that person is stigmatized by society because he is not just a criminal, not just an immoral person, but worse; a racist. That is the whole gist behind our argument in this case and, of course, we are hoping that the Supreme Court will see it our way and tell New Jersey that they have to change the law. The law itself is fine, as it is necessary to have these race-based crimes charged because people who commit those crimes should be punished more so than the average criminal. The question instead is whether those charged with violating it should get their constitutional safeguards just like anybody else charged with committing a crime.

It is not just being charged with a crime, it is something more serious than that. It is, as I told you, being stigmatized as a racist. For as the law is written now, the New Jersey statute denies the defendant his right to proof beyond a reasonable doubt, and his right to have the case tried in front of a jury. But it does something else, too. The statute also takes from the jury the essence of its existence as a fact-finder.

I feel that everyone charged with a race or hate crime should have the right to notice by virtue of the indictment that I spoke about earlier. I also believe that a jury, not a judge, should find the person charged with having committed a hate crime be found guilty by proof beyond a reasonable doubt before that person can be sentenced to a longer term of imprisonment.

E. Remarks of Fred Margulies

Good morning ladies and gentlemen. You are probably just as puzzled as I am as to why I am here, and I must tell you that I looked at the program carefully and I noticed that only one other

participant had a shorter subtitle under his name and that was our last speaker, an esquire. For the longest time, I always thought Esquire was a magazine until I found out that it is also a lawyer. I have a son who is a lawyer, he is an esquire. Under my name it says Fred Margulies, Holocaust Survivor. I was introduced to give you an international perspective. Let me tell you who I am and why I am here and let me tell you why I am so impressed with Mr. Parker, because he spoke about respect and civility. One of the things that I do as a volunteer is speak during the course of the year to thousands of students, primarily in high schools, and some colleges.

Briefly, my real name is Mumfred and I was born in Germany in Berlin in 1927. I could not help but reflect this morning. I live in Long Island, not too far from Jones Beach. It was a long drive and I took a train and I heard on the radio, "Good morning, it's March 31" and I thought, my God, look at that. Fifty-three years ago on March 31 I was on a boat. I left Europe and came to the United States of America. I arrived here on April 4, 1947, all alone. I was a nineteen-year-old teenager. My mother and father were murdered and my only sister was murdered, and I came here as a displaced person. I had no possessions, no country, no documents, no family and no home. I was an orphan. I came to this crazy, foreign land to start again.

Let me talk to you about bias and prejudice and let me take you to where we are today. Let me tell you what I do for a living. Let me tell you, Mr. Parker, how civility very often is confused by people who do not know to whom they are talking. First, a little bit about my story and I ask some of you to listen very carefully. I think many of you are going to be lawyers. Who knows, there might be administrative personnel here, people who adjudicate law, legislators, and people who might end up in government.

One of the things that I tell young people is that it only started with words. It is words, Mr. Parker, only words. You said it so well, sir. In my lifetime it started with the word "shiffeuden," meaning "shit Jews." That is how the Holocaust started. Nobody cared enough to announce that it was their neighbor they were talking about. It ended in murder and left me an orphan, an immigrant refugee who fell between the cracks. It left me a man without any formal education, and here I am all these years later. I must tell you, I am very impressed and, with all due respect to the panelists, I am very confused, because my opinion is that you

cannot legislate hate. It is almost impossible. It is an expression and we do not know where it comes from. Let me then give you some examples.

Incidentally, some of you might wonder, what is it like when you have to learn a new language? My mother tongue is German. The first words you learn are the short words, the little words. And to this very day, I have been in this country now for fifty three years. There are many words in the English language that I avoid like the plague because I know I am going to trip myself up. So, to not use them, I substitute words. But you learn the little words first. Young ladies and gentlemen, the first things you learn are the four-letter words. They come easy. The funny thing is that if you speak to someone who even speaks with a foreign accent, they use these four-letter words. It is amazing. I know some that you do not even know.

I want to tell you about the four-letter words that impress me. One of them is "hate" and one of them is "love." Some of the words that I love to use of these four-letter words are fear and hope, give and take. Those are the four-letter words that make an impact. And once in a while when I speak in schools in Harlem or in Bedford Stuyvesant, I am asked to speak to students at risk. They are not students at risk. They need a little guidance and I teach them two letter words. I teach the ten commandments, ten-little words, "if it is to be, it is up to me." No word contains more than two letters.

So, I came to this country in 1947 very confused. I lived in a furnished room and went to work. My first job was at 7 West 45th Street for a company called Gullivan Dental Company. I had to go to work when I was fourteen years old and I have been working with my hands ever since. I earned seventy-five cents an hour and got used to this crazy country. I was so confused and so amazed and so puzzled.

I heard words I never heard before like "guinea," for an Italian. I had spent some time in England and in England at that time a "guinea" was twenty-one shillings, so when someone said to me at a factory in which I worked, "I see you always having lunch with Gus the guinea," I once asked Gus, "Gus, what have you got to do with twenty-one shillings" and Gus said to me, "say that again." I said, "well they keep saying that you are the guinea." I had never heard that before. I had never heard the word nigger. So, I asked

somebody what a nigger was, and he responded, "hey look, that Dutch boy don't know what a nigger is."

I did not come from Holland, I came from Germany. Suddenly, I was a Dutchman nicknamed for a German and they tried to explain to me and I still do not know. I never got an explanation. That is how you learn that all is not as rosy in the land of the free and the home of the brave.

One of the things I want to talk to you about is that I have lived in slums, and I have been deprived, and I have cried, and it has been a long story. But one of the things I want you to know, and I say that with all due respect of what I have heard from the gentlemen on the panel, is that love is an expression and hate is an expression. You cannot legislate love and you sure cannot legislate hate.

I work mechanically. That is what I do. I am a sheet metal worker. I work with my hands. I manufacture aluminum awnings. Now, can you imagine how pleased people are when Fred pulls up? "Wow, here is an elderly man with a German accent, Mr. Mercedes-Benz."

Let me take you back about twelve years or so. A man came into the shop in Ozone Park, and across the street is an auto body fender place. He came in and asked to use the telephone. He was dressed in a sports shirt, slacks and he flashed a badge. He was a policeman. "Sure," I said to him, "you can use the telephone."

Standing in front of him were two young men, Michael Slack and Joe McCall who worked for me. He addressed Mike and Joe and mentioned that he lived in Long Beach, Long Island, and then he told them how the town was going to pot because too many of these damn Jews were moving in. Mike Slack smiled at me and as this man leaned over to relax. Underneath his shirt, I saw his gun in the holster and he gave me his card when he left. Ladies and gentlemen, if you would have heard what he had to say about the Jews, you would not believe it. This was a law officer.

In another case, I had a young gentleman, Vinnie, working for me. He is now a civil engineer. I had an awning job to do in Howard Beach five years or six years ago. Driving to this installation, I said to Vinnie, "Vinnie, I want to recheck the measurements here because I gave these people a very low price." I felt so sorry for the gentleman, Mr. Santangelo, because when I arrived, I saw an old gentleman sitting in front of the stoop. His hand was shaking, and he had very thick glasses. He was obviously

not in good health and I realized that he needed shade because a tree had fallen over and there was no more shade for this gentlemen. I looked at this gentleman and I thought to myself that it was a pity that a man of his age had to sit like that.

I measured the job and it dawned on me that if I did something extra on the back of the building, it would make it a better job, and when the lady came out of the house, she could go underneath this additional part of the awning and not get wet when she takes her garbage cans out. I decided to do that because I felt compassion for this elderly gentleman and it would make the job better. My total investment in addition to my costs was maybe \$26, \$28, or \$30. So, we did the job.

Now, listen carefully. Mrs. Santangelo came out of the house and said, "Fred, that is so nice. We did not talk about that." I said, "no, I thought I would like to do that for you." She replied, "you did that because you're a nice German man, but if you were a Jew, you would not have done that." This was not so long ago gentlemen. You are going to legislate hate?

A Mr. Caruso came to the shop in which I formally operated my business. A fellow by the name of Bob Scorsi moved in. I did not sell my business. He just moved in there and I helped him out from time to time. Two years ago, Bob was not there. I was there and a gentleman by the name of Steve Caruso came to the door, rang the bell and I said, "can I help you?" "Is Bobby in?" I said, "no, he's not." "Gee, when will he be in?" "I have no idea." "He was going to do an awning for me and I want to have an addition done." I said, "come in, maybe I can help you."

Mr. and Mrs. Caruso came in. He told me what he wanted. I told him I did not think it could be done. He explained his house to me. He was sort of nervous. "Where is Bobby? I have not seen Bobby in three weeks." I asked, "did you give Bobby a deposit?" He said "no." I said, "well, I'll save the job for Bobby." I said to him, "look, I know what you mean and when Bobby comes in, I'll tell him."

Rest assured, Mr. Caruso was very, very complimentary to me. He obviously realized that I had many years experience as a mechanic in this business. I said, "I'll come with Bobby and we'll measure it and we'll lay this out and we can do something for you." I went with Bobby and I was the master mechanic. I could do no wrong. For reasons best known to Bobby, he did not want and

could not do this installation immediately so he wanted to postpone and, indeed, he did need me for this. This was a very tricky installation. Obviously, he told Mr. Caruso one week in September that Fred could not be there for two days because it was Rosh Hashanah, the Jewish New Year. I did not know this.

A week later, I was walking along 98th Street in Ozone Park in Queens. There was Bobby facing me and there was Mr. Caruso, with his back to me. Mr. Caruso did not see me. I walked up behind him and suddenly I hear this, "who ain't coming in next week, the Jew?" I tapped him on the shoulder. I said, "are you talking about me?" "Oh, I didn't see you coming, Fred." Then he said to me, "I'm not prejudiced. I don't call black people niggers. I don't call Spanish people spics." I said, "then why do you refer to me as the Jew? Why didn't you say, 'who was not coming in, Fred?'" So, we had quite a discussion. We did not get anywhere, gentlemen.

You cannot legislate that kind of statement or that kind of feeling. It is inside of people. You can write all the laws that you want. You can do all that you can, and you can try to legislate and make speeches and it is so nice, but that detective still hates me because I am Jewish and he would hate you, Mr. Parker, because of the color of your skin. I have heard it all.

You have heard about my life. I went to the home of a gentleman in Jackson Heights whose daughter asked me if I could go and help this man out. When she came over and saw me doing an installation, I came down from my ladder and she asked me if I would go to her father's house. She had two little girls that she was taking to the Catholic school in Jackson Heights, Queens.

I went to the father's house. His name is Tony and he has a foreign accent, but it is not an Italian accent. I make no comments about people's accents. So we went to the back of the house and he asked me if I wanted to have a beer and I told him, "no thank you." He was sitting at a table drinking beer. I took my tape measure out. We measured across the width of the house, about twenty-eight feet. He is at one end, I am at the other end.

As the tape measure comes back into my case, he says to me, "you're German, aren't you?" "Yes, I am," I said to him. "Oh," he said, "I'd recognize that accent anywhere." I said, "well, you have an accent, Tony, but it's not Italian and Tony's an Italian name." "No," he said to me, "I'm a Croat. I come from Croatia." All I

could say was "that's nice." "Listen," he said to me. "You people didn't finish the job. You should have killed the rest of them Jews. Better to be German than Jew. Look at the trouble them people are causing over there."

Ladies and gentlemen, can you imagine what his grandchildren must hear around the dinner table? "Better to be German than Jew. We didn't finish the job." He is saying that to me. I am the only survivor of a family because it started with words and it ended in murder. To those of you who are going to pursue the law of politics, listen to the words of this fine gentleman. It boils down to respect, recognition and human understanding. For God's sake, we are all entitled to our small space under the sun.

When we left the job at Mrs. Santangelo's in Howard Beach, and went back into my truck, I did not say a word because I knew what was going to happen and sure enough it happened. Vinnie said to me, "Fred, why didn't you say anything?" and I said to him, "Vinnie, why didn't you say anything? You're of Italian descent and so is she. She had the statue in the garden on the front lawn. She is the Catholic, Vinnie, and so are you. You wrote me a letter last year, Vinnie, in which you said other than your father and mother, I've been the best and most wonderful influence on you in your life and you know that I'm Jewish. Why didn't you say something to Mrs. Santangelo?" He never answered me. We are still friends, Vinnie and I.

Listen to me. There are no guineas. There are no kikes. There are no spics. There are no niggers. If anyone ever says something about someone else, will you do the right thing and have the courage, as young as you are, to say "don't talk that way about my school friend, don't talk that way about another human being?" Simple words, simple words, led to the murder of six million human beings because there were not enough decent people to speak up and to stand up. It does not take much. It takes a little bit of courage. It elevates you and gives you the self-respect that you had the courage to say "that's no way to speak about someone else."

I know we live in this wonderful land, and I bless this country every day, and yet everyday, ladies and gentlemen, when I put my shoes on, I have a certain pain in my heart and I am going to tell you why because I think there is a lesson to be learned as well. I want to share with you something because I want to deliver a message to you. It took so many years for the Germans to finally

say it to the new generation of Germans. There is no collective guilt, you understand that. And, there were good Germans. I want you to know that, too.

My life was saved by a non-Jewish Berlin policeman who took my father. That was the last time I ever saw my father. I was eleven years, three months, and five days old. That German policeman, God rest his soul, I do not know who he was, had papers in his hand and my name was on the papers and he folded them back and he waived these papers and he said to my mother, "listen Mrs. Margulies, Mumfred is on the list. I heard in the station house that the boys under sixteen are going to be picked up in the afternoon." That good German non-Jew waived the papers and said to her, "this action against Jews will last only one day, so if Mumfred is not home when they come for him, I think Mumfred will be all right." He then took my father. I never saw my father, I never saw the policeman. I wish I would know who he was, that policeman. Maybe I could go back and find grandchildren or great grandchildren and hug them and say thank you.

But I want to share with you a very poignant reminder of how precious we must be to one another. It took so many years for the young generation of Germans, to say, "yes, we did this." So, when we speak about visionism, I often say that the Germans published in 1971 these large volumes called memorial books. Listed are tens of hundreds of thousands of names of Jewish people, the towns from which they came, the date that they were born, the means of their murder and where the murder took place. The Germans say, "we did this." No revisionists can talk to you about these lists.

When I looked at the book, I saw a murder victim, a Mumfred Margulies who was born in Frankfurt in 1930. More coincidental, this Mumfred Margulies from Frankfurt had a sister and her name was Taar. I had a sister, may she rest in peace, who was a victim in a concentration camp and her name was Taar. We were not related and we did not know each other. We came from different towns. Both of the girls, Mumfred's sister and my sister, are murder victims and the other little boy Mumfred was only twelve years old when he was murdered.

So, when I get up in the morning and put my shoes on, in order to guide me for the day, in order, Mr. Parker, to make me aware of the fact of decency and civility to all of God's children, I look up and I do not know whether it is God up there or something else, but

there has to be some power somewhere who decided that I should live and they should not. I often wonder whether that little boy looked like me and why I lived to be married and have children and he was murdered when he was only twelve. The Holocaust happened only because nobody spoke up for us. It started with words and the rest of the population turned their back. It is only the Jews. It is not us.

You can legislate all you want. You can write all of the laws that you want. But, listen carefully to those four-letter words, fear and hope, hate and love, give and take. It is in your hands, ladies and gentlemen. Respect yourself and respect each one around you, and with God's help we will understand each other and we will respect each other and we will make this place a better world to live in for all of God's children.

Thank you.

F. Remarks of Clay Constantinou, Esq.

Thank you very much. Just by way of introducing myself just a tiny bit more, I am a Seton Hall Law School graduate and I was also a member of the SETON HALL LEGISLATIVE BUREAU. I spent almost five years as the U.S. Ambassador to Luxembourg. When you work as an Ambassador, you have in your embassy, not only people from the State Department on your staff but also people from the Department of Justice, the Department of Commerce, Agriculture, and just about every agency of the U.S. Government. In the course of that, you get to appear in the Foreign Ministry, meet with the Foreign Minister or the Prime Minister and not only do you get to advance American foreign policies as they relate to your strategic issues, but you also get to try to get the host country to support human rights issues that the United States is seeking to support or promote.

Now, I thought this afternoon, instead of discussing with you theories about human rights issues, I should instead share with you three or four examples of some cases that I either participated in or watched very closely. I want to begin by pointing out the obvious which is that everyone supports human rights and yet, year after year, we see the same issues, the same violations, often by the same

entities, and the reason for that is that there are competing interests that clash.

These competing interests could be economic interests, political interests, or strategic interests. These violations, take place abroad, and here at home. One thing that is very important is not to be too bashful about discussing these issues because the bottom line is that if we raise these issues, and become more conscious about these violations, then it is easier to make some improvements. The more vigilant we are about human rights, the better results we will have.

Let me take an example that has been in the news for the last couple of years. The former dictator of Chile, General Augusto Pinochet, has spent a very long time in Great Britain, under kind of house arrest, if you will, for crimes allegedly committed while he was the dictator in Chile back in the seventies.

Some of the member states of the European Union try to come up with very common positions and policies in politics as well as in economic issues and they have become a very strong partner with the United States. The United States spends a great deal of its foreign policy output effort in trying to negotiate agreements with the European Union because these agreements do not just relate between the United States and the European Union, but they also are common policies as they relate to other parts of the world.

But the point I want to make is that there is a consensus out there that General Pinochet should be held accountable for some of the worst crimes in the last fifty years. Thousands of people disappeared in Chile.⁸² Mass graves have been discovered and he was the strongman. The European Union, actually a judge from Spain, sought his extradition to take him back to Spain to be tried. The reason for that is because many Spanish citizens in Chile disappeared and there were many witnesses to support the fact that

⁸² It has been reported that over 3,000 people were either killed or disappeared during Pinochet's regime. See World Headlines, *Chile Court to Decide Pinochet Immunity May 24* (visited May 11, 2000) <http://dailynews.yahoo.com/h/nm/20000503/wl/pinochet_chile_3.html>. Eighty-four-year-old Pinochet had spent 503 days under arrest in Great Britain where he had avoided extradition to Spain because he was too ill to withstand trial. See *id.* He is now in Chile and a Chilean appellate court will soon rule as to whether his immunity can be stripped, thereby allowing him to be put on trial in Chile for the alleged human rights abuses. See *id.* The immunity claimed by Pinochet springs from a change he made to Chile's Constitution in 1980, whereby all presidents that have served for at least six years become a senator for life and obtain immunity from prosecution. See *id.*

many of them were killed while in custody of the state. Nevertheless, Great Britain was faced with a dilemma. This case went back and forth for a very long time and, eventually, General Pinochet was released to go back to Chile where, in many circles, he was received as a hero.

There are many cases where the United Kingdom stands at the forefront. I remember meeting on several occasions with Defense Minister Secretary Robertson, who was a great supporter of the European Union and the United States going after Slobodan Milosevic and, in fact, bombing Serbia. In many circles, Milosevic was esteemed as a great violator of human rights, and some people called him an outright murderer. There is no doubt that Albanians suffered a great deal and many were killed, raped and maimed and that Milosevic should have been brought in to be accountable. The fact is that the United States and European Union, under the umbrella of NATO, decided that the only way to go after Milosevic was to bomb Yugoslavia, bomb the former Yugoslavia, and bomb Belgrade. We wound up bombing the City of Belgrade day after day and week after week.

Now, you can tell from my statement that I was not a strong proponent for that because I did not think that the United States had any business in bombing the people of Belgrade, the citizens and civilians, notwithstanding that Milosevic was an outright criminal. We tried very hard not to bomb civilian population areas, but we all know that there were many terrible accidents and that many civilians died. It is very easy for me to stand here and be critical, and believe me, my purpose is not to be critical. My purpose is just to raise the issue and just basically point out to you why one of the biggest problems with human rights is a great inconsistency.

Ultimately, the United States, United Kingdom, the other European member states, and every government in the civilized world, wants to do the right thing. But, there are competing interests and often, as a result of inconsistencies, we wonder what ought to be the right policy. One of the problems is that it sends a wrong signal to the next guy or other governments. As a result of the wrong signal, more human rights violations take place.

As another matter, I just arrived from Istanbul, Turkey, where I spent three days. I do not know how many people here saw the film *Midnight Express*. *Midnight Express* was the story of a young American who was caught with hashish at the airport and wound

up, according to the film, spending some time in a tourist jail in Turkey. He experienced some of the worst things any human being could experience. Now, I was not there. I did not see that happen. I only saw the film. I know that the government of Turkey has a different view about the film, but I am sure somewhere in there, between their view and the author's view, lies the truth. The interesting thing, and I just say this tongue in cheek, is that I spent three nights sleeping in this former jail. I say this because now it is a four-star hotel. But, I could not help think, as I discovered that after I arrived, how only fifteen or twenty years ago it was a notorious jail.

My background is of Great Cyprus descent. Many of you may know that there is a conflict. There has been a conflict in Cyprus with Turkey and, in fact, Turkey invaded Cyprus in 1974. But I do not want to give the impression that I stand here before you trying to criticize Turkey. I am not going to do that. I have gone to Turkey five times in the last two years. I have a lot of Turkish friends. I have asked some of my Turkish friends to serve on the Board of Overseers of the School of Diplomacy. But, at the same time I would be a hypocrite if I were to stand here before you and not bring out issues that at least I have become aware of.

What I am about to tell you involves cases about which I have read and heard. I have spoken to people about what has taken place in Turkey. In fact, I subscribe to the Turkish Daily News online which does not mince words. It has pointed out a story where a Turkish religious leader was essentially seen to be a little bit of a heretic. His preaches were not mainstream Islam and he was seen somewhat as a political leader as well. After being treated very violently on several occasions, individuals in plain clothes rushed in his home, beat him up very badly in front of his family and children, and put him out of the house. They identified themselves as police. The next day, he was found dead in an alley.

Now, mind you, there are many people in Turkey that are very brave. Many of them are scholars and politicians and they are neither afraid nor shy about discussing these things and bringing it out in the open. They do this at the risk of their own lives. The problem is that there are some people, even within the United States Government, that suggest that we should not be too critical of these human right violations in Turkey because by doing so we may wind up upsetting the status quo or the balance. As a result, the

democratic government that is in place all of a sudden may be knocked out of power and we may wind up getting a government that is absolutely extreme and certainly not a supporter of human rights.

Well, that argument undoubtedly has some validity, but the question is, what do you do? It is not an easy call. So, on purpose, I painted for you this bad picture of several things that take place in Turkey, but at the same time, I am the first one to acknowledge that there is a very tough balance. In fact, let me change my words, very volatile balance. It would not take much to tip the scales and all of a sudden we would have people in government that would be very extreme. As a result of that, perhaps other countries in the vicinity could also be influenced to go the wrong way.

So, again, those of you that care about human rights have to be aware of these competing factors and try to find ways to deal with them. Often, the best way to deal with them is to use a little carrot and a little stick, which is done successfully by the United States and European governments. When I say successfully, I do not mean conclusively successfully. It is just that there is progress made and there has been a great deal of progress in Turkey in the last ten years, and there is no doubt that there will be even greater progress in Turkey, especially if Turkey enters the European Union. In fact, if Turkey, in my view, enters the European Union, it would be hard pressed not to comply with the rest of the European Union. Otherwise, it would not get those great benefits of the European Union such as the financial support of billions of dollars to help Turkey improve the quality of life of their citizens.

Portugal and Ireland are great examples of this. Twenty or thirty years ago, those countries were far poorer than other European countries, and today Ireland has one of the finest economies and Portugal is doing quite well. The European Union has been instrumental in supporting these countries. Most recently, Greece is finding itself moving down the right path and shortly it hopes also to join the Economic Monetary Union for single currency that will be in effect next year in the European Union. So, the bottom line is using the carrot and the stick to try and offer the kind of support to Turkey, or any other country that has problems with human rights, to entice them to be more sensitive.

Let me give you an example of a case that I was involved with. This case took six years to bring to conclusion. A few years ago, a

young physician from overseas was doing his residency in Mount Vernon was going out to dinner on a cold Friday night in February. He was going out with a nurse he had met. He had made reservations at the restaurant. As he was driving to get off of the highway, he made the wrong turn and instead of going right, he went left and found himself in an industrial area. He had the directions, but he did not realize he had made the wrong turn so he was kind of driving slow and looking at numbers. It was hard to see and he could not see any homes. All of a sudden, a Cadillac pulled out and cut in front of him. An individual got out with a long beard and army fatigues and this individual asked him to get out of the car.

The young physician was terrified. According to his friends, not long ago, the local chief of police went on the radio to point out that there had been a series of car jackings and if anyone found themselves in a situation in a dark and desolate place being stopped by an unidentified car, they should not have any qualms about driving slowly to an area that is better lit. If it turned out that this individual is a policeman or a policewoman, so be it. But, at least this individual would not be dealing with this unknown situation in a dark and desolate place.

This young man tried to put his car in reverse to escape. As he was doing that, the gentleman, who turned out to be an undercover police officer, shot at the automobile. The first bullet hit the hood of the car. This gentleman tried to go around him and the second bullet went through the side window and through his shoulder. When he got out of the car, and was trying to run, he had to run around the officer. The officer claimed that this individual kind of bumped into him and as he was falling over him. Accidentally, he hit the elbow to the ground and the gun shot off and hit him and eventually killed him.

I am giving you the short version of this story. There were a lot of inconsistencies in the testimony. The County Prosecutor of Westchester County filed criminal charges against this policeman. One of the inconsistencies is that there was no gunpowder on the jacket of the physician. Anyone that knows anything about ballistics and shootings knows that if anyone is shot at close distance, there would be gunpowder.

Nevertheless, there were no witnesses. I remember sitting in trial and watching as the County Prosecutor was doing a brilliant job trying to bring in all the circumstantial evidence to prove that at the

very least there was criminal negligence on the part of the officer. Since there were no witnesses, the judge found the officer innocent. What was terrible about this case was that the defendant police officer exercised a certain right that exists in New York of not having a jury trial.⁸³ As a result, the trial was handled solely by a judge.

Now, I do not want to sound cynical and skeptical, but judges in New York are not appointed by the Governor. They are elected. What was peculiar was that this particular judge tried the entire case without taking one note. I was there every day, and so were journalists, and we all felt that this must have been a very brilliant gentleman with an incredible memory because he did not take one note. As soon as the trial was over, he did not wait for more than five seconds before he said "not guilty," and then he literally ran out of the courtroom. Maybe he walked very fast. He did not even have the courtesy of telling the family that flew from overseas to sit there for five days, "gee, you know, it's a terrible case, I'm terribly sorry about what has happened but, you know, I have to follow the law and there were no witnesses and I cannot just go by circumstantial evidence."

I believe that many of you that are lawyers in this room may feel that sometimes circumstantial evidence may be stronger than an actual view because our own eyes often deceive us. Usually, that is not the case but I am just trying to make the point that perhaps one of the things the judge was considering was that he was going to be reelected and in a small town, well, you can make your own conclusions.

This death led to a civil trial in federal court with a jury and a judge who took lots of notes. In federal court, as a result of the civil trial rules, more evidence was admissible. The town, the officers,

⁸³ See N.Y. CONST. art.1, § 2. (McKinney 1999). The New York Constitution reads in part:

Trial by jury in all cases in which it has been heretofore guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. . . . A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of the court having jurisdiction to try the offense.

Id.

and the municipality were all found negligent. The jury was so upset about the facts that it awarded a verdict of seventeen million dollars; a very large verdict in cases like this. Now, I want to point out one thing. About ninety-nine percent of our law enforcement officials, at least those I have come across, are outstanding professionals who have done an extraordinary job in the most difficult areas, at the most difficult times, and often at their own risk. These people work very hard and they do a Herculean job and they do not get paid anywhere close to what they should be getting paid. But, there are bad apples and we need to make sure, as part of the human rights process, whether we discuss each case from overseas or domestic, to have the courage to bring them out.

I mentioned this case only because I felt that it would be unfair and improper to ourselves to talk about human rights and only talk about things that go on in China or elsewhere. With that, in closing, I will tell you that in my view everyone in this room can make a difference in human rights only if you are vigilant, willing to talk about the issues, and willing to spend the time.

Thank you very much.

G. Remarks of The Honorable William L. Gormley

Thank you very much. It is a pleasure to be here today. I will talk very briefly about a key set of state issues. It is a shame we have to talk about it. I was blessed with a mother, a father and an environment where I learned that any prejudice directed at race, religion or one's preference was inappropriate. Unfortunately, in our society, whether because of the atmosphere in which someone is brought up or because of their own persona, there are laws that are necessary to protect those individuals against whom an act is committed based upon their color, their religion or their sexual preference.

In New Jersey, unlike New York that was mentioned earlier, we are fortunate. We have, I believe, the finest judiciary in the country. Consequently, by and large, I would say discretion given to that judiciary in terms of sentencing would be reasonably applied. What we have in New Jersey is a system that, if an individual is convicted of an offense, the judge is able to weigh aggravating

factors, with one of those factors specifically relating to what you would call hate crimes.⁸⁴ In other words, a defendant is going to go to jail for a longer period of time if they committed the criminal act because of the fact that a person might have been of a particular color.

We have currently a case before the Supreme Court of the United States that deals with this in which an individual in a county next to mine shot through the window of someone's home.⁸⁵ It was an individual of color. The defendant is saying it was just a coincidence. Uh, huh. I will not go any further with that because it is an ongoing case. The judge said it was not just a coincidence and as a result of that, the individual, instead of having to serve five years, has to serve ten years.

That is now being questioned in the Supreme Court and the defense counsel is saying that we in New Jersey, as a legislature, and I voted for this bill, did not have the right to vote for such a piece of legislation. Those opponents of the law say that we could not delegate to the judge the ability to provide for a higher sentence. I submit to you that what we did in New Jersey was correct.

In our state, in determining whether a person is guilty of committing the act of firing a weapon in a particular case, it must be proven beyond a reasonable doubt. When you get to that portion of the case dealing with sentencing that is under the auspices of the judge, the standard is preponderance of the evidence. In this case, the judge in New Jersey saw that by a preponderance of the evidence, that person took that weapon and shot it through that individual's window because of that person's color. The defense counsel has claimed that this much discretion should not be given to a judge.

I think if you weigh the discretion that has been given over the years and the fact that we have a number of aggravating and mitigating factors in sentencing, it is absolutely appropriate in New Jersey that this is our system. There is something that has to be dealt with by law to make a difference so that people know that there is a penalty. We have freedom of speech and, in our society, all levels of speech are protected. We might not agree with them.

⁸⁴ See N.J. STAT. ANN. § 2C:44-3(e) (West 1999).

⁸⁵ See *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485, *cert. granted*, 120 S. Ct. 1289 (1999).

We might not agree with some of the messages that espouse hatred but they have a right to those freedoms under our Constitution. But what our Constitution does not do is say that your expression can be channeled through a criminal act. It is correct to say a judge can use an aggravating factor in sentencing to provide for a higher sentence.

Let us look at cases we have seen around the country where a person took a young man, tied him to a pole because of his sexual preference, beat him up, and left him out all night.⁸⁶ Yes, that is an aggravating factor. When you see people maimed because of their religious belief, because of their preference; yes, that should be an aggravating factor. As I said, the issue is in front of the United States Supreme Court right now.

As a society we must realize that if we are going to send a meaningful message, we must do it by increasing the punishments for hate crimes. Sentencing has a real impact because telling someone that their term of imprisonment will not be five years, but ten, hopefully will serve as a deterrent. But, as I opened up with, that sentencing alternative is secondary to our hope that young people like yourselves are raised in an environment in which circumstances like this do not occur. It is important that people are brought together to understand that these differences do not serve as a basis to discriminate or to hurt or to mutilate another human being. But until we reach that day, and it will be a long time coming, we need legislation like this. We need this type of help.

In New Jersey we are fortunate because of our strong judiciary. While the law provides for a broad level of discretion, it should be maintained. By contrast, our neighboring states have elected judiciaries. The level of those serving on the bench in New Jersey tends to be of such a high caliber, and since we have protected our system from an elected judiciary, judges can be independent of those prejudices. I believe our system is as good as you can get until, that is, we reach that ideal society.

Thank you very much.

⁸⁶ See Tom Kenworthy, *Gay Man Near Death After Beating, Burning, Three Held in Wyoming Attack Near Campus, Hate Crime Suspected*, WASH. POST, Oct. 10, 1998, at A1.

H. Remarks of Raymond M. Brown, Esq.

I have just a couple of points I wanted to make to you about hate crimes. Some of my thinking is not finished because it involves a subject I have been wrestling with for a while, but first I wanted to tell you about something that happened not too long ago that might be of some relevance.

You know, there was a young kid who had the opportunity at the age of seventeen to satisfy his dreams to be an environmentalist. He went down to the Amazon to get involved in a project which involved some deep questions concerning the ecosystem of the rain forest.

He was having a good time for the first several months until he started to get home sick; and he missed his mom. You can kind of understand that when a seventeen-year-old sets out boldly and then misses his mom, that he thought about whether or not he could send his mom a gift. He looked around the rain forest and he realized that there was a bird. It was a fairly rare bird. A bird of uncommon skill with languages, and some people thought maybe even advance cognition, and he was under a certain kind of tension because as an environmentalist he did not want to do what he was thinking of doing. Ultimately, however, he found a way to design a cage in which the bird could live and he mailed the bird back to his mom. And he waited. And he waited, and he did not get anything back by way of a response from his mother.

Just when his patience was about to wear thin he got a letter from his mom acknowledging the bird and saying, "son, I want to know. . .we're happy that you're doing well and we really loved that bird when we fixed him with collard greens and sweet potatoes." The young man was horrified and he ran to the nearest radio telephone and he got in touch with his mom and he asked, "mom, how could you do that? That was a rare bird. That bird could speak in eight languages." His mother said, "well, he should have said something."

I tell you this because I think it is not a bad theme for those who care about the subject of human rights. As you move along in your life and you realize how unpredictable your duration on this planet is, the last thing you would want to be doing is confronting yourself, perhaps at the moment of your departure, with saying to yourself or

someone saying to you, "you should have said something." The question that is addressed by hate-crimes legislation, and more broadly by the question of human rights, is precisely the question of when you will say something and, frequently, it is in the context of when will you say something to sovereign power.

Two little things that I have experienced. One which I think we have all shared, and the other just personally. Some of you may know that I chair a program on NJN, called *Due Process*. One of the interesting phenomena in talking to people about hate crimes is that there is a racial divide. Not that anybody on either side of the divide said, "I like hate crimes," but there was a different perception of what hate crimes are. Most of the white people interviewed had an understanding of hate crimes that included swastikas on temples, desecrated churches, or attacks on people for racial grounds in a broad sense. But the black folks almost all thought in terms of a police assault on a civilian motivated by race. And thinking maybe that was kind of a unique New Jersey phenomena, I had occasion just yesterday to be talking to folks in New York City for MSNBC and low and behold, when it came to the question of hate crimes, the same phenomena occurred.

This brings us to a fundamental question; what does this tell us? Sometimes our perspective is too short. Our memory is not long enough. We talk about hate crimes and we kind of take it for granted; hate crimes are part of something larger. Remember that hate-crimes legislation is probably among the most complex areas of the law and has gotten there in a relatively short time. The First Amendment issues raised in *R.A.V.* and the Due Process issues raised in *Apprendi* continue to be the concern of legislators and courts.⁸⁷ I understand Mr. O'Neill was here this morning and while I do not share his view that the record supports the fact that his client was not racially motivated, I do think that the due process issues about sentencing are serious issues. In fact, one of the questions you might want to ask is that in the broad universe of

⁸⁷ See generally *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992). In *R.A.V.*, petitioner was charged with violating a city ordinance prohibiting bias-motivated disorderly conduct. See *id.* at 378. Writing for the majority, Justice Scalia held that the ordinance was facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of "race, color, creed, religion or gender." See *id.*; see also *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485, *cert. granted*, 120 S. Ct. 1289 (1999).

people who seem to care about these issues, proponents of hate-crime legislation have frequently been at odds with other people with whom they might otherwise think themselves to be kindred spirits. Why is that and what is that about?

Let me take you back to what I think is part of the root of the contradiction and something we need to focus on. A concern about hate crimes stems from something much deeper, which is a response to World War II. Two things happened. One was an expansion of international humanitarian law. The Nuremberg trials governed warfare. These were an international tribunal that held men accountable for their actions by hanging them for war crimes and crimes against humanity.

But at the same time, while the Nuremberg trials were under way, there was a conference taking place and this conference led to the United Nations resolution, known as the Universal Declaration of Human Rights. That is an important document because it is far broader than most of us imagine. It touches on economic rights. It was the first time that the governments of the world said that there shall be guarantees of fair trial and non-discrimination on the basis of race or gender. In 1948, the Soviets correctly pointed out that there were some contradictions since the United States tolerated lynching. The United States then pointed out that the Soviets had several gulags. Nevertheless, the governments of the world said there are human rights.

I was two years old at the time that resolution passed. I was living not far from here in a Jim Crow housing project in Jersey City, segregated, and I have asked this frequently of young high school kids, especially black kids: What was the issue that dominated the civil rights agenda in 1946? Well, it was not fair housing and it was not economic opportunity and it was not education. It was lynching. It was not until 1953 that we had a year free from the lynching of African-Americans.

I say this to suggest that the idea of human rights is not an old idea; it is a new idea. It is an idea that first burst forth as a concept accepted widely in response to the horrors of World War II; horrors permitted and committed by those who abused state power. So, maybe it is not so surprising that a lady in Trenton or a young kid in Washington Square Park might perceive that the real human rights issue of today for him or for her is the question of the abuse of the police power. Anyway, the point is that the question of human

rights involves a complex set of issues about which we should be concerned. The first place we must start is to look at the limitations of state power, because the state is an instrumentality that should be for all of us but maybe it is not always that way.

You can also derive human rights from the fact that many of the world's sacred texts provide a basis for such rights in terms of an admonition to love the Divine and love your neighbor. You have been there, right? In addition, they may be derived from the enlightenment in what has been called the secular humanism that evolved from it. But whatever its evolution, it is powerful and it has been powerful in American life in our evolution of our concept about civil rights.

People talk about Dr. King. And there is a tendency to look correctly on his letter from a Birmingham jail, which is partly about this question of when people stand by and could be said to be charged with having not said anything. But perhaps his most interesting speech is the one from Mason Temple just before he died. It has been called the "Promise Land Speech," and we tend to focus on the fact that he almost had a premonition of death, but there is something more profound in that speech because the basis of his discussion that night was about the fact that he had recently been to the Holy Land.

He had been on the road from Jerusalem to Jericho and he talked about the fact that for the first time he fully understood the parable of the Good Samaritan. He said if you are on that road, those dunes are high, and if you venture out into those dunes you are taking your life in your hands. If there is an ambush out there, you are finished.

He talked about the parable of the Good Samaritan and as you recall, the parable of the good Samaritan is the discussion that Jesus is having about the question of loving thy neighbor and, of course, in most translations of the New Testament, it is a lawyer who says, "well, who's my neighbor? How do you define neighbor?" Jesus responded by referring to those who had passed by the Good Samaritan and asked for his help. While a Levite and priest both passed by, so to did a traditional enemy of the Judean. This enemy was crying out from the dunes for help. The Judean resolved that he would simply not pass by his enemy, so he did not have to resolve the internal conflict of what to do, "I can't pass him by because I don't want to confront that question."

The question now becomes not just why did you not say something, but also why did you not do something? Why did you not care? It is the problem of the other, and it is the fundamental problem that law is designed to address. To protect the weak from the depredations of the strong. But as you know, when you get to law school, nothing is as simple as it seems. So, who is the victim? The guy that got shot, or the accused. Well, the law must be enforced evenly across the board and so you have a tension, as you do in *Apprendi*, between some legitimate concerns about whether we have delegated responsibilities for sentencing in ways that may not pass constitutional muster, or just bad policy, versus a concern that people not be assaulted because the color of their skin. And there should be a tension because both of those concepts flow from this recognition of universal rights, but guess what? We do not live in an America where people care about universal rights, acknowledge international standards, or talk about our own shortcomings.

Let me finish by trying to put this in some broader perspective. Black folks are 12% of the population, yet 40% of the prison population. What is this about? This society allows conditions of social justice to exist where the very initial contact between police and citizen is racially biased. In New Jersey, for example, when a young trooper comes into that department, which is a highly structured paramilitary organization, he or she sees that the way to advance is to make a lot of arrests. You do not have to be a scientist to realize who that trooper sees arrested frequently. All you have to do is drive down the Parkway or Turnpike. For Christy Whitman and her Democratic predecessor to say they did not know about this when we, who have been driving to the shore and to Camden for years, have seen it, is absurd. Day after day, there are a bunch of black guys spread out over the hood of the car. It is like there are no people to stop. I am not advocating that we should stop white people. I am advocating a concern about the underlying values that are reflected here. I am arguing that we cannot satisfy ourselves that because we have a statute that seeks to criminalize hate crimes, we are O.K.

We are now faced with legitimate concerns about sentencing structures and legitimate questions about the First Amendment that

need to be addressed.⁸⁸ However, we must go back and look at Justice Blackmun's concurring opinion in *R.A.V.*⁸⁹ Justice Blackmun suggests that maybe some concerns about politically correct speech and cultural diversity underlie this First Amendment decision, since there are people who can, and must, honorably disagree.⁹⁰ This is so because that is the nature of the struggle, but if you are not rooted in a concept of universal recognition of rights, whether it has a theological basis or a secular basis, then there is a deep problem.

And so the question is: number one, do you take seriously your presence as an opportunity to develop an analysis and an understanding? If you have not read the Universal Declaration, go read it and understand some of its development. If you have not read *R.A.V.*, go read it and understand it. And if you have not, in your own personal life asked, "do I speak out, do I care, or is it O.K. since it is those people, not I, that get stopped?" Ultimately, when it comes time when somebody has to ask, "did you say something or did you do something," I am pretty sure the one thing we all have in common is what we would like the answer to be.

Thank you.

I. Remarks of The Honorable William J. Pascrell Jr.

Ray, that was a great job and I can say that I can agree with a lot of what you say, but I am not an attorney. I do not have the luxury of selective memory or selecting the specific evidence that will defend my position. I see our roles as very different and while we will come down on one side of an issue or perhaps another side of an issue, I have to examine all sides, be result-oriented, and not get so caught up in the process, which is your job as an attorney, as an educator, and as one deeply rooted in human rights.

⁸⁸ See generally, Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999) (discussing the history and development of the federalism argument, responding to the recent development of the judicial federalism doctrine, and suggesting that expanding the federalism doctrine would have negative consequences).

⁸⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁹⁰ See *id.* at 415 (Blackmun, J., concurring).

The Spanish officers that shot the black person and the response from the establishment, well how wrong could they be? That they were Spanish frightened me because it is a mirror; it is a mirror to where many of our heads are and who can shoot whom and who is guilty or innocent before we know all of the facts. And I would imagine that is what stereotyping is about; what profiling is all about, be it ethnic, be it racial, and so what we need to do is take our clothes off and stand naked in the front of truth. We must try to understand it as best we can because even as attorneys, my good friend Ray and my good friend, Senator Gormley, and all of you who are students of the law, must all know that there is no absolute truth here on earth. We struggle as finite beings to discover what is and what is not.

We do not have to go very far to understand the roots of stereotyping and hate crimes throughout this greatest of all democracies. Whether what you say is true or not, there has never been an experience or an experiment that has compared with our system. While much of the system continuously needs to be repaired, it is here that we can say these things and point out to the authorities when they are wrong, whether they like it or not.

I guess you have to go to Albania. I guess you have to go to Kosovo to understand that there is a stark difference. I freely choose, as you freely choose, Ray, to be here, in agreement and in disagreement. I choose to say this: every social, ethnic, and racial group has been a target in loud ways and in quiet ways. There are stereotypes and no group has a monopoly on prejudice in this country. No group is privy to virtue. If we start with that premise and if we open our minds, we will come to some very different conclusions than we thought we might have.

On the federal level, we have legislation before the Congress of the United States which would elaborate upon and expand what hate crimes are all about on a federal level.⁹¹ There are some states in the union, believe it or not, twenty-one states to be exact, that have failed to specify sexual orientation as a category for protection under hate-crimes law. I believe there is a need for further federal legislation.

⁹¹ See H.R. 1082, 106th Cong. (1999). The Senate also introduced a virtually identical version of the Hate Crimes Prevention Act of 1999. See S. 622, 106th Cong. (1999).

There are certain things that we should stay out of. But twenty-one states have no definition within the hate-crimes legislation. Ten states have no hate-crime legislation on the books at all. In Congress, we are divided between those who say hate crimes should be treated like every other crime and those of us who believe that to strike out against an individual because of the group or the category that he belongs to is a very different situation than a one-on-one situation. Very different, indeed. Just as the nation's outrage over the treatment of Rosa Parks helped lead to the passage of the Civil Rights Act of 1964, I believe revulsion over recent incidents referred to by some of our past speakers will galvanize the public and lead support for the hate-crimes legislation.

Congressman Conyers of Michigan, who is the main sponsor of this legislation, and I am an original co-sponsor, recently compared hate crimes to an epidemic claiming 50,000 victims in the last six years.⁹² Under the present federal law, crimes motivated by racial, religious, and ethnic prejudice are defined. What we want to do is expand it. He has compared that current epidemic of hate crimes with previous outbreaks of violence and intimidation referred to just a few moments ago against African Americans. Between 1880 and 1930 there were 4,000 African-Americans tortured and killed in the United States of America, in this "land of opportunity." Americans are being tortured and killed today, not only because of their race, but also because of their religion, their disability, their sex and their sexual orientation. It is long past the time that the Congress passed a comprehensive piece of legislation banning these atrocities.

I think that hate crimes need very special attention and that is why we are trying to pass legislation. And why would you be against that? We are not demonizing anyone. What we are saying is that we need to speak out as an official body. That folks who take it out on other folks or their property because of who they are need to be separated from the general law and prosecuted and punished more severely than the individual who would commit that crime in other circumstances.

I am a grandson of Italian immigrants. I believe our heritage of ethnic diversity is one of the country's greatest resources. Not all of

⁹² See 145 CONG. REC. S9028-08, S9041 (1999); see also Federal Bureau of Investigation, *Hate Crime Statistics 1998* (visited Apr. 4, 2000) <<http://www.fbi.gov/pressrel/pressrel199/haterel.htm>>.

my neighbors feel the same way as I do, however. Sadder still is the fringe which takes out their personal bigotry and inflict it violently on other people. We are aware of the heinous crimes of the ignorant that have been created and committed in recent months and years.

For example, in February of 1999, in Sylacauga, Alabama, the body of thirty-nine-year-old Billy Jack Gather was found bludgeoned with an ax handle and charred in a pile of burned tires.⁹³ Killed, as one paper described it, for being himself. In July of 1999, a young man linked to a White Supremacist organization shot several people in Illinois and in Indiana.⁹⁴ Included in the killings was a group of Jewish men walking home from Sabbath services held in Chicago, Illinois.⁹⁵ Also killed was Ricky Byrdson, an African American who was walking with his daughters in his home in Skokie, Illinois, famous Skokie, Illinois.⁹⁶ In June of 1998, we were horrified by the dragging death of James Byrd Jr., an African-American man in Texas.⁹⁷

These happen too frequently, and I am saddened to say that our district, where we stand and sit, is no different. Right in Clifton, just a few months ago, vandals painted swastikas and anti-Semitic statements on the Jewish Center wall.⁹⁸ This shook this close-knit community. It made my commitment to this cause even greater because there is no time for silence here. It is convenient, as it will keep you out of trouble, but it will plunge us deeper into trouble. I think that our long-term goal must be to prevent hate crimes by addressing bias before it manifests itself into violent criminal behavior. However, in the meantime, it is imperative that we have the law enforcement tools necessary to ensure that when hate crimes occur, the perpetrators are swiftly and strongly brought to justice.

Hateful acts divide our communities. They intimidate our most vulnerable citizens and they damage a collective spirit that needs to

⁹³ See Sue Anne Pressley, *2 Accused of Killing, Burning Gay Man*, WASH. POST, Mar. 5, 1999, at A1.

⁹⁴ See Edward Walsh, *Racial Slayer Killed Himself in Struggle*, WASH. POST, July 6, 1999, at A1.

⁹⁵ See *id.*

⁹⁶ See *id.*; *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (discussing a Nazi march through Jewish neighborhoods).

⁹⁷ See Sue Anne Pressley, *Disabled Man Dragged to Death, FBI Probes for Racial Motive*, WASH. POST, July 10, 1998, at A3.

⁹⁸ See Leonor Ayala, *ADL Joins Jewish Leaders in Denouncing Hate Graffiti Clifton Incident*, THE RECORD OF NORTHERN NEW JERSEY, Mar. 4, 2000, at A5.

be created. These attacks, committed because the victims looked different, practiced a different faith or have a different sexual orientation, threaten America's most cherished ideals. They represent an attack, not just on the individual victim, but on the victim's community. Their impact is broader because they send a message of hate. They are intended to create fear and they are intended to create dissension.

I believe that by passing this federal legislation, the Hate Crimes Prevention Act, we can accomplish and send not only a message but a very clear signal to those who will realize they will be punished severely for their actions. This bill sets federal penalties for persons who cause injury or attempt to cause injury to another based upon race, color, religion, national origin, etc. It directs the United States Sentencing Commission to study the issue of enhancing sentences for those who participate in these crimes. The National Association of Attorneys General have called the bill a necessary supplement to state hate-crimes law enforcement efforts. There is rationale for the federal government to do some things if they are not being done on a state level.

I pledge to you that I will continue to speak out on these crimes. I think that there is an important message to be learned here from what we have examined in cases over the past two years. If we do not prevent and punish severely these actions, that they will become worse.

Thank you very much.