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**HOUSE OF REPRESENTATIVES**  
COMMONWEALTH *of* PENNSYLVANIA

**VIRTUAL HEARING: The Oath of Office**

January 21, 2021 | 1 p.m. to 3 p.m.

*Examining the intersection of the constitution, the ethics act, and the criminal code applicable to those who incite or participate in violence and disinformation campaigns to discredit American Democracy.*

- 1 p.m. - 1:30 p.m.** Gerry Gendlin, Professor  
Department of History & Politics, Edinboro University  
*Exploring the history of constitutional remedies to root out sedition*  
**Q & A with legislators**
- 1:30 p.m. – 2 p.m.** Shira Goodman, Anti-Defamation League  
Dr. Lauren Bairnsfather, Holocaust center of Pittsburgh  
*Decoding hateful messaging and symbolism*  
**Q & A with legislators**
- 2 p.m. - 2:30 p.m.** Congresswoman Susan Wild  
Congressman Conor Lamb  
*Discussing experiences being under siege in the Capitol*  
**Q & A with legislators**
- 2:30 p.m. – 3 p.m.** Frederick Lawrence, Hate Crimes Expert  
*Discussing the evolution of hate crimes and community and legal response*  
**Q & A with legislators**

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## ***NEWS ARTICLES OF INTEREST***

[Corman denies involvement in election fraud lies.](#)

[New Yorker article which draws the link from PA rallies to the insurrection.](#)

[American Thinker apologizes for spreading election lies about Dominion Voting Systems.](#)

[Chairman Grove convenes press conference to attack Dominion.](#)

[Representative Diamond exhorts followers to fight back like they would against a bully.](#)

[Representative Owlett issues press release pledging to make election fraud investigation top priority.](#)

[House Republicans press release alleging irregularities in election return numbers](#)

## ***STATISTICS***

[Amicus brief in support of Texas challenge to election results: 24 Senators and 69 House members.](#)

[13 House members circulated a petition to try and force a special session on "Election Issues".](#)

[HR 1100 passed State Government for an audit of the 2020 election by a vote of 15-10 and the House by a vote of 112-90.](#)

[Representative Diamond sent a letter to Vice President Pence regarding election regularities which was signed by 31 House members.](#)

Prepared Testimony  
of  
Gerry Gendlin, Ph.D., Associate Professor  
Department of History, Politics, Languages & Cultures, Edinboro University  
House Democratic Policy Committee  
January 21, 2021

Good afternoon Mr. Chairman, Mr. Vice Chairman, members of the Committee.

Thank you for the opportunity to appear before you today. I am Gerry Gendlin, a professor in the Department of History, Politics, Languages and Cultures, at Edinboro University. For almost 19 years at Edinboro, I have taught American politics, in addition to courses in international relations and comparative politics.

I am here today to discuss issues raised by the events in Washington on January 6, 2020, particularly as they relate to persons serving in an official capacity in the Pennsylvania public sector. I will do so in the context of both the federal Constitution's Fourteenth Amendment and the Pennsylvania Constitution.

Students in my American government class learn about the Fourteenth Amendment, primarily for the effect it has had on creating national rights by applying the protections of the federal Constitution to the states. Because of the January 6 events, however, another aspect of the amendment is now getting attention: using the Fourteenth Amendment to expel and exclude elected officials from further government service if they participate in insurrectionary activities.

First, though, I would like to summarize the norms and conditions established by the amendment.

Passed by Congress in 1866, the 14<sup>th</sup> Amendment was ratified by the states and came into effect in 1868. That timeframe is important: just after the Civil War. The amendment was one of three that attempted to accomplish several post-Civil War goals. The Thirteenth Amendment abolished slavery, and the Fifteenth Amendment prohibited the states from making race a factor in the right to vote.

The Fourteenth Amendment had several purposes, and so it consists of four main parts, and an auxiliary clause for its implementation.

Section 1 settles the citizenship question for freed slaves, and applies federal Constitutional protections to the states.

Section 2 invalidates the three-fifths clause.

Section 3 I will come to in a moment.

Section 4 deals with the public debt, particularly as it related to the Civil War

The Fourteenth Amendment was controversial for several reasons, including how it was ratified. And we know, of course, that it did not eliminate racial injustice. More recently, the citizen clause has come under attack because children born in the United States to immigrants who had crossed the border illegally are citizens, and this is upsetting to some people.

My focus today is on Section 3, which prohibits federal or state government service by anyone who had taken an oath to support the Constitution and then engaged in rebellion against it. This was meant to apply specifically to those who had participated in the Confederacy after having served in the federal government.

I think the fundamental principle is sound: If someone takes an oath to support the constitutional government, and then works against it, we don't believe them anymore, we don't trust them anymore, and they don't get to serve in government anymore. People can certainly change their minds, but we are not going to believe them when they say they're changing it back.

However, this clause and the principle it represents were all but abandoned not long after the Amendment was ratified. For one thing, just a few months later, President Andrew Johnson issued an amnesty for anyone who had served in the Confederacy. Also, Congress voided the restriction several times in individual cases and then permanently in 1898.

The case of Alexander Stephens is illustrative. A former member of the US House of Representatives from Georgia, Stephens was Vice President of the Confederacy. After the Civil War, he won election to the US Senate, but was prevented from taking that seat through the 14<sup>th</sup> Amendment. Even so, he was subsequently elected to the House, where he served several terms, and in 1882 became Governor of Georgia. The Fourteenth Amendment was set aside.

Clearly, as a former Congressman, Stephens had taken an oath to the Constitution. By 1875, the South also had sent to Congress some 85 ex-Confederate soldiers. Perhaps they had never first taken an oath to the Constitution. The mere act of having participated in the rebellion was not prohibitive, even under Section 3; it's the initial oath that is important. Or perhaps it was felt that Johnson's amnesty had removed the Section 3 restriction.

Congress officially voided the restriction in 1898.

I am aware of only one other time Section 3 was used thereafter: to prevent Victor Berger, a socialist who had opposed US entry into World War I, from returning to Congress after the war. But his district repeatedly re-elected him, and eventually he took his seat.

So it is difficult to rely on a principle that was soon ignored, never consistently applied, and officially removed. But the 14<sup>th</sup> Amendment is only one tool that legislatures have to deal with anti-Constitutional activities by public officials.

Article I of the federal Constitution gives Congress power to expel any member, and potential reasons are not listed. So long as a supermajority of two-thirds agrees, a member can be expelled. This power has been used sparingly, in cases of corruption.

And that same power exists for the state legislature in the Pennsylvania Constitution. Each House has the right to expel members using a supermajority, and there is no enumerated list of reasons for expulsion. Those reasons may be determined by the members themselves. Other than elected officials and judges, civil officers in the Commonwealth can be removed by the Governor when they have been convicted of a crime.

I find nothing in the current Pennsylvania Constitution, nor in published debates before adoption of past versions, specific to rebellion or insurrection as a cause for expulsion or exclusion. However, the Pennsylvania Constitution does not need to be so specific. After all, the most famous application of the Fourteenth Amendment is to apply protections of

the national Constitution to the states. Therefore, I conclude, if the national Constitution protects the people from duplicitous oath takers at the national level, that protection applies at the state level as well. I believe the principle remains, even though Congress removed the specific legal restriction implementing it. (I acknowledge this is a political analysis, not necessarily a legal one.)

The Pennsylvania Constitution does refer to exclusion by those convicted of an “infamous crime” without defining what that means. I think conviction for sedition or insurrection would fit, but, as I will discuss shortly, all these terms are vague, and vague terms invite arbitrary interpretation, which runs counter to due process. This suggests either the need for legislative definition or the opportunity for judicial intervention.

There are wrinkles here worth mentioning. For apart from the legal issues that arise, on which I defer to lawyers and legislators, there are a few political questions that would make expulsion and exclusion problematic on the specific grounds of insurrection or infamous crimes.

First, as we know, a member of the Pennsylvania legislature who commits violence or otherwise breaches the peace may be arrested — privilege does not apply in those cases. A member who commits treason may similarly be arrested. And with a supermajority, the legislature may expel this person. In other words, insurrection is not necessary to expel and exclude a member — once. If they get re-elected, then they may come back if re-elected.

The only time a permanent ban would apply is in case of corruption or “infamous crime.” So the question is how to define those terms.

Moreover, for “infamous crime” to be applied, there must be a conviction. This suggests trial in a court, not in the legislature. And after a conviction, there has to be a determination that whatever the crime was, it was “infamous.”

The legislature may wish to formally define corruption or infamous crimes so as to include participation in insurrectionary activities, or violation of oath of office — which includes support for the federal Constitution.

Second, then, it is clear that definitions are important. *Treason* is defined in the federal Constitution, but the application of the terms it uses — adhering to “enemies” and “aid and comfort” — would rest on judicial precedent. *Insurrection* and *sedition* are not well defined and are foremost political terms.

What constitutes insurrection? The Civil War was an obvious case. And while my opinion is that the storming of the Capitol on January 6<sup>th</sup> was insurrectionary, the totality of events on that day are not so simply categorized. It would take a court ruling — probably a series of them — or an act of the legislature to answer such questions as: How many people are necessary for an event to be defined as an insurrection? Which specific activities or behavior are necessary or sufficient for such a definition? Does verbally expressing a preference for overthrow of the government count as insurrectionary? (There is judicial precedent to think it does not.) Can a person guilty of insurrectionary activities if there is no general insurrection? The attempt to intimidate elected officials into voting with mob is illegal, but is it insurrectionary? If insurrection or sedition is to justify a permanent exclusion from public service, terms and activities need better definition than they currently have.

In other words, there is a difference between someone naively or even disingenuously chanting “Stop the Steal” on the one hand, and, on the other, someone who assists violent

rioters by pointing how they should proceed to accomplish their illegal goals, or gives them verbal encouragement to accomplish those goals. Without firm definitions, the line between protected speech and unprotected activity is only clear when it is obvious. Otherwise, it could be arbitrarily applied by this or that political party.

Third, insurrection is about purpose. For some in the mob that day, their intent was clear. Storming the Capitol carrying zip cuffs, tweeting assistance to the mob, or expressing violent sentiments at the time — these all lead us to one conclusion.

But someone who walked behind the violent mob into the Capitol may have been a curious onlooker swept up in events as opposed to a real insurrectionist. Some people who were down the street may simply have been stupid, not seditious. The goals of those who waged a violent battle against the Capitol may not define the goals of others down the street engaged in misguided or cynical but peaceful protest.

I trust the law enforcement investigations can uncover more information about the purposes of the people present, whether in the Capitol or not.

And lawyers may point out that, in court, motive is not really a necessary factor in determining guilt. But I would argue that because insurrection and sedition are defined by motivation, they are important to determine.

Fourth, because assessing the goals of the mob members is important, we should note that while some people may not have had insurrectionary goals, some of those who committed violence actually believed themselves to be acting in defense of the Constitution. They say they there were acting against the enemies of democracy. They style themselves as patriots acting in defense of their country. Looking at them from the outside, we style them as dishonest, perpetrating a lie. And clearly some are. But in the words of the great George Costanza, "it's not a lie if you believe it."

To the extent that any elected official in Pennsylvania believed and encouraged such delusions, they may be held accountable as having violated their oath. Falsehoods helped create an atmosphere in which insurrectionary violence was extremely likely, but those who uttered them might not be insurrectionists — just cowardly, self-interested, and unintelligent, and protected by the First Amendment if they can make a case that they did could not have known what their falsehoods would produce. My own reading is that everyone knew or should have known.

So while violent agitators broke the law — subject to a fair trial — and tried to disrupt legitimate government, subvert due process, and intimidate those who carry it out, it's not clear whether all who are connected to it share the same level of responsibility. And so attempts to use the Fourteenth Amendment to exclude someone from office should be handled on a case-by-case basis where the wrinkles I have discussed could be ironed out.

I did say "subject to a fair trial," not just because we rightly insist on treating people as innocent until proven guilty, but also because that is one way in which insurrection could be proven. If that actual charge is made, then the Fourteenth Amendment applies. Until then, one person's un-American violent insurrection is another person's pro-American opposition to tyranny that just went too far.

Finally, I would like to add a few personal words. I have taught American politics at Edinboro University for almost 19 years. In my classes, I try very hard not to express to

students any partisan views. I do not view the opinions I have expressed today as partisan, and I do not want them construed as such.

Still, there is one opinion I do not shy away from expressing in my classroom. Every semester, in the first week of my class on American politics, I teach that the United States rests on four fundamental political values: liberty, equality, democracy, and the rule of law. I am a cheerleader for these values, and for the country that constantly attempts to live up to them. It is these efforts at self-improvement, to get us to live up to our own values, that make the United States the greatest country in the world. And I think most Americans respect and admire those values.

So now I will reveal another opinion to you: To my mind, anyone who attempts physically to subvert these values, including the rule of law, is unpatriotic and un-American. That is true in this case, and holds true even when the subversion is made in the name of causes I support. Mere breaking of the law is not subversion of rule of law, but when action turns violent and is aimed at the seat of government, then it is subversion of American values. In such cases, we are justified in attaching the political labels of sedition and insurrection — no matter what their stated motivations are — and let the legal process play out.

In conclusion, I would like to remind you that my analysis is political, not legal. But if there are political challenges in using the 14<sup>th</sup> Amendment to exclude someone from public service, the Pennsylvania legislature may act on some other basis. It may encourage law enforcement to press charges of breach of peace. It may define corruption such that it includes *violation of oath of office* as a means specifically to expel members for seditious behavior and prevent them from running again. Even without doing those things, though, a non-permanent expulsion could be a forceful gesture, as symbolic as the impeachment of a president with only days left in his term.

Thank you for time. I would be pleased to flesh these issues out further and answer any questions you may have.

## **Testimony of Shira Goodman, Regional Director of the Anti-Defamation League, Before the PA House Democratic Policy Committee**

**January 21, 2021**

ADL (the “Anti-Defamation League”) thanks the Committee for the opportunity to submit this testimony about the growing threat of domestic extremism and how we can combat it. Since 1913, the mission of ADL has been to “stop the defamation of the Jewish people and to secure justice and fair treatment to all.” For decades, ADL has fought against bigotry and antisemitism by exposing extremist groups and individuals who spread hate and incite violence.

ADL’s Center on Extremism investigates extremists across the ideological spectrum, including white supremacists and other far-right violent extremists, produces research to inform the public on the threat, and works with the law enforcement and educational sectors to promote best practices that undermine or counter threats to communities.

ADL’s data suggest that extremism is on the rise. As our CEO Jonathan Greenblatt has said repeatedly, “Over the last decade, right-wing extremists have been responsible for more than 75 percent of extremist-related murders in this country. This should no longer come as a shock to anyone. Lawmakers, law enforcement and the public need to recognize the grave and dangerous threat posed by violent white supremacy. We cannot begin to defeat this deadly form of hatred if we fail to even recognize it.”

### **The Increasing Threat of Domestic Extremism**

There is growing recognition of the threat posed by domestic extremism. In the 2020 Homeland Threat Assessment Report<sup>1</sup> Issued by the Department of Homeland Security, the Acting Secretary wrote: “Domestic violent extremism is a threat to the Homeland. As Americans, we all have the right to believe whatever we want, but we don’t have a right to carry out acts of violence to further those beliefs. The Department works with other Government, non-Government, and private sector partners to prevent individuals from making this transition from protected speech to domestic terrorism reflected by violence. As Secretary, I am concerned about any form of violent extremism. That is why we design our programs to be threat agnostic – ensuring that we can combat a broad range of domestic threats. However, I am particularly concerned about white supremacist violent extremists who have been exceptionally lethal in their abhorrent, targeted attacks in recent years.”

ADL had been sounding this alarm for many years, in testimony to Congress and in publicly issued reports. It is important that DHS and state agencies are recognizing the threat, and now we need action to counter it.

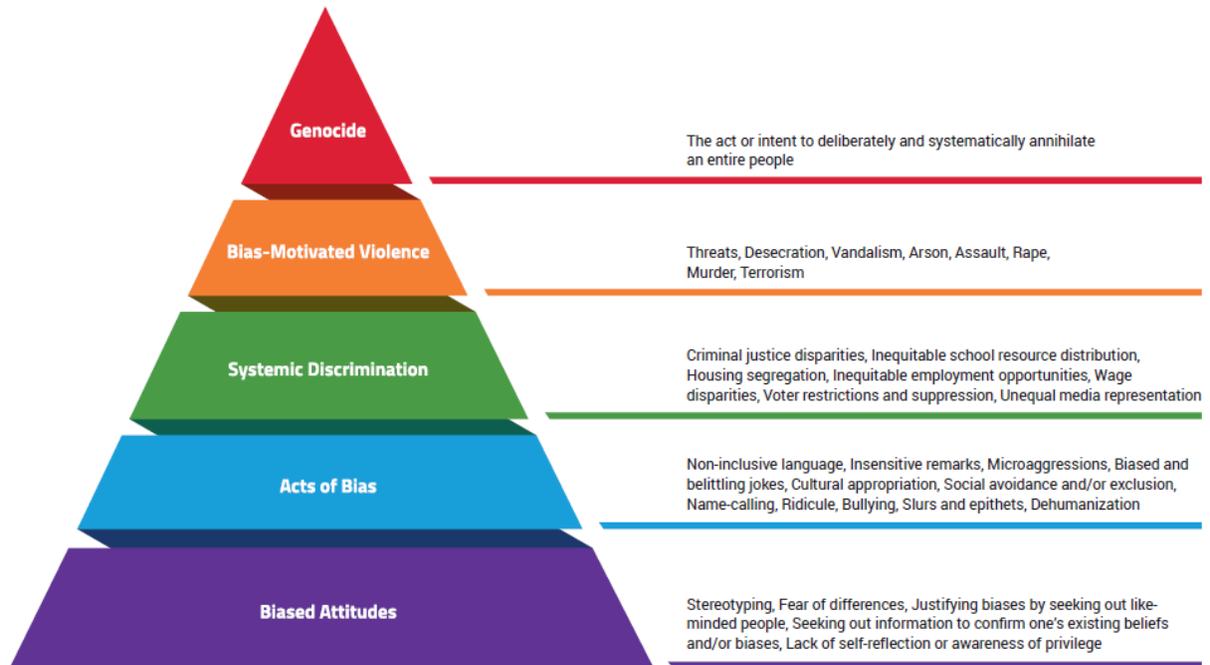
As ADL has said time and time again, extremists must be taken at their word. First there was volatile rhetoric online, then explicit calls to violence, and now people have acted on those calls in the sacred halls of our nation’s Capitol. This cycle did not begin on January 6. It is part of an escalating pattern that characterizes how hate transforms from biased attitudes to speech to

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<sup>1</sup> [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf).

action to violence. The cycle can be interrupted, but it requires vigilance and commitment from all of us.

ADL uses the Pyramid of Hate as a model for understanding how hate escalates. Hate follows an insidious process. As societies acclimate to progressively more severe forms of bias, this enables more extreme expressions of bigotry.



This pyramid of escalation underscores why we cannot consider January 6 or the rising threat of domestic extremism in a vacuum. Instead, we must look at the broader context of how hate manifests, and at the identity-based conspiracy theories that are taking hold.

The pyramid also underscores the difference between hate speech, which is generally protected under the First Amendment, and hate crimes, which are criminal acts motivated by an actual or perceived protected characteristic of the victim.

To be absolutely clear, statutes like Pennsylvania's ethnic intimidation law, which we discuss in more detail below, punish criminal acts, not speech. Indeed, one of the central tenants of our democracy is that speech alone, no matter how abhorrent it may be, must remain outside of the government's reach. But just because hate speech may be constitutionally protected, doesn't mean that this General Assembly is helpless in the face of it. Each and every one of us has a critical role to play in pushing back against this rhetoric through stronger and more powerful counter-speech, anti-bias education, and essential work to disrupt and dismantle systemic racism.

## Rising Tide of Hate

The data is clear: Hate is on the rise in our country. As we discuss below, this is clear both from the FBI's data and data collected by the ADL. Not all hate crimes or bias incidents are perpetrated by extremists, and not all those who hold extremist views will engage in criminal activity. However, as the Pyramid of Hate illustrates, hate-filled attitudes can escalate into activity, and the more the surrounding climate seems tolerant of hateful ideologies, the easier it is for extremists to engage others in their rhetoric, expand their reach, and escalate into dangerous behavior.

The FBI's annual Hate Crime Statistics Act (HCSA)<sup>2</sup> report reveals that 2019 was the deadliest year on record with 51 hate crime murders – a 113-percent increase over the previous record of 24 set in 2018. Total hate crime incidents rose to 7,314, marking the fourth increase in the past five years:

- Race-based hate crimes remained the most common type of hate crime (54%), as has been the case every year since the FBI began reporting hate crime data.
- There was a 14-percent increase in anti-Jewish hate crimes, from 835 in 2018 to 953 in 2019; 63 percent of the total reported religion-based crimes were directed against Jews and Jewish institutions.
- Anti-Hispanic hate crimes rose nearly 9 percent, the fourth straight year of escalating numbers.
- After a 41-percent increase in 2018, hate crimes targeting individuals based on gender identity rose another 18 percent last year.

In 2019, Pennsylvania reported 41 hate crimes to the FBI. 28 were motivated by race; 9 were motivated by religion; and 4 were motivated by sexual orientation.<sup>3</sup> The FBI's report is based on voluntary local law enforcement reporting to the Bureau. However, in 2019, 86 percent of participating agencies did not report a single hate crime to the FBI, including at least 71 cities with populations over 100,000. Just over 2,000, or 14 percent, of the more than 15,000 participating agencies actively reported at least one hate crime. Many hate crimes go unreported, so the numbers in the FBI report likely underestimate the true number of hate crimes committed across the country.

### **Audit of Antisemitic Incidents**

Parallel to the FBI hate crimes data is ADL's own data collection and analysis. Since 1979, ADL has compiled an annual Audit of Anti-Semitic Incidents (the Audit) that includes both criminal and non-criminal acts of harassment and intimidation. The data we have compiled from the last three years show that antisemitism in America is far more pervasive than in previous years. In 2019, ADL counted a total of 2,107 antisemitic incidents across the U.S., a 12 percent increase from the 1,879 incidents recorded in 2018. There were incidents reported in every state except Alaska and Hawaii. The audit found there were, on average, as many as six antisemitic incidents in the U.S. for each day in the calendar year – the highest level of antisemitic activity ever

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<sup>2</sup> <https://ucr.fbi.gov/hate-crime/2019/hate-crime>.

<sup>3</sup> <https://www.adl.org/adl-hate-crime-map>.

recorded by ADL. 2019 included five fatalities directly linked to antisemitic violence; another 91 individuals targeted in physical assaults.<sup>4</sup>

While most antisemitic incidents are not directly carried out by extremists, a growing number of incidents do have ties to extremism. In 2019, for example, ADL recorded 270 antisemitic incidents attributed to known extremist groups or individuals inspired by extremist ideology. This represents 13% of the total number of incidents, tying 2018 for the highest level of antisemitic incidents with known connections to extremists or extremist groups since 2004.

ADL recorded 109 antisemitic incidents statewide in Pennsylvania, a 22 percent increase over the previous year. The number of incidents is 70 percent higher than Pennsylvania's historic average of 64 incidents a year. The 2019 total capped an extraordinary 150 percent surge in antisemitic incidents in the Commonwealth over the past five years, making Pennsylvania the state with the fifth-highest number of antisemitic incidents in the nation in 2019.

At the same time as these numbers have been escalating, however, ADL's polling data has revealed that antisemitic stereotypes have been on a steady decline. How is that reconciled with the record number of antisemitic incidents? Fewer people may harbor these views, but the ones who do have become more emboldened to act on them.

### **Extremist-Related Murders**

As hate escalates from attitudes, to speech, to action, it also becomes increasingly dangerous and even more deadly. In January 2020, ADL published our fifth annual report on extremist-related murders, "Murder and Extremism in the United States in 2019," which found that of the 42 murders committed by extremists in 2019, all but one were perpetrated by right-wing extremists.<sup>5</sup> With 42 deaths, 2019 is the sixth-deadliest year for domestic extremist-related killings since 1970, according to ADL's Center on Extremism. This is part of a general trend of increasingly lethal attacks by domestic extremists in the United States. The past five years (2015-2019) include four of the deadliest on record. Of the 427 people killed by extremists in the last 10 years, 73% have been at the hands of right-wing extremists – 76% of these carried out by white supremacists – making white supremacists the deadliest type of extremist movement in the United States over the past 10 years, by far.

### **Hate-Fueled Domestic Terrorism**

Extremist-related killings have, in recent years, increasingly manifested as domestic terrorism attacks, where victims are intentionally selected based on their protected characteristics. The residents of El Paso, Texas, experienced this type of tragedy in August 2019 when white supremacist Patrick Crusius traveled across Texas from the Dallas area to El Paso in order to attack the Latinx community. Crusius opened fire with an assault weapon outside an El Paso

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<sup>4</sup> <https://www.adl.org/audit2019>.

<sup>5</sup> Murder and Extremism in the United States in 2019, ADL Center on Extremism, Feb. 2020, <https://www.adl.org/media/14107/download>.

Walmart, killing 22 people and injuring 24 more. In a manifesto posted online, Crusius claimed that his attack was a “response to the Hispanic invasion of Texas.”

El Paso unfortunately takes its place in a long line of deadly attacks perpetrated by white supremacists, including the deadliest attack on Jews in the United States, which occurred in Pittsburgh in 2018. On October 27, 2018, Robert Bowers entered the Tree of Life synagogue in Pittsburgh yelling, “All Jews Must Die” as he opened fire. A profile on Gab – a social media site frequented by right-wing extremists – which appeared to belong to Bowers, showcased his virulent antisemitism.

It is important to remember that extremist murders represent only the tip of the iceberg when it comes to extremist violence in the United States. For every person killed by an extremist, many more are wounded or injured in attempted murders and assaults. Extremists engage in a wide variety of violent and criminal acts related to their causes, including terrorist plots and conspiracies, hate crime assaults, terroristic threats, campaigns of intimidation and harassment, and other offenses.

### **Unique Threat of White Supremacist Extremist Violence**

With hate and extremism on the rise across the country, white supremacist extremist violence currently poses the gravest threat. Adherents are not as obvious about their allegiances or true objectives as Klan members or racist skinheads. Today, many white supremacists dress in a non-descript manner and use coded language as a way to communicate – and protect their anonymity.

### **January 6, 2021**

On January 6, 2021, pro-Trump extremists, including some identified right-wing extremists, stormed the U.S. Capitol building, interrupting the Congressional session affirming the election results and forcing a partial evacuation. The nation and the world watched the chaos unfold, including scenes of the mob on the Senate floor, in House Speaker Nancy Pelosi’s office, and swarming the Capitol steps. The siege resulted in at least five deaths: three from “medical emergencies,” one, a pro-Trump extremist, who was shot inside the Capitol, and a Capitol police officer who died from his injuries.

ADL’s Center on Extremism uncovered a range of posts reacting to the event and spreading conspiracies and memes. These have appeared on platforms favored by extremists, including MeWe, Parler, militia forums, Twitter, and, most overwhelmingly, on Telegram.

In the immediate aftermath of the November 2020 presidential election, pro-Trump and other extremists had announced their initial plans to protest President-Elect Joe Biden’s inauguration in Washington D.C. Those calls for largescale protests on or around January 20 attracted renewed interest following the January 6 attack on the U.S. Capitol, with threats of additional extremist violence circulating on numerous online platforms.

While it is impossible for anyone to predict with certainty how the events of the next weeks may unfold, recent history has shown that we cannot ignore potential threats from political and other right-wing extremists.

One of the chief sources of the potential longevity of the threat of domestic extremism is President Trump, who has provided extremists the gift of a narrative that will carry them through the next four years: a story about a stolen election, all thanks to the treasonous “left” and mainstream media, who are, as the narrative goes, suppressing the rights and voices of “real Americans.” Extremists are often animated by the angry and paranoid conviction that something sacred is being or has been taken away from them.

This rhetoric has been ramping up for years as American society has become increasingly polarized. And that means what happened at the U.S. Capitol on January 6 was in some ways the most predictable incident of political violence in American history. Anyone who had been paying attention to extremist activity across the country, or to the chorus of disinformation and hatred rampant across right wing media and its social media counterparts, could have expected it.

Most importantly, this deadly attack was not a surprise, because the President – and many of his supporters – incited it in broad daylight. Moreover, many of the people who were roused to violence that day are the product of weeks and months and years of similar incitement. They constitute a new breed of extremist, one foundationally animated by devotion to President Trump, placing him over party or country. They are living in an entire ecosphere of disinformation, lies and conspiracy theories, one fertilized by Alex Jones, QAnon, the President and his enablers, and many others.

Over the coming months and years, as they mingle with established extremists – including white supremacists, antigovernment extremists, antisemites and hardcore conspiracy theorists – these individuals could coalesce into a distinct and potent extremist movement. Alternatively, they could eventually add to the ranks of those other hateful causes.

A sense of grievance lies at the heart of every extremist movement. And right now, many right-wing extremists, including white supremacists, QAnon conspiracy fanatics and anti-government militia members, believe the election – and, more broadly, their “rights” as Americans – have been or are being stolen by actors in a far-reaching left-wing, globalist or “Marxist” conspiracy.

White supremacists and some other extremists, including Islamophobes, are also driven by manufactured fears around demographic change, which they believe will accelerate during the Biden administration, which will likely enact more humane policies towards immigrants and refugees who are people of color. Some extremists equate those policies to “white genocide.”

Militia and other antigovernment groups may be very active in the next few years. The militia movement has historically derived much of its energy and vitality from its rage towards the federal government. However, the movement’s support of Trump over the past few years dulled that anger. A Biden administration will allow militias to return to their foundational grievances – that a tyrannical government in league with a globalist conspiracy is coming to enslave them by first taking their guns and then the remainder of their rights.

Finally, antisemitism will often be a central part of the conspiratorial views that fuel right-wing violence. Many of the key narratives, especially the conspiracy theories that animated the D.C. attackers, are also drivers of antisemitism. Likewise, the ongoing, high-level efforts to undermine American democracy through voter suppression constitute a threat that puts all marginalized communities at increased risk.

## **Recommendations**

While Federal solutions will absolutely be necessary to address the rising threat posed by domestic extremism, there are steps the members of this committee and your colleagues in the PA General Assembly can take.

### **Use the Bully Pulpit:**

All elected officials must call out bigotry and hate at every opportunity. The right to free speech is a core value, but the promotion of hate should be vehemently rejected. Simply put, you cannot say it enough: America is no place for hate.

### **Strengthen Pennsylvania’s Hate Crime Laws:**

Pennsylvania must also take immediate action to strengthen and improve its hate crime laws.

First and foremost, Pennsylvania must amend its ethnic intimidation statute to include gender, gender identity, sexual orientation and disability as protected characteristics. Unless and until these changes are made, our Commonwealth will continue to send a devastating message to members of the LGBTQ+ community and to people with disabilities that they are not worthy of protection from hate crimes, and to the community at large (including hate crime offenders and law enforcement) that the Commonwealth does not consider these crimes to be as serious as hate crimes based on other protected characteristics.

The need for these reforms could not be more urgent. In Pennsylvania, all Commonwealth law enforcement agencies are required to report hate crime data to the Department of State Police, which form the basis of annual “Crime in Pennsylvania” reports.<sup>6</sup> While the law does not require reporting of hate crimes motivated by gender, gender identity, sexual orientation, or disability bias (a gap we urge the General Assembly to close), the number of such hate crimes voluntarily reported by Commonwealth law enforcement agencies is remarkable. In 2019, for example, of the 41 hate crimes reported in Pennsylvania, 10% were motivated by sexual orientation bias.<sup>7</sup> Between 2015 and 2019, hate crimes motivated by gender, gender identity, sexual orientation, or disability bias accounted for 11.9% of all hate crimes.<sup>8</sup> In other words, *11.9% of all hate crimes*

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<sup>6</sup> [https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/037/chapter53/chap53toc.html&d=.](https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/037/chapter53/chap53toc.html&d=)

<sup>7</sup> <https://www.adl.org/adl-hate-crime-map>.

<sup>8</sup> *Id.*

recorded by the Pennsylvania State Police during this five-year period were crimes not covered by Pennsylvania's hate crime laws.

Unfortunately, it is highly likely that these figures understate the true number of hate crimes motivated by gender, gender identity, sexual orientation, and disability bias in Pennsylvania. Because the law does not provide hate crime protections for victims who are targeted based on these protected characteristics, these victims may be more reluctant to come forward to report these crimes, and law enforcement may not be equipped to recognize and respond to such crimes when victims or witnesses do come forward. In addition, it is well documented that victims are far more likely to report a hate crime if they know a special reporting system is in place – if they believe the police are ready and able to respond effectively.

Legislation must also be enacted to encourage the reporting, investigation and prosecution of hate crimes in the Commonwealth. We must require schools and postsecondary institutions to offer online and anonymous reporting options for students and employees. Anonymous online reporting alerts campus police of a possible hate crime while at the same time serving as an early point of contact, when a victim can learn about the steps required to file a formal report. In addition, we must provide our law enforcement officials with the tools they need to properly investigate, identify and report crimes of ethnic intimidation.

These updates to our hate crimes laws have been introduced in successive legislative sessions without receiving any committee or floor votes. These pieces of legislation deserve bipartisan support.

### **Support Anti-Bias Education in K-12 Schools & Invest in Diversion Programs for Adults:**

The best way to combat prejudice is through anti-bias education, to prevent hate from taking root among our young people. We encourage Pennsylvania lawmakers to pass anti-bias education legislation similar to Act 70, which strongly encourages Holocaust education in Pennsylvania schools. Like Act 70, this legislation could create a steering committee of anti-bias education experts to advise schools on high-quality anti-bias educational resources.

### **Ensure Priority Attention is Given to Online Hate and Harassment:**

Hate and harassment have infiltrated online spaces, including social media and games, but our laws have not kept up. Many forms of severe online misconduct are not consistently covered by cybercrime, harassment, stalking and hate crime laws. Pennsylvania should increase protections for targets of cybercrimes such as doxing and swatting. Elected officials also should urge social media platforms to institute robust governance. Urge technology companies to recognize their role in being part of the solution: Every social media and online gaming platform must have clear terms of service that address hateful content and harassing behavior, and clearly defined consequences for violations. These policies should state that the platform will not tolerate hateful content.

The internet plays a vital role in allowing for innovation and democratizing trends, and that should be preserved. At the same time, the ability to use it for hateful and severely harmful conduct needs to be effectively addressed. Law enforcement is a key responder to online hate, especially in cases when users feel they are in imminent danger. Increasing resources and training for these departments is critical to ensure they can effectively investigate and prosecute cyber cases, and that targets know they will be supported if they contact law enforcement.

## **Conclusion**

Our data clearly and decisively illustrates that hate is rising across America and domestic terrorism will continue to be a grave threat to our communities. On behalf of the ADL, we look forward to working with you as you continue to devote your urgent attention to the issue.

Testimony for the “Oath of Office” Hearing  
Dr. Lauren Apter Bairnsfather  
Director of the Holocaust Center of Pittsburgh  
January 20, 2021

The siege on the Capitol in Washington, D.C., on January 6, 2021, was the culmination of years of online misinformation aimed at promoting violence. Two images in particular have become emblematic of that day - a man walking through the Capitol rotunda waving the confederate flag and a man wearing a shirt that read “Camp Auschwitz” on the front and “Staff” on the back.

In 2020, the Conference of Material Claims Against Germany, also known as the Claims Conference, released the results of a survey of American adults. The results of that survey indicated that people do not know what Auschwitz was. One of many concentration camps, and a small number of Nazi killing centers in occupied Poland, Auschwitz has become synonymous with the Holocaust. At Auschwitz, Nazis carried out the systematic murder of nearly one million of the 6 million Jews killed in the Holocaust. Yet in 2020, 41% of all adults surveyed by the Claims Conference, and 66% of all millennials surveyed, did not recognize the word.

I have worked in this field for more than half of my life, and the field has changed. From emphasizing the Jewish experience to trying to use the example of the Nazis and their allies and bystanders to understand perpetrator behavior. What accounts for man’s inhumanity toward man? How do we understand a call to violence like what we saw on January 6 at our Nation’s Capitol? How do we understand the power of propaganda, denial, and complicity? The power of “Camp Auschwitz.”

The same Claims Conference survey that found a profound lack of Holocaust knowledge also asked if Holocaust education should be compulsory in schools. We should be encouraged by the results for the Commonwealth of Pennsylvania. Sixty-seven percent (67%) of respondents agreed that Holocaust education should be compulsory in schools. This indicates that the implementation of PA Act 70 of 2014 worked to establish the importance of Holocaust education in the Commonwealth.

In 2014, the legislature unanimously passed Act 70, legislation which strongly recommended that the Holocaust, Genocide, and Human Rights be taught in public schools, grades 6 through 12. The act articulated its purpose as follows:

To provide children with an understanding of the importance of the protection of human rights and the potential consequences of unchecked ignorance, discrimination and persecution, it is a matter of high priority that children in this Commonwealth be educated concerning the Holocaust, genocide, and other human rights violations.”

The Holocaust Center of Pittsburgh contributed to the implementation of Act 70 by gathering resources and conducting trainings for educators and school administrators, working with the PA Department of Education and our regional Intermediate Units.

Act 70 was deemed a success in 2017, with more than 90% of school units participating in an Act 70 training.

From inside the Holocaust Center, we knew that this would not be enough to curb the growth of hate movements online and in our region. This was made painfully clear on October 27, 2018, when the Tree of Life building, in the heart of Pittsburgh’s Jewish neighborhood, Squirrel Hill, was attacked by a violent White Supremacist. Robert Bowers attacked the building armed to the teeth, murdering eleven people in the deadliest antisemitic attack in American history. It was the quick action of Rabbi Jeffrey Myers inside the building and rapid law enforcement response that kept this terrible tragedy from being even more deadly.

Three congregations met at the Tree of Life Building in October of 2018 - Tree of Life \* Or L’Simcha, New Light, and Dor Hadash. Each congregation lost members on October 27, 2018.

The perpetrator was active on the social network Gab. Fueled by antisemitism and xenophobia, he had broadcast his intentions to attack Pittsburgh’s Jewish community. His paranoid worldview was built and nurtured by online campaigns of disinformation and propaganda.

We can draw direct lines from the attack on the Tree of Life to the attack on two mosques in Christchurch, New Zealand, to the attack on Chabad of Poway in Poway, California, to the attack on the Capitol on January 6, 2021.

We can know with 100% certainty that anyone wearing a “Camp Auschwitz” shirt on January 6 was broadcasting a specific worldview, where Jews are less than human and are marked for elimination.

To combat violent hate in 2021, social media platforms must recognize references to the Holocaust and the credible threat they imply to individual lives.

Antisemitism is the core of White nationalism. With rare exceptions, groups that espouse antisemitic beliefs also stand for racism, xenophobia, and other categories of hate and bigotry. The confederate flag, so flagrantly on display at the Unite the Right rally in Charlottesville in August 2017, and again on January 6 at the Capitol, sounds the clarion call to white supremacy and racist hatred.

Let me elaborate - The confederate flag - a celebration of the Confederacy, is no longer exclusively anti-Black. It is the banner of the kind of violent hatred that we saw on display on January 6. The Confederate flag represents a threat to American Democracy.

Public figures and scholars immediately began to compare what happened on January 6 with the Holocaust. Let me share the warning I see in both the Nazi war against the Jews and other minorities and the riot at the Capitol. Both the Holocaust and the attack on the Capitol were the culmination of multi-year campaigns of propaganda, denial, and complicity.

In the Winter of 2019, the Holocaust Center of Pittsburgh began a rural outreach program, aimed at reaching middle and high school students in Western Pennsylvania who are vulnerable to recruitment into hate groups. The program relies on in-person outreach, and our progress has been hindered by COVID restrictions. As we closed the doors to the Holocaust Center and began to work remotely, I shuddered to think of the opportunity isolation presented for hate groups. With our lives and schools moving online, and with hate groups already advanced in the use of social networks, we faced a perfect storm.

Hate spreads on social media. Last year, we discovered an Instagram account called “Zyklon B.” Zyklon B was the poison gas used at the Nazi killing centers. Nazis arrived at this method of killing after the Nazis and their allies had killed at least one million Jews in what was then the Soviet Union with bullets. This method of killing took a toll on the killers - it was too personal to look someone in the eye and shoot them. The use of Zyklon B allowed Nazis to kill hundreds of Jews and Roma at one time from a distance.

It was an instrument of genocide. I reported this account repeatedly and never succeeded in gaining any traction with Instagram.

Indeed, hate groups function in corners of the internet unknown to many of us; yet hate groups also succeed in spreading misinformation through the most commonly used online platforms and through the mainstream media. Here I call out media outlets across the political spectrum. When ratings supersede facts, society pays the price.

Magda Brown, a Holocaust Survivor from Skokie, Illinois, was scheduled to speak in Pittsburgh on October 28, 2018. Owing to her advanced age, she and her daughter Rochelle booked tickets to fly to Pittsburgh on October 27. They sat at the airport as the news broke that there was an active shooter at a synagogue in Pittsburgh. Faced with the choice to come to Pittsburgh or cancel her appearance, Magda insisted, "Now the message is more important than ever! Let's go!"

I ask all of you:

Will you renew your commitment to education about the Holocaust, Genocide, and Human Rights?

Can we learn that the violence and disinformation that currently threaten our Democracy, are straight out of recognizable playbooks of the past?

Can we teach that there is no room for this kind of organized violent hatred in a healthy Democracy?

Thank you

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The Holocaust Center of Pittsburgh connects the horrors of the Holocaust and antisemitism with injustices of today. Through education, the Holocaust Center empowers individuals to build a more civil and humane society.

For more information, see [www.hcofpgh.org](http://www.hcofpgh.org)

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Testimony for PA House of Representatives Policy Committee Hearing: “Oath of Office”

January 21, 2021

Thank you for convening this hearing today and for inviting me to testify on my experience during the attack on the Capitol on January 6, 2021.

I never thought I’d fear for my life as a member of Congress inside the U.S. House of Representatives, but that’s exactly what I experienced on that day.

I started the day with a virtual call of Pennsylvania delegation members. Arriving at the Capitol at around noon, I entered the House chamber and took a seat on the far end of the gallery, to observe the proceedings below on the House floor. I knew it would be a while before Pennsylvania would come up in the election certification process, since it occurs alphabetically and since I knew that certain Republican members would likely object to the certification of earlier states.

Having seen the same signs that the general public had seen—particularly media reports that certain individuals had posted on social media channels about bringing weapons to Washington that day—I was concerned about the potential for violence and, like many of my colleagues, instructed my staff to work remotely on Wednesday. I had not seen the President’s earlier remarks to the crowd, however, and the beginning of the proceedings felt normal.

The first sign I got that a major disturbance was occurring was a text message from Capitol Police, warning about the crowd gathering outside. A second message said that individuals had breached the Capitol’s external perimeter. Then the third message came, stating that they had breached the Capitol’s internal perimeter.

At this point, I began seeing and hearing Capitol Police Officers run through the hallways. Speaker Pelosi and Majority Leader Hoyer were soon whisked away. Despite the chaos breaking out, the Sergeant-at-Arms told everyone else to stay calm and to remain in our seats.

Proceedings were still going on, but the members around me had stopped paying attention. I started scoping out the surroundings—trying to figure out where to duck if necessary. Suddenly, officers began locking the doors of the gallery behind us and started assembling a makeshift barricade with nearby furniture. They told us to check under our seats for gas masks and to put them on because Capitol Police were planning on deploying teargas against the attackers.

This is when complete mayhem broke out in the Chamber. Members on the floor started running and made their way out, but those of us in the gallery were trapped. One of my colleagues also sitting in the gallery, Rep. DeGette of Colorado, cried out, “What about all of us?”

The members seated alongside me in the gallery got up and started moving toward the one nearby door that remained unlocked. Navigating the extremely small and narrow aisles of the gallery amidst the rising tension, the group advanced extremely slowly. Finally, I reached the exit—only to be told that I couldn’t go through. Capitol Police Officers had been forced to barricade that door as well to protect us from another disturbance.

Turning back, I heard Officers shout “Get down! Get Down!” I began crawling my way back through the gallery. At this time, I heard colleagues like Rep. Sewell of Alabama and Rep. Crow of Colorado start to make phone calls to their loved ones. I decided to FaceTime my kids, my 27-year old son Clay and my 24-year old daughter Addie. I didn’t want to unnecessarily alarm them but, at the same time, I wasn’t certain that I’d ever be able to see or talk to them again. I told them that I loved them and that I would be okay. My son said, “We hear gunshots and breaking glass in the background. How can you say you’re okay?”

After that call, the full reality of the moment started setting in. It activated a paralyzing sense of panic within me. Outside, I could hear what sounded like bullets ricocheting in the hallway. While I don’t remember the exact moment, this was around the time that I found myself on my back, gripping Rep. Crow’s hand—a moment captured in a photo that has since circulated widely in the media. Rep. Crow assured me that we would make it out alive. As a former Army Ranger who had done multiple tours in Afghanistan and Iraq, he surely had firsthand experience with people experiencing extreme panic and must have recognized that this is what I was going through.

Out of all my recollections, this is the time period that feels most like a blur. It is difficult for me to say whether 5 or 30 minutes had passed when officers announced that we were clear to exit under their protection. After a frantic, chaotic exit in which I lost my right shoe, we moved through obscure, labyrinthine hallways—passing through many places in the Capitol I had never even seen.

We reached a large conference room, which served as a secure location for House members. We stayed sequestered there for around 6 hours.

Ultimately, once Capitol Police had cleared the complex, we made it back to the House floor to finalize the business of certifying the election. Crucially, the work of our democracy was interrupted but not stopped. The will of the people of Pennsylvania—and the American people as a whole—prevailed.

As I reflect on what occurred, I first want to pay tribute to Capitol Police Officer Brian D. Sicknick, who died protecting our democracy from the traitors attempting to betray and destroy it. Officer Sicknick put his life on the line for his country, and he was violently assaulted and killed because he refused to abdicate his oath. Every American should mourn his passing.

I also want to pay tribute to the many other Capitol Police officers who responded heroically to the attack and protected our nation’s elected officials. Badly outnumbered and ill-served by their superiors and by system-wide failures, these officers found themselves in an uncontrollable situation that never should have reached the point that it did. I will never be able to fully express my gratitude for the extraordinary officers who, in these tragic circumstances, battled the assailants with every fiber of their being. I am heartbroken for the family of Officer Sicknick, as well as for the families of the many officers who experienced extremely severe injuries in the attack.

It is for them, for our entire nation, and for the future of our democracy, that I believe that there must be accountability for what occurred. With one voice, our nation must make clear that what happened on January 6 will never be allowed to happen again.

The only way that I know to achieve that outcome is to hold those responsible to account, no matter how powerful they are. That is why I support prosecuting the attackers to the fullest extent of the law, and it's why I voted to impeach President Trump—a vote I took alongside ten conservative Republicans.

While we hold starkly different views on many issues, those Republicans came to the same conclusion I did: After months of patently false claims about the outcome of the 2020 presidential election and the possibility of somehow overturning the result, President Trump whipped the assembled crowd earlier that day into a frenzy, calling on the mob to “walk down to the Capitol” and rise up against an election certification process in Congress that he described as a coverup for the “theft” of an election he claimed to have won. President Trump insinuated that he would join them at the Capitol, saying: “And after this, we’re going to walk down, and I’ll be there with you, we’re going to walk down, we’re going to walk down.” Later, as the attack was ongoing, the President failed to take unequivocal and decisive action to end the insurrection.

In the face of this lawless behavior, I am proud that the House did its constitutional duty—refusing to be deterred from holding a vote on impeachment. Now, every U.S. Senator must do their patriotic duty and uphold the oath of office they swore to “support and defend the Constitution of the United States.” As part of that oath, they have an obligation to fairly and fully consider the evidence that will come before them in the upcoming Senate trial. If no one is above the law in our country, everyone found to be involved—from President Trump on down—must face the consequences of their actions.

The need to ensure accountability is also why I have joined colleagues across the House in calling for an independent, impartial, and thorough investigation—modeled after the 9/11 Commission—to study every aspect of this attack and issue recommendations to prevent anything like it from happening in the future.

Like so many Pennsylvanians and so many Americans, I am sickened by the images and accounts we have seen from that day—reporting that exists only because courageous journalists put their own lives at risk in order to inform the public: The anti-Semitic and racist symbols carried into the Capitol by the attackers. The assailants breaking into the chambers to look for members of Congress. The gallows set up outside and the threats to “hang” elected officials, including Vice President Pence. The pillaging of the Capitol. And, above all, the horrific violence targeting law enforcement and aiming to overthrow our democracy.

The attack on January 6 should have never happened. Had President Trump recognized his loss and conceded the 2020 election—the most basic rule of the road in our democracy and an action that he still refuses to take—it is extremely likely that we would not be having this hearing today.

As we work to rise above the events of January 6, the only way we can truly move forward is if we are honest about delivering justice. Patriots of all political beliefs can surely come together around that cause. Together, let us protect our Constitution and strengthen our democracy—in our time and for generations to come.

Thank you.

**Free Speech, Hate Speech and Hate Crimes  
Keeping us Safe and Free  
Pennsylvania House Policy Committee  
January 21, 2021**

**Frederick M. Lawrence  
Secretary and CEO, The Phi Beta Kappa Society  
Distinguished Lecturer in Law, Georgetown University Law Center**

**Keeping Society both Safe and Free**

We are living in a time in which fundamental rights are colliding. Freedom of expression is fundamental both to our private lives and to our lives as citizens. Indeed, it is fundamental to the very idea of a democratic society and a self-governing people. And yet, of course, free expression has its limits.

In the context of threats or incitement, we are at the intersection of 1) freedom of expression and 2) personal safety for oneself, one's family, and one's property. In the context of hate speech and hate crimes, we are working at the intersection of those two sets of significant individual and societal rights as well as a third interest: for people to be treated equally in a multicultural society. This third interest is about personal dignity. There are many ways in which dignity may be understood. What I have in mind is the concept concerned with a person's basic social standing, and the interest in being recognized as "proper objects of society's protection and concern."<sup>1</sup> If the right to one's safety is inherently individualistic and about liberty, the right to one's dignity is inherently comparative and about equality – to have one's dignity respected is to be accorded the same basic social standing as any other member of the society. As Lyndon Johnson is said to have answered a question concerning the moral necessity for the Civil Rights Act of 1964, "A man has the right not be insulted in front of his children."

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<sup>1</sup> Jeremy Waldron, [The Harm in Harm Speech](#) (2012).

It has never been more important to articulate the boundaries of free expression in a way that is fully protective of our robust ability to express ourselves but is consonant with the safety and dignity of all members of our society. For over thirty years, as a scholar and advocate in the field of hate crimes and hate speech, I have sought to locate the boundaries of free expression with this task in mind. In my testimony, I will outline the fundamentals of hate crime law in general and in Pennsylvania in particular. I will then discuss why hate crimes should be punished more severely than similar crimes that lack bias motivation, and finally, returning to the subject of free speech, how hate crime laws and laws punishing incitement are fully consistent with our system of free expression under the First Amendment.

### **The Nature of Bias Crimes**

I begin with a brief discussion of precisely what a bias crime is. I prefer the term “bias crime” to the more popularly used term “hate crime.” Although “hate crime” is a powerfully evocative term, “bias crime” captures more precisely what is at stake when we analyze violent and criminal manifestations of prejudice.

The essential element of a bias-motivated crime is that the perpetrator is drawn to commit the offense because of the victim’s race, ethnicity, religion, national origin, sexual orientation, or other group identification. Many instances of personal, violent crimes may be motivated all or in part by hatred per se for the victim. If, however, there were no bias motivation, this conduct would not be considered a civil rights crime. Bias is thus best understood as a special case of hatred, one based on group membership and expressing a form of discrimination that has a social and historical context. However evocative the phrase “hate crime” may be, it can distract from and obscure what is really at stake, whereas the term “bias crime” focuses and clarifies that.

What, then, is a bias crime? While the answer looks both to the motivation of the criminal and the results of his or her conduct, the motivation—what is known in criminal law doctrine as "*mens rea*"—is the key to identifying a bias crime. For example, Robert Barrows' October 27, 2018, shooting spree at the Tree of Life synagogue in Pittsburgh, specifically targeting a Jewish place of worship during a time at which religious services were being held, was properly charged as a religiously-motivated bias crime. In contrast, an interracial fight between a landlord and tenant that erupts following an argument over the level of heat provided to the tenant is not a bias crime.

This brings us to the question of which biases count as constituting a "bias motivation?" Who is a victim of a bias crime? The answers have their roots in a society's very definition of itself. "Bias" in Pennsylvania's Ethnic Intimidation statute includes bigotry on the basis of race, color, religion and national origin. 18 PA Stat. §2710(a). [The full text of section 2710 is reprinted as an appendix to this testimony.] Many states now include gender, sexual orientation, and sexual identity. The breadth of the Pennsylvania Ethnic Intimidation may well be the subject of further legislative action. The scope of what constitutes "bias" adopted by a particular legislature is in fact a significant statement of that society's values and its sense of equality.

Determining what a bias crime is and the categories of its victims leaves two critical questions for consideration: whether bias crimes deserve enhanced punishment, and whether enhanced punishment of bias crimes is an inappropriate punishment of "thought crime" or is consonant with principles of free expression.

## The Enhanced Punishment of Bias Crimes

Crimes consist of two elements: criminal intent, or *mens rea*, and the criminal act, or *actus reus*. Similarly, the severity of a crime is determined by two factors: the *mens rea* of the actor and the harm his or her act causes. Determining the severity of a crime is critical in the process of determining the appropriate sentence to be imposed. Proportionality is a key concept in criminal punishment, whether we believe as did Immanuel Kant and other retributivists that punishment is based on that which is deserved by the perpetrator for the wrong committed or whether we instead agree with Jeremy Bentham and other utilitarians that punishment is based on achieving the optimal deterrence of crime for the greatest good to society. The requirement that "the punishment fit the crime" reflects that sense of proportionality, so in order to determine the relative punishments for various crimes, there must be a means by which to measure the relative seriousness of those crimes.

Where the level of intentionality for two crimes is roughly the same—as is often the case with assault and murder—the relative seriousness of the crimes is best measured by the harm caused: murder is worse than even the most purposeful assault. Similarly, when comparing intentional assaults and intentional bias-motivated assaults, we would look to the harm caused by each category of crime to determine suitable punishment. Although we cannot measure relative harm with arithmetic precision, numerous factors can guide our understanding: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the target community; and the harm to society at large. When we apply this analysis of relative harm to bias crimes, we see that bias crimes warrant harsher punishment than what I call “parallel crimes,” similar crimes lacking bias motivation.

A bias criminal attacks the victim not only physically, but at the very core of his or her identity, making it an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of one's race or religion, for example. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. The victims of bias crimes tend to experience psychological symptoms such as depression, withdrawal, anxiety, feelings of helplessness, and a profound sense of isolation. Additionally, bias-motivated attacks, when directed against minority victims, trigger the history and social context of prejudice and hate-motivated violence against the victim and the victim's group. The image of a burning cross, for example, is far more than a single act of vandalism, conjuring up the violent legacy of slavery stretching back centuries and its modern manifestation, white supremacy. Hence, the bias component of crimes committed against minority group members is not merely associated with prejudice per se, but often with prejudice against a member of a historically oppressed group. Nevertheless, bias crime laws are colorblind, and protect all victims of bias-motivated violence, whether or not they be members of groups that have been discriminated against. When the United States Supreme Court upheld the Wisconsin bias crime law in *Wisconsin v. Mitchell*, the case before the Court involved a defendant who was Black and victim who was Caucasian.<sup>2</sup>

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more widespread impact on the "target community"—that is, the community that shares the race, religion, or ethnicity of the victim—and an even broader harm to society in general. Members of a target community experience a bias crime far more deeply than the public experiences a parallel crime. The reaction of the target

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<sup>2</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

community is one of empathy with the victim, and members of that community often perceive the crime as if they were each directly attacked.

Consider the burning of a cross on the lawn of an African-American family or the spray-painting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries done to these families, have feelings of anger or hurt, and sympathize with the victims. The reactions of members of the target community, however, will transcend those. The cross-burning and the swastika-scrawling will not just conjure similar feelings of victimhood and fear on the part of other Blacks and Jews respectively. Rather, members of these target communities may experience reactions of actual threat and attack from this very event. Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial or religious characteristics with the victims. In the immediate aftermath of the True of Life shooting, for example, Jewish Americans across the country experienced the behavior patterns associated with actual crime victims. The additional harm of real or perceived personal threats to people other than the immediate victims differentiates a bias crime from a parallel crime and makes it more harmful to society.

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect encompasses a large array of harms from the very concrete to the most abstract. On the most mundane level—but by no means the least damaging—the resulting isolation of a particular group, as discussed above, has a cumulative effect on the community at large. Consider a family victimized by an act of bias-motivated vandalism who then begin to withdraw from society; the family members seek safety from an unknown assailant who, having sought them out for clear reasons, might do so again. Members

of the community, even those who are sympathetic to the plight of the victim's family and who have been supportive of them, may be reluctant to place themselves in harm's way and may shy away from socializing with these victims or from letting their children do so. Thus, the isolation of this family will not be solely a result of their own withdrawal, but the community will isolate them as well, injuring both the family and society at large.

Bias crimes cause an even broader injury to the general community, threatening the community's core values. Such crimes violate not only society's general concern for the security of its members and their property, but also the shared values of equality and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the opposition to discrimination that have become fundamental aspects of the American legal system, and of American culture as well.

This harm is, of course, highly contextual. We could imagine a society in which, for example, racial motivation for a crime would have no greater impact than a criminal act motivated solely by the perpetrator's dislike of the victim. Given America's legal and social history, however, ours is not such a society. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes do to the immediate victim, the target community, and society at large.

The bias-motivated criminal seeks to inflict a greater harm than that caused by a crime of otherwise similar intensity with no bias motivation. The appropriate response of the criminal justice system is to identify the bias crime as something related to, but ultimately distinct from and worse than, the parallel crime, and to impose a criminal sentence of greater severity as a means of punishment.

## The Conflict between the Punishment of Hate and Freedom of Expression

Although the question of whether bias criminals deserve enhanced punishment is significant, legal scholars, journalists, and other commentators have focused more attention on whether the enhanced punishment of bias criminals comports with our commitment to freedom of belief and expression. I refer to this as the "bias crimes/hate speech paradox." Is it possible to enhance the sentences of bias-motivated crimes when the right to free expression of ideas, no matter how distasteful or hateful, is a fundamental constitutional principle? How much intolerance a liberal democracy should tolerate is a question that has fueled debate for years.

The apparent paradox of seeking to punish the perpetrators of bias-motivated violence while being committed to protecting bigots' rights to express their prejudices is actually not a paradox at all. We must focus on the basic distinction between bias crimes and hate speech; the criminal manifestation of prejudice may be punished whereas the articulation of prejudicial views, no matter how unpleasant, is protected. This distinction has been blurred (or denied) by commentators and courts alike, including, for example, the Supreme Court in *R.A.V. v. City of St. Paul*<sup>3</sup>, where the Court struck down a St. Paul, Minnesota ordinance banning cross-burning or other displays that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" and *Wisconsin v. Mitchell*, in which the Court upheld that Wisconsin law providing penalty enhancements for bias-motivated crimes. Others have suggested either that both bias crimes and hate speech be protected, or that both be punished. But we may and should reject these extremes in favor of a middle position.

The basic distinction between a bias crime and hate speech lies in the underlying motivation of the actor, which can be ascertained by looking at the non-bias element of the

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<sup>3</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

behavior involved. The non-bias element of hate speech is expression, a form of behavior that, however offensive, is protected and should not be made criminal. Speech advocating racial superiority is, bias aside, the expression of an opinion. The non-bias element of a bias crime, however, is an actual parallel crime that is punishable. Burning a cross on the lawn of a Black family, bias aside, is still at least trespassing and would probably warrant a charge of endangerment, assault, or arson.

Free expression protects the right to express offensive views but not the right to behave criminally. This is true even when the parallel crime consists solely of speech. Bias-targeted behavior that is intended to create fear in its targeted victim or to incite others to bias-motivated violence is a bias crime, whether the behavior is primarily verbal or physical. Behavior that vents the actor's bigotry and perhaps upsets the addressee greatly is, on the other hand, hate speech that is protected by the First Amendment. The enhanced punishment of bias crimes, therefore, is fully consonant with our constitutional guarantees of free expression.

### **When Expression Crosses the Line**

We began by recognizing the core value of free expression in our society. This is the reason that under our legal principles, speech is presumed to be protected. As Justice Oliver Wendell Holmes, Jr. wrote:

If there is any principle of the constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate.<sup>4</sup>

Justice Louis D. Brandeis, Holmes' celebrated fellow dissenter, wrote in *Whitney v. California* that ordinarily, the answer to harmful or hateful speech is not "enforced silence" but,

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<sup>4</sup> United states v. Schwimmer, 279 U.S. 644 (1929) (Holmes, J., dissenting).

rather, “more speech.”<sup>5</sup> The powerful dissents of Justices Holmes and Brandeis found their way into the law, especially in the seminal holding of *Brandenburg v. Ohio* in which the Court concluded that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation.”<sup>6</sup>

But the presumption that expression, even hateful expression, is protected is not an *irrebuttable* presumption. Brandeis planted the seeds in his concurrence in *Whitney*. The answer to bad speech was more speech, *except* in those rare cases in which the harm from speech is real and imminent. As the Supreme Court articulated in *Brandenburg*, a state may not proscribe advocacy of the use of force or the violation of the law “*except* where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>7</sup> In those cases of actual incitement, the law is not required to stand idly by. Nor must law enforcement wait until harm has occurred before stepping in to protect potential victims of criminal conduct. As we know all too well, failure to act to prevent harm can result in tragic outcomes.

We may conclude by bringing *Brandenburg* to bear on the bias crimes/hate speech paradox. Expression that has as its purpose the communication of ideas, even hateful ideas, is protected speech. But verbal behavior that is intended to produce imminent lawless action and is likely to do so, may be prohibited. We may stay safe while we are staying free.

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<sup>5</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>6</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

<sup>7</sup> *Id.* (emphasis added).

**Final thoughts**

It has been nearly seventy years since legendary psychologist Gordon Allport asked whether America would continue to make progress toward tolerance and stand as a "staunch defender of the right to be the same or different," or whether "a fatal retrogression will set in."<sup>8</sup> The legal response to hate crimes discussed above is only one set of means of answering Allport's call but they do constitute a critical element in the defense of the "right to be the same or different."

A strong legal response to bias crimes, including criminal law enforcement, will not by itself end bigotry in our society. If, however, we are to be "staunch defender[s] of the right to be the same or different," we cannot desist from this task. It is incumbent upon our federal and state governments, in ways that are fully consistent with our commitment to free expression, to protect all members of our society, and celebrate a diverse and inclusive America.

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<sup>8</sup> GORDON ALLPORT THE NATURE OF PREJUDICE, 480 (1954).

**§ 18 PA Stat. §2710. Ethnic intimidation**

**(a) Offense defined.--**A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, he commits an offense under any other provision of this article or under Chapter 33 (relating to arson, criminal mischief and other property destruction) exclusive of section 3307 (relating to institutional vandalism) or under section 3503 (relating to criminal trespass) with respect to such individual or his or her property or with respect to one or more members of such group or to their property.

**(b) Grading.--**An offense under this section shall be classified as a misdemeanor of the third degree if the other offense is classified as a summary offense. Otherwise, an offense under this section shall be classified one degree higher in the classification specified in section 106 (relating to classes of offenses) than the classification of the other offense.

**(c) Definition.--**As used in this section "malicious intention" means the intention to commit any act, the commission of which is a necessary element of any offense referred to in subsection (a) motivated by hatred toward the race, color, religion or national origin of another individual or group of individuals.