

Report to Congress

The Role of Telecommunications in Hate Crimes



U.S. DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

The National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce was established in 1978 by Executive Order 12046, and its functions were codified in 1992. NTIA serves as the President's principal adviser on telecommunications policies pertaining to the nation's economic and technological advancement and to the regulation of the telecommunications industry. NTIA develops Executive Branch views on communications and information policy and seeks to present that policy effectively to the Federal Communications Commission, Congress, and the public.

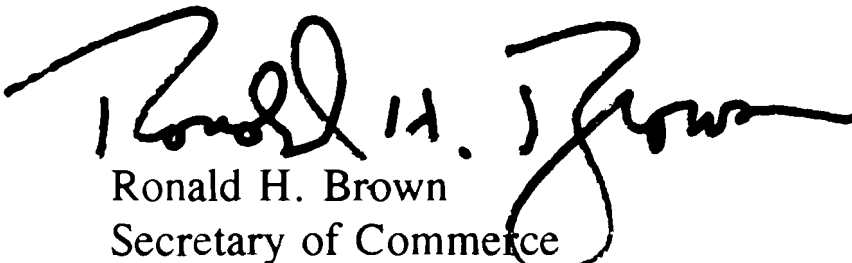


MESSAGE FROM THE SECRETARY

Sadly, hatred and bigotry persist in our society. "Hate crime" — crime directed at people because of their race, religion, ethnicity or sexual orientation — is a destructive manifestation of the divisions that threaten to rend the fabric of our nation. Americans must stop the spread of intolerance, and extinguish it.

This report focuses on one aspect of this large issue: the use of electronic communications media to advocate or encourage the commission of hate crimes or to spread messages of hate. It also examines the value of the media as a tool to counter the effects of intolerance.

Hate crime and hate speech will end only with the elimination of their underlying causes. This report looks at ways in which the federal government and private citizens can aid in this endeavor.


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Secretary of Commerce

The Role of Telecommunications in Hate Crimes

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EXECUTIVE SUMMARY

Racism and bigotry strike at the heart of those values that the United States cherishes in its society -- especially the fundamental tenet that all persons are created equal. Despite the progress that has been made over the last few decades, there unfortunately remain vestiges of racial, ethnic, or other types of prejudice in some Americans. In some instances, those prejudices run so deep that they motivate the commission of so-called "hate crimes" -- crimes directed at individuals because of their race, religion, ethnicity, or sexual orientation.

There has been concern that some are using telecommunications to advocate and encourage the commission of hate crimes. Because telecommunications by its nature involves expression (often combining images and sound), government's response to these concerns must be measured with respect to other cherished rights -- particularly those guaranteed by the First Amendment.

In 1992, Congress directed the National Telecommunications and Information Administration (NTIA) to undertake an examination of the use of telecommunications, including broadcast radio and television, cable television, public access television, and computer bulletin boards, to advocate or encourage violent acts and the commission of crimes of hate against designated persons or groups. This congressional charge is phrased broadly enough to encompass not only messages threatening "imminent unlawful action" -- which are not protected by the First Amendment -- but also situations in which the speaker intends to create a climate of hate or prejudice, which in turn may foster the commission of hate crimes.

This report first discusses the nature and frequency of instances in which telecommunications has been used to advocate or encourage the commission of hate crimes. The examples presented are deeply troubling. However, the available data linking the problem of hate crimes to telecommunications remains scattered and largely anecdotal. The record and NTIA's research revealed few cases in which individuals have used telecommunications to advocate openly the commission of hate crimes. Instead, in most instances, individuals have used telecommunications to disseminate messages of hate and bigotry to a wide audience. Although any use of telecommunications to convey prejudice and intolerance is of concern, the extent to which such messages actually lead to the commission of crimes is unclear.

The report then considers possible government responses to the various types of incidents reported and gives recommendations, as appropriate, from a telecommunications policy perspective. It begins with a discussion of First Amendment principles applicable to expressions of hate or bigotry. NTIA endorses the belief, expressed by virtually every commenter, that the best remedy to hate speech is not government restrictions, but more speech, to disseminate views that challenge notions of hate and bigotry. We discuss instances in which hate speech has resulted in community response, and conclude that the

private sector and government can and should play a valuable role in encouraging greater tolerance.

NTIA does not have sufficient information about the use of telecommunications to commit hate crimes to recommend, as a matter of telecommunications policy, enactment of a federal penalty enhancement statute that would apply to such crimes. Similarly, while amendment of the federal civil rights laws to provide greater protection for victims of bias-motivated offenses may be justifiable from a civil rights/civil liberties perspective, it is difficult to make a case for such changes on telecommunications policy grounds given the lack of available data on hate crimes involving electronic media. We recommend that the Federal Bureau of Investigation consider collecting statistics on hate crimes that use telecommunications, as well as classifying hate crime statistics according to whether incidents constitute an apparent violation of state or federal laws. NTIA will also conduct additional meetings with industry and the public to address the role of telecommunications in hate crimes.

Finally, the report discusses telecommunications technologies that allow individuals to protect themselves from receiving unwanted messages, including offensive hate speech. Such technologies include caller ID, which allows subscribers to identify the number of a calling party before accepting a telephone call, call trace, which permits subscribers to trace the origin of incoming calls, and video "lockboxes," which cable television subscribers can use to block out certain programming at a time they select. In the future, variations of video blocking approaches, based on more sophisticated technology, could conceivably give consumers greater control over the programming they receive. However, the First Amendment implications and implementation difficulties of such approaches should be carefully considered.

Ultimately, hate crimes are a manifestation of the bigotry that remains in society. The United States should take steps to combat all forms of prejudice -- not just those that culminate in a crime -- while retaining the virtues of robust debate necessary for a pluralistic society. From the perspective of telecommunications policy, NTIA's recommendations offer some ways in which the federal government can address bias-related crimes that involve the use of telecommunications. However, hate crimes will cease only when society rids itself of the prejudice that motivates them.

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SUMMARY OF FINDINGS AND RECOMMENDATIONS

Section II -- Scope of the Report

Finding

Congress directed NTIA to study "hate speech" that advocates or encourages "hate crimes." We therefore examined speech that fosters a climate of hatred and prejudice in which hate crimes may occur, focusing on situations in which the party that controls the use of the telecommunications facility or service intended to spread messages of hate and bigotry.

Section III -- Data Regarding the Role of Telecommunications in Crimes of Hate

Findings

Radio and television broadcasting: NTIA's research found only a few instances in the last decade in which broadcast facilities have been used to spread messages of hate and bigotry within the scope of this study. In two such instances, radio broadcasts arguably urged an audience to commit a hate-motivated crime. In the other instances, radio broadcast licensees aired programming that evidenced prejudice.

Cable Public Access Television: There have been a limited number of highly publicized programs on cable public access channels promoting messages of hate or bigotry. In some cases, such programming stirred community reaction and was followed by counterprogramming.

Computer Bulletin Boards: During the 1980's, computer bulletin boards were established by various white supremacist and neo-Nazi groups. It is not clear how many such bulletin boards are operating today. Some bulletin boards apparently fell into disuse later in the 1980s, while others may have gone underground.

There has been at least one instance in which users of a national commercial computer bulletin board posted anti-Semitic and other offensive messages. Messages opposing these views reportedly outnumbered the offensive messages by about 100-to-one. Ultimately, the bulletin board operator prohibited expressions of bigotry, racism, and hate.

Telephone Hate Hotlines: In recent years, more than twenty hate "hotlines," which deliver recorded messages of bigotry and prejudice, reportedly have operated in the United States. These hotlines provide callers with a readily accessible means of anonymously associating with hate groups. They typically engage in diatribes against minorities and other groups, and in some instances have openly encouraged violence. White supremacists have also used such hotlines to recruit members and to sell merchandise.

Telephone Harassment and Intimidation: Telephones can be used to intimidate, threaten, or harass individuals or organizations. This may be criminal conduct under federal or state law. Although the FBI reports that intimidation was the most frequently reported hate crime in 1991, accounting for more than one in three offenses, the FBI's data do not specify the number of incidents involving telephones. However, NTIA has identified a number of instances in which telephone callers have made death threats, bomb threats, or obscene or harassing phone calls to specific groups.

Conspiracies: Telephones can be used to form or actuate a conspiracy to commit a crime or to violate an individual's civil rights.

Section IV -- Issues and Recommendations

Findings

Little information is available regarding the extent to which telecommunications is used to advocate or encourage the commission of hate crimes. The evidence is largely anecdotal.

The record and NTIA's research revealed few examples in which telecommunications has been used to advocate the commission of hate crimes. More commonly, a party uses telecommunications to convey messages of hate and bigotry that create a hostile environment, which may in turn encourage the commission of hate crimes. In some instances, this may be part of an overall strategy to foment violence; in other instances, it is not clear whether the speaker intends to provoke action or merely to express a point of view.

NTIA's research suggests that messages of hate represent a very small percentage of all communications through each type of electronic media. While the existence of hateful messages is of concern, it appears that the number of messages promoting tolerance far outweigh messages of hate.

NTIA found little empirical evidence of a causal relationship between telecommunications-based "hate speech" and the occurrence of hate crimes. The use of telecommunications for any hateful purpose is nevertheless of concern.

A. First Amendment Considerations

Finding

The defining characteristic of both hate speech and hate crimes is the bigoted motivation of the speaker or actor. Governmental efforts to control hate speech or hate crimes should be designed not to erode fundamental liberties such as those of the First Amendment.

Recommendations

The best response to hate speech is more speech to educate the public and promote greater tolerance, rather than government censorship or regulation. This is consistent with the well-recognized theory that free speech serves an "enlightenment function."

Government can take further steps to ensure that hate speech is met with more speech. Examples include:

- Intensifying efforts by government officials to speak out against bigotry and prejudice in American society.
- Encouraging the private media industries to produce and disseminate programming to counter messages of hatred and prejudice, and to educate their audiences about the destructive impact of intolerance.
- Arranging meetings among NTIA, industry, and affected groups to continue discussions regarding hate crimes and hate speech involving the use of telecommunications.

The federal government could use existing mechanisms, such as the Community Relations Service of the U.S. Department of Justice, to bring parties together to resolve disputes and disagreements relating to discriminatory practices.

B. Legal Remedies

1. Criminal Penalties

Findings

Many illegal acts involving the use of telecommunications can be prosecuted under existing federal criminal laws. Many states have enacted "penalty enhancement" statutes that increase penalties for bias-motivated criminal actions. Congress is now considering a similar statute, which would increase permissible sentences for existing federal crimes, if motivated by bias.

The paucity of data on the occurrence of federal hate crimes involving telecommunications does not provide a basis, on telecommunications policy grounds, for determining whether a federal penalty enhancement statute should be adopted.

Recommendation

The Federal Bureau of Investigation should consider whether to modify its collection of statistics on hate crimes to include those that use telecommunications. The FBI should also consider whether to report hate crime statistics indicating whether the offenses involve federal or state crimes.

2. Civil Remedies

Findings

Although criminal prosecution will likely be the most effective government response to hate crimes, civil proceedings also can be powerful tools for punishing or deterring bias-related incidents. Civil actions afford the victim an opportunity to receive compensation from his or her assailant for injuries suffered in an assault, and have other features that make them an effective weapon for combating hate crime.

Some states have enacted statutes creating a civil cause of action for victims of hate crimes. Federal law also authorizes civil actions to remedy private and government violations of civil rights, but the principal pertinent civil rights statutes are sufficiently narrow in scope or uncertain in application to limit their usefulness as a weapon against hate crimes, including those using telecommunications.

Recommendation

Although telecommunications facilities may play a role in conspiracies to commit hate crimes, neither the record nor NTIA's research provides information on how common such conspiracies are. Amendment of the federal civil rights laws may be justifiable from a civil rights/civil liberties perspective. However, NTIA has no sound basis, as a matter of telecommunications policy, for making such a recommendation.

C. Technologies That Can Protect or Empower Targets of Hate Speech

1. New Telephone Services: Caller ID and Call Trace

Findings

Telephone services such as caller ID and call trace could enable consumers to protect themselves from offensive messages by allowing them to make more informed choices on whether to accept a call.

However, approval of caller ID by state and federal regulatory agencies has been slowed by controversy over the competing privacy rights of callers and called parties.

Other factors, including limited deployment of advanced signaling technologies in local central offices, and disagreement between local exchange carriers and interstate carriers over the terms of carriage for calling party number information, have also slowed deployment of this service.

Recommendation

Federal and state regulators should consider the utility of caller ID and similar services in preventing or limiting hate-related telephone calls when determining whether to permit the offering of such services.

2. Channel Blocking for Video Services

Findings

The 1984 Cable Act requires cable system operators to make available, at a subscriber's request, a "lockbox" or parental key through which subscribers can prevent viewing of particular cable services at their homes during times they select.

Certain provisions of the 1992 Cable Act, although not specifically applicable to messages of hate, offer another approach to limiting the delivery of undesirable messages to cable subscribers. These provisions require cable operators to block certain channels when those channels carry indecent programming, and give subscribers the right to request blocking of other channels under certain conditions.

Recommendation

In the future, variations of the approaches described above, based on more sophisticated technology, could conceivably give consumers greater control over the programming they receive. However, the First Amendment and implementation aspects of such approaches should be carefully considered.

An interracial couple's home is severely damaged by fire and sprayed with neo-Nazi graffiti after the couple received anonymous phone calls that said, "Get Out Nigger."^{1/}

An arsonist torches a church that ministers to homosexuals and AIDs victims, after a phone caller threatens to burn the building in the name of the Ku Klux Klan.^{3/}

A Jewish pawnbroker receives several hundred phone calls containing threats and anti-Semitic slurs from five individuals intent on putting him out of business.^{2/}

A restaurant owned by an Arab-American is firebombed hours after an anonymous caller vows to put "camel jockeys" out of business.^{4/}

A fraternity with Jewish members receives a message on its answering machine, "Get in the oven. I'll take care of you."
Contemporaneously, someone burns a swastika on the fraternity's lawn.^{5/}

I. INTRODUCTION

The incidents described above are examples of "hate crimes" -- offenses motivated by the animosity that the perpetrators bear towards their victims' race, physical characteristics, or group affiliations.^{6/} Although the hate crime phenomenon has grown in visibility and has provoked considerable comment and concern,^{7/} it is difficult to know the precise scope of

^{1/} Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Apr. 1990, at 8 (Apr. '90 Klanwatch Report).

^{2/} United States v. Danko (S.D. Cal. Sept. 26, 1990) (information supplied by the Civil Rights Division, U.S. Dep't of Justice) (on file at NTIA).

^{3/} Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Oct. 1990, at 10 (Oct. '90 Klanwatch Report).

^{4/} Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Aug. 1992, at 12 (Aug. '92 Klanwatch Report).

^{5/} Id. at 11.

^{6/} For a more specific definition of the term "hate crime," see infra note 20 and accompanying text.

^{7/} See, e.g., Somini Sengupta, Hate Crimes Hit Record High in 1992, L.A. Times (Wash. ed.), Mar. 23, 1993, at B1; Bettina Boxall, Survey Shows 4% Rise in

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the problem because available statistics are subject to a variety of limitations.^{8/} The numbers are troubling, nevertheless. The first report of the Federal Bureau of Investigation (FBI) on hate crimes^{9/} identified 4558 separate incidents nationwide in 1991, even though the Bureau received data from only 19% of state and local law enforcement agencies.^{10/}

Of even greater concern is the sharp increase in hate-motivated episodes over time. According to statistics compiled by the Anti-Defamation League of B'nai B'rith (ADL),

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- ^{7/} (...continued from preceding page)
Anti-Gay Violence, Harassment in U.S., L.A. Times (Wash. ed.), Mar. 11, 1993, at B1; Charles Leroux, "Hate Speech" Enters the Computer Age, Chi. Trib., Oct. 27, 1991, News, at 4.
- ^{8/} For example, the annual survey of anti-gay incidents compiled by the National Gay and Lesbian Task Force includes reports to gay organizations in only five cities. Boxall, supra note 7, at B1. Further, many statistical compilations list as hate crimes incidents in which the perpetrator and the victim are of different races or ethnic groups, even though there is no evidence that the difference motivated the attack. Finally, some groups include "verbal harassment" in their hate crime statistics, regardless of whether the words (and accompanying conduct), however offensive, violate any state or federal law.
- ^{9/} The Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 note) (HCSA), mandated that the Attorney General collect data on specified categories of hate crimes for the years 1990-1994. The Attorney General subsequently delegated that task to the FBI. Hate Crimes Statistics Rule on Delegation, 55 Fed. Reg. 28,610 (1990) (to be codified at 28 C.F.R. § 0).
- ^{10/} There are approximately 16,000 law enforcement agencies in the United States. See Hate Crimes; First-Time FBI Report Reveals Prevalence of Malice, The Hous. Chron., Jan. 11, 1993, at A12. Fewer than 3000 law enforcement agencies in only 32 states responded to the Bureau's request for statistics on hate crimes. Federal Bureau of Investigation, U.S. Dep't of Justice (Press Release, Jan. 4, 1993) (FBI Press Release). Only 27% of the law enforcement agencies participating reported hate incidents, with low participation from, for instance, California, Georgia, and Mississippi, and no participation from South Carolina or Alabama, among others. The FBI plans to expand its data collection to include reports from law enforcement agencies in all 50 states, id. at 1, even though it has no authority to require reports from non-federal agencies.

reports of anti-Semitic incidents grew by some 70% between 1987 and 1992.^{11/} Similarly, the National Gay and Lesbian Task Force reports that anti-gay incidents escalated by 172% between 1988 and 1992.^{12/}

Concern about the proliferation of hate incidents has prompted government action on a number of fronts. The most common response has been the enactment at the state level of "hate crime" statutes, which generally increase the penalties for criminal actions committed with bigoted intent.^{13/} Additionally, like the federal government, some states have required their law enforcement agencies systematically to collect statistics on the number of hate crimes within their jurisdictions.^{14/} Finally, and most importantly for purposes of this report, Congress has focused on the dissemination of messages of hatred and bigotry, which may create a climate conducive to the commission of hate crimes. Specifically, the Telecommunications Authorization Act of 1992 (Authorization Act) directed the National Telecommunications and Information Administration (NTIA) to examine "the role of telecommunications in crimes of hate and violent acts against ethnic, religious, and racial minorities" and to report its findings and recommendations, if any, to Congress.^{15/}

11/ See Michael Lieberman, The Law v. Violent Bigotry and Anti-Semitism: Possibilities and Limitations 9 (1993) (unpublished paper, on file at NTIA) (ADL's 1992 Audit of Anti-Semitic Incidents cited 1730 such incidents in 1992); Anti-Defamation League of B'nai B'rith, 1987 Audit of Anti-Semitic Incidents App. C (1987), reprinted in Hate Crimes Statistics Act of 1988: Hearing on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 60 (1988) (HCSA Hearings) (1018 anti-Semitic incidents reported in 1987).

12/ See National Gay and Lesbian Task Force Policy Institute, Anti-Gay/Lesbian Violence, Victimization & Defamation in 1992, at 12 (1993).

13/ For further information on these statutes, see infra notes 183-185 and accompanying text.

14/ See, e.g., Mich. Stat. Ann. § 4.469(57a) (Callaghan 1992); Okla. Stat. Ann. tit. 21, § 850(g) (West Supp. 1993); Pa. Stat. Ann. tit. 71, § 250(i) (1990).

15/ Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, § 135(a), 106 (continued...)

NTIA commenced its examination by publishing a Notice of Inquiry (Notice) in the Federal Register on March 25, 1993.^{16/} In that Notice, the agency solicited comments on the relationship between telecommunications and acts of hate, including "information on specific instances in which telecommunications was used to advocate or encourage the commission of hate crimes or violent acts motivated by prejudice or bias."^{17/} We also posed a series of questions on the appropriate government response to the contribution of telecommunications to the hate crime problem.

Twelve parties commented on the Notice; nine parties submitted reply comments.^{18/} Those public comments, supplemented by substantial independent research by NTIA, provide the basis for the findings and recommendations in this report. Section II outlines the scope of the report, consistent with the language of the Authorization Act. Section III provides, for each telecommunications technology considered, both a general overview and specific illustrations of how individuals have used telecommunications to advocate or encourage the commission of hate crimes. Section IV considers possible government responses and makes appropriate recommendations. That discussion rests on the principle that the First Amendment properly limits government's ability to regulate speech, however noxious it might be.

^{15/} (...continued from preceding page)

Stat. 3533, 3542. NTIA was directed to complete this report with the assistance of the Federal Communications Commission (FCC), the Department of Justice (DOJ), and the U.S. Commission on Civil Rights. Id.

^{16/} Report on the "Role of Telecommunications in Hate Crimes", 58 Fed. Reg. 16,340 (1993).

^{17/} Id. at 16,341.

^{18/} Parties filing comments and reply comments are listed in Appendix A. For the sake of brevity, all subsequent citations to "Comments" and "Reply Comments" shall refer to filings submitted in response to the Notice. All of these submissions are on file at NTIA.

II. SCOPE OF THE REPORT

In establishing the boundaries of this study, NTIA began with the wording of the Authorization Act, which, in relevant part, instructs the agency to

analyze information on the use of telecommunications, including broadcast television and radio, cable television, public access television, computer bulletin boards, and other electronic media, to advocate and encourage violent acts and the commission of crimes of hate, as described in the Hate Crimes Statistics Act [HCSA] . . . , against ethnic, religious, and racial minorities.^{19/}

The quoted language clearly contemplates that NTIA would examine more than the conduct that constitutes a violent act or a crime of hate. The Authorization Act's use of the words "advocate" and "encourage" indicates an expectation that NTIA would spotlight the messages conveyed via telecommunications, rather than any action resulting from those messages. In other words, Congress directed the agency to study "hate speech" that advocates or encourages "hate crimes."

For purposes of this report, we define "hate speech" and "hate crimes" by reference to the governing federal statute on the subject -- HCSA. Under HCSA, a "hate crime" is an offense "that manifest[s] evidence of prejudice based on race, religion, sexual orientation, or ethnicity."^{20/} "Hate speech" would therefore encompass words and images that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity."^{21/}

^{19/} Authorization Act § 135(b)(1) (citation omitted). The "crimes of hate" enumerated in HCSA include: murder; non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage or vandalism of property. HCSA § (b)(1).

^{20/} HCSA § (b)(1).

^{21/} *Id.* As indicated above, the Authorization Act requires NTIA to analyze hate speech that advocates or encourages violent acts or crimes of hate only against "ethnic, religious, and racial minorities." However, because the Act defines "crimes of hate" by reference to HCSA, and because HCSA covers offenses based on sexual orientation (in addition to the three characteristics also mentioned in the Authorization

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The Authorization Act does not require NTIA to consider all types of "hate speech," however. Rather, we must analyze only speech that "advocates" or "encourages" violent acts or crimes of hate. NTIA could construe these terms very narrowly and restrict our investigation to words that threaten to incite "imminent lawless action," which may be criminalized without violating the First Amendment.^{22/} We believe it appropriate, for at least two reasons, to interpret the two words more expansively, to encompass speech that creates a climate of hate or prejudice, which may in turn foster the commission of hate crimes.

First, NTIA's proposed construction of "advocate" and "encourage" seems more consistent with the legislative history of the Authorization Act. The only pertinent congressional remarks on the meaning of § 135 of the Authorization Act (which mandated the NTIA report) indicate that the object of NTIA's study should be "the use of modern telecommunications to spread messages of hate and bigotry."^{23/} This formulation manifests clear congressional intent that NTIA should cast its net wide in investigating hate speech conveyed via telecommunications. There is no indication whatsoever that Congress wished NTIA to consider only some narrowly-defined subset of hate speech, such as messages that advocate or trigger immediate unlawful conduct.

Second, a defining characteristic of telecommunications is its ability to disseminate words and pictures to a widely-dispersed audience. Not surprisingly, hatemongers recognized very

^{21/} (...continued from preceding page)
Act), for purposes of this report, we construe the terms "hate speech" and "hate crime" to include words, images, and acts that evidence prejudice based on sexual orientation. See Notice, 58 Fed. Reg. at 16,340 n.2.

^{22/} See Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). See also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (First Amendment does not protect "'fighting words' -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

^{23/} 138 Cong. Rec. H11,731 (daily ed. Oct. 5, 1992) (remarks of Rep. Markey).

early that telecommunications can be a potent tool, not only for spreading divisive views, but also for recruiting and organizing those who share these views.^{24/} In pre-World War II Germany, control of the mass media (including radio), with its power to shape and galvanize public opinion, was one of the pillars of the Nazi state.^{25/} In America, too, the use of radio to disseminate messages of hatred and bigotry is as old as commercial radio itself. In 1930, for example, the Federal Radio Commission declined to renew the license of an AM station in Los Angeles, California, because the station had, among other things, broadcast anti-Semitic and anti-Catholic programming.^{26/} In short, the use of telecommunications to disseminate messages of prejudice or bigotry is not a new phenomenon, but merely the continuation of an unfortunate tradition.^{27/}

The power of telecommunications is not limited to speakers, however. For the recipient, hate messages delivered via telecommunications offer a degree of anonymity not available in face-to-face contacts. As a result of the use of telecommunications, hate groups may find

^{24/} This is not, of course, to say that telecommunications begets hatred. It is merely another medium through which bigots can reach their audiences.

^{25/} See, e.g., Golo Mann, The History of Germany Since 1789 426-27 (1966); William Shirer, The Rise and Fall of the Third Reich 247-48 (1960) (describing the effectiveness of Nazi radio propaganda even to a listener who knew the truth about Hitler's regime).

^{26/} See Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932) (affirming the Commission's decision). The Communications Act of 1934 transferred jurisdiction over interstate communications from the Federal Radio Commission to the FCC.

^{27/} As discussed in more detail below (see infra notes 76-114 and accompanying text), extremist groups of all stripes have operated electronic bulletin board systems and telephone hotlines for these purposes since the early 1980s. See Peter Stills, Dark Contagion: Bigotry and Violence Online, PC Computing, Dec. 1989, at 144. One white supremacist, Tom Metzger, has been quoted as saying that the "[e]lectronic media is the only way to get to the white working class." Id. at 145. See also Larry Luxner, Hot Line to Hate: White Supremacist Recordings Ignite Voice Mail Debate, Telephony, Dec. 3, 1990, at 9 (Metzger also believes that "all serious groups must install a fax machine 'to receive instant information on serious issues.'").

willing and sympathetic listeners among individuals who would be reluctant to associate with such groups openly.^{28/} Because dissemination of hate speech via telecommunications may both enable the speaker to reach a wider audience and make it more likely that the recipient will be receptive to the message, adopting a narrow construction of the words "advocate" and "encourage" for purposes of this study would give an incomplete picture of "the role of telecommunications in crimes of hates."^{29/}

Finally, the Authorization Act does not require NTIA to examine all uses of telecommunications that may contain offensive speech. Rather, the Act directs the agency to analyze the "use of telecommunications . . . to advocate and encourage" certain undesirable or unlawful acts.^{30/} Thus, the Act requires that the user of the telecommunications facility or service (i.e., the individual that directs the transmission and controls the content) employ that facility for the purpose of "advocating" and "encouraging" hate crimes, or "spread[ing] messages of hate and bigotry." This condition would be satisfied when, for example, a white supremacist disseminates anti-Semitic epithets over a cable public access channel.

^{28/} See Stills, supra note 27, at 145.

^{29/} Authorization Act § 135(a).

^{30/} Id. § 135(b)(1). While the portrayal of any group in a way that perpetuates stereotypes or encourages prejudice is a concern, especially if such a portrayal leads to violent acts, this broad topic lies beyond the scope of this study. In particular, the issue of the effect on society of violence on television has been the subject of much congressional scrutiny, and has been addressed by the Administration in recent testimony. See, e.g., M. Joycelyn Elders, M.D., Surgeon General of the United States, Statement before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Finance (Sept. 15, 1993), to be published in Hearing on Television Violence Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Finance, 103d Cong., 1st Sess. (forthcoming 1993); Janet Reno, Attorney General of the United States, Statement before the Senate Comm. on Commerce, Science, and Transportation (Oct. 20, 1993), to be published in Hearing on Violent Programming on Television Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong., 1st Sess. (forthcoming 1993). In contrast to the broad issue of violence on television, this report focuses on the use of telecommunications specifically to advocate or encourage violence or acts of hate based on race, religion, ethnicity or gender.

In contrast, this requirement would not necessarily be satisfied if that individual made the same remarks during a newscast, a broadcast interview, or even a talk show controlled by an independent moderator (e.g., Donahue or Oprah).^{31/} In those cases, it cannot be said that the "users" of the facilities (i.e., the producer of the news program or talk show, or the media outlets that deliver the programming to viewers) do so for the purpose of advocating or encouraging violent acts, even if the subject of the newscast or interview may be doing so.^{32/} Although newscasters have an obligation to treat hate speech and hate crimes with care and discretion,^{33/} government should not lump them with those whose aim is to incite and divide, rather than inform and enlighten.

III. DATA REGARDING THE ROLE OF TELECOMMUNICATIONS IN CRIMES OF HATE

In the Notice, NTIA sought information on "specific instances in which telecommunications were used to advocate or encourage the commission of hate crimes or violent acts motivated by prejudice or bias."^{34/} We present below the evidence we have obtained from the

^{31/} See Comments of Capital Cities/ABC at 2-3 (bigoted remarks made in the course of an interview or news program should not be deemed within the scope of NTIA's investigation). See also Reply Comments of MPAA at 2 (depictions of hate crimes in news and dramatic programming are covered by the First Amendment and should not be considered within the scope of the NTIA study).

^{32/} NTIA recognizes that the user's intent may not be evident in all cases. In many cases, intent to advocate or encourage can be inferred when the producer or host of a broadcast show personally articulates prejudice or is affiliated with a known hate group. In other situations, it will be more difficult to discern the user's intent. See, e.g., *infra* notes 57-58 and accompanying text. The existence of close cases, however, does not counsel against adopting, for the purposes of this report, a general requirement that the user of a telecommunications facility or service have an intent to advocate or encourage violent acts or crimes of hate. Such a condition accords with the language of the Authorization Act and limits potential government entanglement with First Amendment interests. See Comments of Capital Cities/ABC at 3-4.

^{33/} Comments of Bailon at 1.

^{34/} Notice, 58 Fed. Reg. at 16,341-42.

commenters^{35/} and other sources, broken out by the categories specified in the Authorization Act -- broadcast radio and television, cable public access television,^{36/} computer bulletin boards, and "other electronic media," which we interpret to mean transmission facilities employed to convey information from place to place.^{37/}

A. BROADCAST TELEVISION AND RADIO

There are approximately 1516 television stations and 11,528 radio stations in the United States licensed by the Federal Communications Commission.^{38/} There is little evidence that any of these facilities are being used to spread messages of hate and bigotry. Indeed, NTIA is aware of only a few such incidents in the past decade, all involving radio stations.

In two of these incidents, a radio broadcast arguably urged the audience to commit a hate-motivated crime.^{39/} In 1982 and 1983, radio station KTTL-FM, Dodge City, Kansas,

^{35/} See Comments of EFF; Comments of National Institute (attaching National Institute Against Prejudice and Violence, Bigotry and Cable TV: Legal Issues and Community Responses (1988)); Reply Comments of ADL.

^{36/} Although the Authorization Act also lists cable television as a subject to be studied, we do not discuss it here because we have found no instances in which messages of hate within the scope of this study were aired on non-public access cable channels.

^{37/} "Other electronic media" therefore include the facilities (wire and wireless, public and private) used to provide conventional telephony services. The term does not encompass magazines, newsletters, or other printed materials, nor does it include film, or sound and video recordings.

^{38/} Broadcast Station Totals as of September 30, 1993, Mimeo No. 40,067 (FCC News Release, Oct. 7, 1993).

^{39/} In addition to radio broadcasts, there is at least one reported instance in which an individual used other radio frequencies to advocate the commission of a hate crime. In 1990, a man was arrested on charges of obstructing the administration of justice and for FCC violations after allegedly broadcasting racist remarks over police radio frequencies. According to the police, in one broadcast the suspect offered instructions on how to lynch a black man. Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), June 1990, at 11 (June '90 Klanwatch Report).

gained national attention by broadcasting over 250 hours of taped programming that included many derogatory and offensive comments aimed at Jews and blacks.^{40/} In one of the most inflammatory programs, the program host suggested that listeners should ambush Jews and "cleanse our land . . . with a sword."^{41/} Another program urged listeners to arm themselves and "take care of the problem" of Mexican immigration.^{42/}

When the station's FCC license came up for renewal in June 1983, the National Black Media Coalition and a group of citizens in the community filed a petition to deny, while another local citizens group filed a competing application for the broadcast license.^{43/} They argued, among other things, that the subject programming constituted a deliberate incitement to riot and imminent lawless action, and therefore fell outside the protection of the First Amendment.

In 1985, the FCC declined to designate a programming issue in the contested license renewal proceeding. While recognizing that much of the programming was highly offensive, the FCC noted that under both the First Amendment and Section 326 of the Communications Act of 1934,^{44/} it was barred from censoring broadcast material or interfering with the licensee's discretion in selecting and broadcasting particular programming. The FCC concluded on the evidence before it that the programming was no more than "advocacy of

^{40/} Cattle Country B/casting, 58 Rad. Reg. 2d (P&F) 1109, 1112 (1985).

^{41/} Alan Katchen, The Station That Broadcast Hate, ADL Bulletin, Feb. 1985, at 3. The program hosts preached the philosophy of the Identity Church, a pseudo-Christian movement that believes that white Anglo-Saxons, and not Jews, are the true lost tribes of Israel, and that Jews represent the Devil.

^{42/} Cattle Country B/casting, 58 Rad. Reg. 2d (P&F) at 1125-26.

^{43/} In addition, ADL, the Jewish Community Relations Bureau of Kansas City, Missouri, the Jewish War Veterans of the U.S.A., and the Attorney General for the State of Missouri all filed informal objections to the license renewal application.

^{44/} 47 U.S.C. § 326 (1988).

illegal action at some indefinite future time," and hence did not constitute a "clear and present danger."^{45/} The station subsequently went off the air in May 1986, and in August 1986 the station owner negotiated a settlement with the competing applicant to withdraw the license renewal application in exchange for \$10,000.^{46/}

The other incident in which an FCC broadcast licensee allegedly advocated violent acts occurred in 1992, the day after the acquittal of four white police officers in Los Angeles on criminal charges for the beating of black motorist Rodney King. "Ralph from Ben Hill," a black talk show host on station WGST-AM, Atlanta, Georgia, aired a broadcast in which he urged listeners, "Let's take it to the streets, brothers," and "We got mobs in the streets. They're burning L.A. down. Burn baby burn," while playing the song, "Burn, Baby, Burn," in the background. The broadcast occurred hours after Atlanta's mayor had declared a city emergency and imposed a curfew in the face of violent demonstrations.^{47/}

The ADL filed a formal complaint with the FCC against JACOR Broadcasting, licensee of WGST, requesting that the FCC hold a hearing to determine whether the licensee was

^{45/} Cattle Country B/casting, 58 Rad. Reg. 2d (P&F) at 1112-13 (citing Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). The FCC noted that if the Kansas state courts were to conclude that the programming in question violated state law (i.e., constituted an incitement to riot), it would take that judgment into account in deciding whether to renew the license or impose sanctions on the licensee.

^{46/} Comm. Daily, Aug. 11, 1986, at 6. In addition to the contested license renewal proceeding, the station owners had other legal problems, including pending suits for copyright infringement, defamation, civil warrants for arrest for contempt of court, and garnishment of wages for failure to pay state personal property taxes. See Cattle Country B/casting, 58 Rad. Reg. 2d (P&F) at 1121.

^{47/} Cynthia Durcanin, ADL Complaint Targets "Ralph from Ben Hill", Atlanta J. & Const., Oct. 23, 1992, at G2; Cynthia Durcanin, FCC Gets Complaint on Talk Show Host, Atlanta J. & Const., Oct. 24, 1992, at B2.

serving the public interest and to decide what sanctions, if any, should be imposed.^{48/} In January 1993, FCC staff declined to take action, concluding that any "determination of whether the speech [at issue] was directed towards inciting and producing imminent lawless action and was likely to produce such action is best made locally."^{49/} The FCC noted that any allegation that programming did not serve the public interest would be appropriately raised at license renewal time.^{50/} ADL filed a petition for reconsideration, which remains pending.^{51/}

In other instances, FCC broadcast licensees have aired programming that clearly evidences prejudice, but does not explicitly advocate the commission of any hate crime. In 1987, a white supremacist named Dwight McCarthy purchased time on radio station KZZI-AM, West Jordan, Utah, to air a weekly hour-long show, The Aryan Nations Hour. While the show apparently did not openly espouse violence towards any group, McCarthy purportedly argued that Hitler was a great man, the Holocaust was a hoax, and "the satanic Mongoloid Jews must be separated out of the Aryan nation republic."^{52/}

^{48/} Complaint of Anti-Defamation League Against JACOR Broadcasting of Atlanta, Inc., Licensee of WGST (AM). Atlanta, Ga., Ref. Nos. 8210-BH and C10-733 (dated Oct. 9, 1992). See also Comm. Daily, Oct. 27, 1992, at 5-6.

^{49/} See Letter from Edythe Wise, Chief, Complaints & Investigations Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, to Charles Wittenstein, Southern Counsel and Civil Rights Director, Anti-Defamation League 2 (Jan. 7, 1993) (Ref. Nos. 8210-BH and C10-733) (citing Cattle Country Broadcasting).

^{50/} Id.

^{51/} Anti-Defamation League Petition for Reconsideration (mailed Feb. 5, 1993)(Ref. Nos. 8210-BH and C10-733).

^{52/} Howard Rosenberg, Neo-Nazis Cloud the Utah Air; "Aryan Nations" to Debut Over Tiny Salt Lake City Station, L.A. Times, Nov. 24, 1987, Calendar, at 1.

When the show's debut was first announced, the Simon Wiesenthal Center in Los Angeles informally complained to the FCC.^{53/} When FCC staff declined to take any action, the Wiesenthal Center sought assistance from Rep. John Dingell, Chairman of the House Committee on Energy and Commerce, who asked the FCC to investigate the matter and report to Congress.^{54/}

In response, the FCC Chairman concluded that no action was warranted, based on the First Amendment and Section 326 of the Communications Act. He concluded that there was no indication that "any of the programming in question was creating an imminent danger of physical injury of the type that might warrant action" under relevant FCC and Supreme Court precedent.^{55/} Meanwhile, the Aryan Nations Hour was cancelled after only two broadcasts when local advertisers withdrew their support for the remainder of the station's schedule in the wake of the controversy.^{56/}

A final example is the Afrikan Mental Liberation Weekend, a thirty-hour black nationalist show aired once in 1992 and once in 1993 by non-profit radio station KPFK-FM, Los Angeles, California, which is owned by the Pacifica Foundation. In both instances, the

^{53/} See Letter from Rabbi Abraham Cooper, Simon Wiesenthal Center, to Congressman John D. Dingell, Chairman, House Committee on Energy and Commerce (Nov. 17, 1987) (on file at NTIA).

^{54/} Letter from John D. Dingell, Chairman, House Committee on Energy and Commerce, to the Honorable Dennis R. Patrick, Chairman, FCC (Nov. 30, 1987) (on file at NTIA).

^{55/} Letter from Dennis R. Patrick, Chairman, Federal Communications Commission, to the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce (Jan. 12, 1988) (on file at NTIA) (citing Anti-Defamation League of B'nai B'rith, 4 F.C.C.2d 190 (1966)). Chairman Patrick also noted that it would be more appropriate for local law enforcement authorities to examine the content and context of the offensive speech to determine whether it was likely to incite or produce imminent lawless action.

^{56/} FCC Dismisses Complaint Against Station that Aired Aryan Talk Show, The Associated Press, Feb. 6, 1988, available in LEXIS, Nexis Library, AP File.

program producer included taped interviews with several individuals who made anti-Semitic and anti-white remarks.^{57/} In the aftermath of the 1992 show, the ADL filed a complaint with the FCC, the station's news director resigned to protest ongoing on-air Jewish and Korean bashing, Pacifica declined to renew the contract of the station's general manager "due to ineffective management skills," the station's advisory board was dissolved, and the station's new general manager promised to provide a "more balanced" show in 1993. The 1993 show also drew criticism, however, leading some to argue that the Corporation for Public Broadcasting should withdraw its funding of the station.^{58/}

In contrast to these incidents, some in the broadcast industry have sought to use that medium to promote racial and religious tolerance. For instance, in 1992, the National Association of Television Program Executives (NATPE) formed an Action Against Racism and Religious

^{57/} During the 1992 show, one guest speaker claimed that Jews were responsible for black slavery; another stated that whites are genetically psychopathic and incurable save for incarceration, psycho-surgery, or death. The program host referred to an ADL official as a "psychotic, idiotic European Jew," and failed to challenge a listener who called in to say, "What Hitler did to the Jews will seem like a party compared to what's coming." Naomi Pfefferman, KPFK Does It Again, The Jewish J., Feb. 12-18, 1993.

During the 1993 show, speakers argued that whites have stolen African culture and are so afraid of genetic annihilation that they persecute blacks. Naomi Pfefferman, "Weekend" of Hate, The Jewish J., Feb. 19-25, 1993.

^{58/} See Allen Jalon, Row Brews Over L.A.'s Hate Radio, Forward, Mar. 5, 1993; Comm. Daily, May 7, 1993, at 9.

There are other examples in which radio stations have broadcast racist remarks. In a May 1993 incident involving WKBQ-FM, St. Louis, Missouri, two disc jockeys at the station drew criticism, and ultimately were fired, for their use of the words "kikes" and "niggers" on the air. Peter Viles, St. Louis DJ's Fired, Sued Over Racial Remark, Broadcasting, June 7, 1993, at 84; In Brief, Broadcasting, May 17, 1993, at 80. Similar incidents have occurred on several college campus radio stations. See, e.g., Isabel Wilkerson, Campus Race Incidents Disquiet U. of Michigan, N.Y. Times, Mar. 9, 1987, at A12.

Intolerance Committee.^{59/} Among other things, this committee commissioned a series of anti-discrimination public service announcements (PSAs), which have appeared on a number of independent television stations, network affiliates, and cable television during 1993.^{60/}

B. CABLE PUBLIC ACCESS CHANNELS

Under 47 U.S.C. § 531, local communities may require their cable franchisees to set aside channel capacity for public, educational, or governmental use. The cable operator does not exercise any editorial control over these public access channels, unless programming is "obscene or . . . otherwise unprotected by the Constitution of the United States."^{61/} Public access channels guarantee free time slots on a first-come, first-served basis. As a result, the content of most programming on public access channels is controlled solely by the groups using the channels, thus making cable public access an "electronic soapbox."^{62/} Some of this programming can contain messages of hate, although the number of such messages is apparently small.

The National Federation of Local Cable Programmers (NFLCP) considers "controversial programming" to include racial hatred or bigotry, alternative lifestyles, nudity, sexual activity, and profanity.^{63/} According to NFLCP, in 1991 there were public access channels in 2000 communities across the United States, airing approximately 15,000 hours of

^{59/} Comments of NATPE at 2, 3.

^{60/} Id. at 3.

^{61/} 47 U.S.C. §§ 531(e), 544(d)(1) (1988).

^{62/} Joseph Berger, Forum for Bigotry? Fringe Groups on TV, N.Y. Times, May 23, 1993, §1, at 29.

^{63/} Controversial Speech: An American Tradition, contained in Controversial Programming Committee, National Federation of Local Cable Programmers, Controversial Programming: A Guide for Community Access Television Advocates (1991) (unpublished manuscript on file at NTIA) (Controversial Programming). NFLCP, now known as the Alliance for Community Media, represents 1200 cable public access organizations, producers, and their employees.

programming each week.^{64/} At that time, NFLCP estimated that "controversial programming" accounted for "less than one percent" of total programming.^{65/}

In a 1991 report, the ADL stated that approximately fifty-seven programs espousing racism and bigotry were airing on public access channels in twenty-four communities in the United States.^{66/} Programs that the ADL has described as preaching racial or religious hatred include Race and Reason,^{67/} The Other Israel, Airlink, Crusade for Christ and Country, Our Israelite Origin, and programs featuring Louis Farrakhan's Nation of Islam.^{68/}

Most hate programs on cable public access single out Jews, African-Americans, and other minorities. For example, in a spinoff of Race and Reason, the program host, Dr. Herbert Poinsett, stated, among other things, that the Holocaust is a lie and that blacks should be relocated to Africa.^{69/} In some cases, programs feature anti-white or anti-homosexual themes. For instance, the host of It's Time To Wake Up, Ta-Har, once appeared with a

^{64/} Id.

^{65/} Id. According to one press report, a show in which the host urged deportation of blacks and described the Holocaust as fiction represented one of approximately 800 programs (slightly more than one-tenth of one percent) airing weekly on the four public access channels provided by Manhattan Cable Television in New York City. Berger, supra note 62, at 29.

^{66/} Anti-Defamation League of B'nai B'rith, Electronic Hate: Bigotry Comes to TV 2 (1991) (Electronic Hate).

^{67/} Tom Metzger is the producer of the largest number of hate programs produced for public access. Id. As of January 1988, Metzger had produced 63 episodes of Race and Reason. National Institute Against Prejudice & Violence, Bigotry and Cable TV: Legal Issues and Community Responses 3 (1988) (attachment to Comments of National Institute) (Bigotry and Cable TV). Spinoffs of Race and Reason are produced by Herbert Poinsett and Matt Hale. Electronic Hate, supra note 66, at 4.

^{68/} Electronic Hate, supra note 66, at 2.

^{69/} Berger, supra note 62, at 29. The Other Israel and Airlink are also reported to spread messages of anti-Semitism. Electronic Hate, supra note 66, at 4-5.

baseball bat proclaiming, "We're going to be beating the hell out of you white people."^{70/} One guest interviewed by Metzger on Race and Reason stated, "[T]here's a lot of faggots, a lot of prey game around [San Francisco] that need to be cleansed."^{71/}

Although many viewers may consider these programs offensive, lawsuits by local communities to block such programming from cable public access channels generally are not successful due to First Amendment protections for the speakers, particularly because the programming is generally neither obscene nor likely to incite "imminent lawless action."^{72/} As a result, many communities have responded to programming espousing racial hatred and bigotry by producing or acquiring counterprogramming. For example, in Pocatello, Idaho, the organization managing the public access channel offered community groups an advance opportunity to view Race and Reason, prior to its cablecast,^{73/} so that they could prepare a response. In addition to negative media coverage in advance of, and following, the cablecast of Race and Reason at 8:30pm, counterprogramming followed at 9:00pm (Bill Cosby on Prejudice), and a live call-in show aired at 9:30pm (Race and Reason: A Response).^{74/} Similar experiences have occurred in Austin, Texas; Sacramento, California; and Fort Wayne, Indiana, among other places.^{75/}

^{70/} Berger, supra note 62, at 29.

^{71/} Electronic Hate, supra note 66, at 3.

^{72/} See Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

^{73/} Channel 12, the Pocatello cable access channel, had an established policy of requiring tapes to be available for viewing at the studio at least seven days before the scheduled cablecast date. One organization that viewed the Race and Reason tape and developed a response was the Pocatello Human Relation Advisory Committee. Randal Ammon, "But I'll Defend Their Right To Say It: Racism, Response, and the First Amendment in Pocatello", contained in Controversial Programming, supra note 63 (case study of Pocatello, Idaho).

^{74/} Id.

^{75/} Id.

C. COMPUTER BULLETIN BOARDS

According to the Electronic Frontier Foundation, there currently are over 45,000 privately run bulletin board systems in the United States.^{76/} Some of these -- such as Prodigy and CompuServe -- are commercial enterprises that charge users for their time on-line, but the vast majority are noncommercial ventures run by universities, corporations, government agencies, professional groups, and other organizations in order to maintain communications among a limited group of users.^{77/}

Over the last decade, a handful of computer bulletin boards have been established by various white supremacist and neo-Nazi groups for the express purpose of disseminating messages of hate. In spring 1983, Louis Beam, an Aryan Nations leader, established a bulletin board in Idaho called the "Aryan Nation Liberty Net." For anyone willing to pay a nominal fee for a password, this network provided a choice of files, including material attacking Jews, other minorities, and the federal government; a listing called "Know Your Enemies," which included the addresses of ADL offices across the nation; and instructions on how to gain access to public access cable television.^{78/} Around that time, bulletin boards affiliated with

^{76/} Comments of EFF at 3. Computer bulletin boards are relatively straightforward to establish, using a personal computer and some inexpensive software that enables users to access the bulletin board through a modem connected to telephone lines. Some bulletin boards contain subject matter of a general nature, while others are "dedicated" to specific topics. Users can read messages left in files by other users, and can add messages of their own, creating an ongoing "conversation" on the bulletin board. Such networks also can be used to send and receive private messages between two individuals. See generally John Hedtke, Using Computer Bulletin Boards 1-2 (1992).

^{77/} According to one 1991 estimate, 90% of all computer bulletin boards were noncommercial ventures. Barnaby Feder, Toward Defining Free Speech in the Computer Age, N.Y. Times, Nov. 3, 1991, § 4, at 5.

^{78/} Anti-Defamation League of B'nai B'rith, Computerized Networks of Hate: An ADL Fact Finding Report 1-3 (1985); Richard Pienciak, White Supremacists See Computers as Revolutionary Key, The Associated Press, Mar. 3, 1985, available in LEXIS, Nexis Library, AP File.

the Aryan Liberty Net also commenced operations in North Carolina, Chicago, and Texas.^{79/} Also in the mid-1980s, George Dietz, an individual widely described as a neo-Nazi, operated a similar bulletin board in West Virginia, variously known as the "Liberty Bell Network" or "Info International Network," and Tom Metzger, head of the White American Resistance (now known as the White Aryan Resistance, or WAR), started a bulletin board in Fallbrook, California.^{80/}

There are no exact figures on how many of these white supremacist bulletin boards are operating today. The various Aryan Nations bulletin boards around the country apparently fell into disuse by late 1985, reportedly due to both a lack of interest and the conspiracy trial of a number of members of the group.^{81/} There were, however, reports that "skinheads" were operating bulletin boards in the late 1980s.^{82/} It appears that a number of the extremist bulletin boards that once operated publicly have gone underground, in part to keep out hostile outsiders who might sabotage the systems.^{83/}

^{79/} Id. According to one Aryan Nations leader, these networks were in large part developed to circumvent restrictions placed on the distribution of printed white supremacy materials in Canada.

^{80/} See Larry Hatfield, Far Right Spreads Gospel of Hate via Computers, S.F. Examiner, Mar. 23, 1986, at A1; Dennis Gaub, Neo-Nazis Employ Computer Bulletin Boards, Billings Gazette, Feb. 2, 1986, at A1; Tim Miller, The Electronic Fringe, Wash. Post, July 14, 1985, Magazine, at 11.

^{81/} Hate, Violence, and White Supremacy: A Decade Review, 1980-1990 (The Klanwatch Project of the Southern Poverty Law Center, Montgomery, Ala.), Dec. 1989, at 10 (Klanwatch Decade Review); Michael Hirsley, Anti-Klan Lawyer Tops "Hit List", Chi. Trib., Dec. 8, 1985, News, at 22; Network for High-Tech Haters Crumbles, Chi. Trib., Nov. 21, 1985, News, at 27; Extremist System Is Going Off Line, Chi. Trib., Nov. 19, 1985, News, at 4.

^{82/} Stills, supra note 27, at 144. Some so-called skinheads -- youths sporting shaved heads, steel-toed black boots, and swastika tattoos -- have adopted a militant neo-Nazi ideology, and have joined white supremacist groups like White Aryan Resistance. Id.; Klanwatch Decade Review, supra note 81, at 4-5, 12.

^{83/} Stills, supra note 27, at 144.

These computer bulletin boards often report on violent confrontations and advocate further violence.^{84/} For instance, in 1989, several bulletin boards in the San Francisco Bay area reportedly carried messages glorifying skinhead attacks on gays, blacks, and skinhead "traitors."^{85/} The name of Alan Berg, a Jewish radio talk show host who was murdered in 1984 by members of the Order, an Aryan Nations spinoff group, appeared on a computer bulletin board "hit list" prior to his death.^{86/} It was widely reported that the Aryan Nation's computer bulletin board carried a message in 1985 stating that Morris Dees (the chief trial counsel to the Southern Poverty Law Center) had "earned two (2) death sentences."^{87/} In one case, a North Carolina neo-Nazi leader allegedly told his followers that "his bulletin board would have 'an up-to-date list of many of the Jew headquarters around the country so that you can pay them a friendly visit.'"^{88/}

In addition, there have been controversies over messages posted on national bulletin boards that cater to the general public. In 1991, Prodigy, one of the largest information services providers serving over a million subscribers, was criticized by the ADL for permitting anti-

^{84/} Id. Indeed, according to Klanwatch, the international police organization, Interpol, was investigating white supremacist bulletin boards in 1990 as part of a study of international terrorism. Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Aug. 1990, at 12 (Aug '90 Klanwatch Report).

^{85/} Stills, supra note 27, at 144.

^{86/} Hirsley, supra note 81, at 22. It is not clear, however, whether the posting of Berg's name on a computer bulletin board actually led to his death. Berg's murderers apparently were on an extended crime spree, as they were convicted in 1985 on racketeering charges involving crimes including robbery, counterfeiting, bombing, arson, illegal possession of weapons, and murder. See Klanwatch Decade Review, supra note 81, at 11, 13, 15.

^{87/} See, e.g., id.; Klanwatch Decade Review, supra note 81, at 11; Miller, supra note 80, at 11.

^{88/} Miller, supra note 80, at 11.

Semitic messages to be carried on its computer bulletin board.^{89/} ADL believed that Prodigy should have rejected such messages for being "offensive" under its existing guidelines for screening messages.^{90/} Ultimately, Prodigy amplified its definition of "offensive" to include messages "grossly repugnant to community standards," including messages that are "blatant expressions of bigotry, racism and hate."^{91/} Meanwhile, Prodigy reported subscriber messages opposing anti-Semitism outnumbered the offensive messages by 100-to-one.^{92/}

^{89/} One of the messages allegedly carried on the bulletin board stated, "Hitler had some valid points too . . . Remove the Jews and we will go a long ways toward avoiding much trouble." Upon investigation, however, Prodigy determined that this particular message was a private electronic mail message that had been repeatedly rejected for public posting. Among the messages that were publicly posted were ones arguing that the Holocaust was a hoax, and criticizing Israel for causing most of the trouble in the Middle East. See, e.g., Leroux, *supra* note 7, at 4; Elizabeth Sanger & Joshua Quittner, *Prodigy Computers*, *Newsday*, Oct. 23, 1991, *News*. at 5.

^{90/} See Reply Comments of ADL at 2-3.

^{91/} Anti-Defamation League of B'nai B'rith (Press Release, Oct. 29, 1991). In 1992, the Arab-American Anti-Discrimination Committee (ADC) accused Prodigy of bias against the Arab perspective in screening messages pertaining to the Middle East. ADC persuaded Prodigy to include racist expressions directed at Arabs in the list it maintains for screening purposes. American-Arab Anti-Discrimination Committee, *1992 Activity Report* 12-13 (1992).

^{92/} *Computer Speech -- Also Free*, *N.Y. Times*, Oct. 30, 1991, at A24. Aside from computer bulletin boards, there are other instances in which computers have been used to transmit messages of hate. In 1991, a random audit of police patrol car computer messages in Alameda, California, discovered seven transmissions containing racial slurs about blacks. The messages included references to "nigger night," the Ku Klux Klan, and "killing 'a nigger.'" *Blast at Home of Alameda Police Critic*, *S.F. Chron.*, Nov. 22, 1991, at A20; *Klanwatch Intelligence Report* (Southern Poverty Law Center, Montgomery, Ala.), Feb. 1992, at 27 (*Feb. '92 Klanwatch Report*).

There also are reports of individuals sending messages of hate through computers directly to intended victims. For instance, in 1989, a University of Wisconsin student was placed on probation under the campus "hate speech" code for sending a computer message to an Iranian faculty member, which included expressions such as "Death to all Arabs," and insults directed at followers of the Islam religion. Leroux, *supra* note
(continued...)

D. TELEPHONY

1. Telephone Hate Hotlines

According to Klanwatch, a watchdog project of the Southern Poverty Law Center, "[t]he most widely used technology for white supremacists during the 1980s has been the recorded telephone message,"^{92/} also known as "hate hotlines." In recent years, there have been reports of more than twenty hate hotlines operating in the United States: at least two in California,^{94/} two in New York,^{95/} three in Pennsylvania,^{96/} two in Washington State,^{97/} one in Alabama,^{98/} at least one in Mississippi,^{99/} one in Dallas, Texas,^{100/} one

^{92/} (...continued from preceding page)

7, at 4. In 1992, two black faculty members and the minority awareness committee at Albuquerque Academy in Albuquerque, New Mexico, received death threats and ethnic slurs that had been sent anonymously from some of the school's computers to various computer printers. Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.). Apr. 1992, at 14 (Apr. '92 Klanwatch Report).

^{93/} Klanwatch Decade Review. supra note 81, at 9.

^{94/} Aug. '90 Klanwatch Report. supra note 84, at 10 (WAR hotline in San Francisco); Luxner, supra note 27, at 8 (WAR hotline in San Diego); Anti-Defamation League of B'nai B'rith, An ADL Special Report: The Los Angeles Riot -- Extremist Exploitation 2 (1992) (ADL Special Report) (Metzger's Aryan Update hotline).

^{95/} ADL Special Report, supra note 94, at 4, 5 (Church of the Creator hotline); Luxner, supra note 27, at 8 (WAR hotline).

^{96/} ADL Special Report, supra note 94, at 2, 6 (Pennsylvania Aryan Independence Network hotline); id. at 3 (White Hotline); Adam Bell, Show Rated R -- For Racist, Bucks County Courier Times, June 7, 1992, at 1A (United States of America Nationalist Party hotline in Bucks County).

^{97/} ADL Special Report, supra note 94, at 5, 6, 7 (Knights of the Ku Klux Klan hotline); Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Feb. 1990 (Feb. '90 Klanwatch Report) (WAR hotline in Seattle).

^{98/} ADL Special Report, supra note 94, at 5, 7 (White Liberation hotline).

^{99/} Id. at 2, 6 (Southern Independence Party hotline, using the same telephone number as the Mississippi Realm of the Confederate Knights of the Ku Klux Klan); Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), June 1991, at (continued...)

in Miami, Florida,^{101/} three in St. Paul, Minnesota,^{102/} two in Tulsa and one in Oklahoma City, Oklahoma,^{103/} one in Wichita, Kansas,^{104/} one in East Peoria, Illinois,^{105/} and one in Elyria, Ohio.^{106/}

These telephone hotlines provide callers with a readily accessible means of anonymously associating with hate groups. The hotlines reportedly engage in diatribes against blacks, gays, Jews, and other minorities, and announce upcoming events of interest to followers.^{107/} In a number of instances, hotlines apparently have openly encouraged

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- 99/ (...continued from preceding page)
18 (June '91 Klanwatch Report) (Confederate Knights of the Ku Klux Klan hotline in Lake, Mississippi).
- 100/ Feb. '90 Klanwatch Report, supra note 97 (WAR hotline).
- 101/ June '90 Klanwatch Report, supra note 39, at 10 (WAR hotline).
- 102/ Ian Trontz, Phone Tapes Carry Racist Messages, Minneapolis Star Trib., June 27, 1992, at 1B (three hotlines, one affiliated with WAR, another affiliated with Aryan Nations).
- 103/ Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Dec. 1992, at 6 (Dec. '92 Klanwatch Report) (two hotlines in Tulsa); Klanwatch Decade Review, supra note 81, at 10 (WAR hotline in Oklahoma City).
- 104/ Feb. '90 Klanwatch Report, supra note 97 (Wichita White Knights hotline).
- 105/ Tom Squitieri & Judy Keen, New Law Strikes Back at USA's Hate Groups, USA Today, Apr. 24, 1990, at 6A (American White Supremacist Party hotline).
- 106/ Scott Stephens, Lorain Police Probe Spate of Hate Leaflets, The Plain Dealer, Jan. 28, 1993, at 1B (Aryan Nations hotline).
- 107/ Klanwatch Decade Review, supra note 81, at 9.

violence.^{108/} White supremacists also reportedly use telephone hotlines to recruit members and, on occasion, to sell merchandise.^{109/}

Some of these hotlines also reportedly provide a form of voice mail, allowing callers to add their own recorded messages.^{110/} According to Klanwatch, in 1990, a WAR member in Fullerton, California, was arrested for threatening murder. The suspect allegedly threatened to kill a Jew, and then placed the man's name and place of employment on a white supremacist recorded message line.^{111/}

There have been several reports of white supremacist groups publicizing the existence of such hotlines in fliers and leaflets, which they have distributed door-to-door and on college campuses, and have placed in newspapers or on car windshields.^{112/} In some instances, individuals have apparently received unsolicited recorded messages publicizing the existence of these hate hotlines.^{113/} According to Klanwatch, several dollar bills bearing a Knights

^{108/} For instance, Klanwatch states that a WAR hotline in Oklahoma City openly urged "whites to arm themselves in preparation for revolution." *Id.* at 10. According to ADL, on May 4, 1992, a Church of Creator hotline in New York included the message, "Rodney King is a violent nigger and violent niggers must be dealt with," while a White Liberation hotline in Alabama contained the message, "It is time to make blacks understand that we will play the coward no longer. We will not tolerate further abuses at their hands. They have stated that it shall be blood for blood, well, so let it be." *ADL Special Report*, *supra* note 94, at 4-5.

^{109/} Trontz, *supra* note 102, at 1B.

^{110/} Luxner, *supra* note 27, at 8.

^{111/} *June '90 Klanwatch Report*, *supra* note 39, at 13.

^{112/} Luxner, *supra* note 27, at 8; *Apr. '90 Klanwatch Report*, *supra* note 1, at 12; *June '90 Klanwatch Report*, *supra* note 39, at 10; *Aug. '90 Klanwatch Report*, *supra* note 84, at 10.

^{113/} *See* Trontz, *supra* note 102, at 1B.

of the Ku Klux Klan message and a toll free, 800 telephone number were circulated in Oklahoma in 1992.^{114/}

In a few instances, efforts have been made by private parties to shut down hate hotlines. In 1990, American Voice Retrieval Corp., a Los Angeles firm specializing in voice mail technology, learned from customer complaints that it was renting telephone lines and answering machines to Tom Metzger, who was operating WAR hotlines in a dozen cities across the United States. The company terminated its relationship with Metzger, who then set up his own voice mail system.^{115/} Also in 1990, United Telephone Company disconnected a telephone message service operated by a white supremacist youth group in Altamonte Springs, Florida. According to a company spokesman, while United Telephone believed that anti-ethnic language generally is protected by the First Amendment, the recorded messages in this case "went beyond constitutional protection" because they could be interpreted as inciting violence against Jews.^{116/}

2. Criminal Conduct Involving Telephones

Telephones can be used to commit crimes, in addition to advocating hateful acts or crimes by others. In particular, hatemongers can use telephones, often anonymously, to intimidate, threaten, or harass individuals or organizations, activities which generally constitute criminal

^{114/} Apr. '92 Klanwatch Report, supra note 92, at 17.

^{115/} Luxner, supra note 27, at 8. Metzger threatened to sue American Voice for violating his "First Amendment rights." Id.

^{116/} Sarah Tippet, Anti-Semitic Message Silenced, Orlando Sentinel Trib., May 25, 1990, at B5; Aug. '90 Klanwatch Report, supra note 84, at 11.

conduct under federal or state law.^{117/} Telephones also can be used to form a conspiracy to commit a crime or to violate an individual's civil rights.

According to data collected by the FBI pursuant to HCSA, intimidation was the most frequently reported hate crime in 1991, accounting for one out of three reported offenses.^{118/} However, the data do not specify the number of incidents in which telephones were used to intimidate.^{119/} Thus, there is no way to determine how many of the 1614 instances of hate-motivated intimidation reported in 1991 involved the use of a telephone.^{120/} According to the Civil Rights Division of the Department of Justice, the

^{117/} Federal law prohibits the use of telephones for obscene, annoying, or harassing calls across state lines or in the District of Columbia. 47 U.S.C. § 223(a) (1988). All states have similar statutes prohibiting the use of common carrier facilities to annoy or harass. *See, e.g.,* Colo. Rev. Stat. Ann. § 18-9-111(e)-(g) (West 1990); Mass. Gen. Laws Ann. ch. 269, § 14A (1990); Ohio Rev. Code Ann. § 4931.31 (Anderson 1991); Wash. Rev. Code Ann. § 9.61.230 (West 1993).

^{118/} *See* FBI Press Release, *supra* note 10, at 1. Under the FBI guidelines, all incidents that are bias-motivated are to be reported, regardless of whether arrests have taken place. *See* Federal Bureau of Investigation, U.S. Dep't of Justice, Training Guide for Hate Crime Data Collection App. C (Instructions for Preparing Quarterly Hate Crime and Hate Crime Incident Report) (undated).

^{119/} Moreover, local law enforcement agencies are asked to report only instances of "intimidation," defined under the FBI's guidelines as "[t]o unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack." Federal Bureau of Investigation, U.S. Dep't of Justice, Hate Crime Data Collection Guidelines 9 (undated). Therefore, local authorities typically do not report the numerous forms of telephone harassment that do not involve a threat of bodily injury.

^{120/} Moreover, these figures undoubtedly understate the number of occurrences nationwide because less than 20% of all law enforcement agencies submitted data to the FBI in 1991. *See* discussion *supra* notes 9-10 and accompanying text.

United States has prosecuted six racial violence cases involving telephone threats or obscene calls since 1987.^{121/}

No commenters provided NTIA with information on the use of telephones to commit hate crimes, although we gathered additional information in the course of this study on the scope and frequency of such acts. For instance, during 1991, the American-Arab Anti-Discrimination Committee received reports of 119 hate crimes directed at the Arab-American community, of which 34 incidents, or 29%, involved the use of a telephone.¹²² Many of those incidents occurred in January 1991, after hostilities began in Iraq. The reported incidents included death threats,^{123/} arson threats,^{124/} and bomb threats.¹²⁵ In other instances, Arab-Americans reportedly were subjected to telephone calls that did not threaten

^{121/} Information supplied by the Civil Rights Division, U.S. Dep't of Justice (on file at NTIA).

^{122/} American-Arab Anti-Discrimination Committee, 1991 Report on Anti-Arab Hate Crimes 11-22 (Feb. 1992) (1991 ADC Report). According to ADC, it utilized DOJ's guidelines on hate crime data collection to compile these figures from information reported to ADC's national office. Id. at 1.

ADC has maintained a log of incidents of harassment and violence directed at Arab-Americans since 1985, and in 1987 began reporting on such incidents in an attempt to sensitize the American public and government officials to the growing problem in this area. During 1986, ADC received reports of 42 hate crimes against Arab-Americans, of which 14 incidents, or 33%, involved intimidation or harassment by telephone. American-Arab Anti-Discrimination Committee, 1986 ADC Annual Report on Political and Hate Violence 6-20 (Apr. 1987). During 1990, ADC received reports of 39 hate crimes directed at Arab-Americans, of which 22 incidents, or 56%, involved intimidation or harassment by telephone. American-Arab Anti-Discrimination Committee, 1990 ADC Annual Report on Political and Hate Violence (Feb. 1991).

^{123/} Among the death threats reported by ADC was a case in New York in which the caller told an Arab-American, "You will die within 48 hours," and a case in Detroit in which the caller threatened to come to the office of an Arab-American organization with a high-powered rifle. 1991 ADC Report, supra note 122, at 12, 13.

^{124/} See, e.g., id. at 13.

^{125/} See, e.g., id. at 11, 13, 14.

harm to persons or property, but nonetheless may have violated federal and state statutes prohibiting obscene or harassing telephone calls.^{126/}

Klanwatch also monitors and reports on the occurrence of hate crimes nationwide. It reported the occurrence of twenty-one hate-motivated incidents involving the use of a telephone in 1992,^{127/} eighteen incidents in 1991,^{128/} and nineteen incidents in 1990.^{129/}

^{126/} See, e.g., id. at 15, 16, 17.

^{127/} See Dec. '92 Klanwatch Report, supra note 103, at 11-13; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Oct. 1992, at 8-10 (Oct. '92 Klanwatch Report); Aug. '92 Klanwatch Report, supra note 4, at 12-15; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), June 1992, at 13-14; Apr. '92 Klanwatch Report, supra note 92, at 13-16; Feb. '92 Klanwatch Report, supra note 92, at 23.

^{128/} Apr. '92 Klanwatch Report, supra note 92, at 14; Feb. '92 Klanwatch Report, supra note 92, at 23-28; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Dec. 1991; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Aug. 1991, at 6-7; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), June 1991, at 15; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Apr. 1991, at 15-16 (Apr. '91 Klanwatch Report).

^{129/} Apr. '91 Klanwatch Report, supra note 128, at 16; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Feb. 1991, at 24; Oct. '90 Klanwatch Report, supra note 3, at 10-14; Aug. '90 Klanwatch Report, supra note 84, at 7-8; June '90 Klanwatch, supra note 39; Klanwatch Intelligence Report (Southern Poverty Law Center, Montgomery, Ala.), Apr. 1990, at 8-11. For Klanwatch's summary of hate crimes reported prior to 1990, see Klanwatch Decade Review, supra note 81, at 35-44.

Some of those incidents were death threats,^{130/} others were arson or bomb threats,^{131/} and yet others may have violated federal and state laws against obscene or harassing telephone calls.^{132/}

In at least one state, attempts have been made to criminalize hate hotlines. In reaction to citizen complaints about a WAR hotline, the Oklahoma legislature amended the Malicious Intimidation and Harassment Act to include a provision that forbids the production or transmission of telephone electronic messages that are "likely to incite or produce, imminent violence . . . directed against another person because of that person's race, color, religion, ancestry, national origin or disability."^{133/} Since 1992, the police department of Tulsa, Oklahoma, has been monitoring messages on Tulsa's two hate hotlines for possible violations of this law.^{134/}

Telephones also can be used to form and actuate conspiracies to commit a crime or to violate an individual's civil rights. The most notorious example is the 1988 murder of Mulugeta Seraw, an Ethiopian, by three skinheads in Portland, Oregon. Investigation of the crime

^{130/} For instance, in 1992, Klanwatch reported that a caller on Long Island, New York, had left a message threatening to kill a homosexual Hofstra College student on the man's answering machine. Aug. '92 Klanwatch Report, *supra* note 4, at 14. In 1991, death threats to Jews were sent by facsimile machine to a radio talk show host in Kansas City, Kansas. Feb. '92 Klanwatch Report, *supra* note 92, at 23.

^{131/} For instance, in 1992, Klanwatch reported that a fitness club in Ocean Beach, California, had received about 150 telephone calls threatening to blow up the club and accusing it of catering to homosexuals. Aug. '92 Klanwatch Report, *supra* note 4, at 14.

^{132/} There have been many reports, for instance, of callers leaving anti-Semitic messages on synagogue answering machines. *See, e.g., Apr. '92 Klanwatch Report*, *supra* note 92, at 14; Aug. '92 Klanwatch Report, *supra* note 4, at 14.

^{133/} Okla. Stat. Ann. tit. 21, § 850(b) (West Supp. 1993).

^{134/} Dec. '92 Klanwatch Report, *supra* note 103, at 6; Telephone Conversation with Dan Allen, Organized Gang Unit, Tulsa Police Department (July 7, 1993).

soon revealed that Tom Metzger had sent agents into Portland to organize the skinheads, including those who committed the crime. Further, Metzger maintained contact with his agents and their protégés via telephone and facsimile. An Oregon jury subsequently held Metzger liable under state law for monetary damages for the murder of Mr. Seraw.^{135/}

IV. ISSUES AND RECOMMENDATIONS

As the preceding section shows, there is a relative dearth of statistics on the extent to which the telecommunications media are used to advocate or encourage the commission of hate crimes. While the problem of hate crimes in general has received national attention, and the FBI has made significant progress in gathering data under HCSA, the evidence linking this problem to telecommunications remains scattered and largely anecdotal.

More importantly, there are very few examples in the record in this proceeding in which the various telecommunications media have been used to advocate openly the commission of hate crimes. More commonly, a party uses telecommunications to convey messages of hate and bigotry that create a hostile environment in which hate crimes may occur. In some instances, such activities appear to be part of an ongoing strategy to foment violence and unrest. In other instances, however, it is difficult to discern whether the speaker actually intends to provoke any action, or merely seeks to express personal, religious, or political views.

Moreover, it appears that messages of hate represent only a very small percentage of the total communications through the various types of electronic media. While the existence of hateful messages is of concern, it appears that the number of messages of tolerance, both in reaction to specific cases and generally, far outweigh the number of incidents involving hate speech.

^{135/} For a complete discussion of this litigation, see Morris Dees & Steve Fiffer, Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi (1993).

Although NTIA understands the fears that the airing of "hate speech" over the media may create an atmosphere that encourages and legitimizes violence against minority groups,^{136/} we have found little evidence, as several of the reply comments noted,^{137/} of a causal connection between telecommunications-based "hate speech" and the occurrence of any hate-motivated crime. The only instance of which we are aware in which a message of hate conveyed via telecommunications can be linked to a specific hate crime is the 1984 murder of Jewish talk show host Alan Berg, and it is not clear in that case whether the message actually was the proximate cause of the crime. Although the other examples described above are deeply troubling, the extent to which messages of hate using telecommunications actually lead to the commission of acts of hate remains unclear.

The use of telecommunications for any hateful purpose is disquieting, nevertheless. In considering the appropriate governmental response to the types of incidents described in Section III above, we are mindful that telecommunications, by definition, involves expression. The First Amendment therefore furnishes a critical starting point for discussion of potential government responses to the use of telecommunications to advocate and encourage hate crimes.

We thus begin Section A, below, with a discussion of First Amendment principles governing expressions of hate or bigotry, and the belief, expressed by essentially every commenter, that the best remedy to hate speech is more speech, to enlighten the public and to challenge notions of hate and bigotry. Section B considers possible government actions to combat conduct motivated by hate or bias, including enhancement of criminal penalties for unlawful conduct committed with hateful intent, and whether existing federal civil rights laws adequately protect victims of hate crimes. Section C discusses telecommunications

^{136/} See, e.g., 1991 ADC Report, supra note 122, at 9 (concerned about anti-Arab slurs on radio talk shows and by disc jockeys).

^{137/} Reply Comments of MPAA at 2; Reply Comments of Alliance for Community Media at 2.

technologies that allow individuals to protect themselves from receiving unwanted messages, including offensive hate speech.

A. FIRST AMENDMENT CONSIDERATIONS
1. Discussion

The defining characteristic of both hate speech and hate crimes is the bigoted motivation of the speaker or actor. Governmental efforts to control the expression of such reprehensible thoughts, even when they are "expressed" in connection with the commission of a criminal act, necessarily implicate the First Amendment because "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."^{138/} For this reason, government must take care that its responses to the hate crime problem preserve First Amendment values.

In discussing these issues, let us make clear that NTIA has no sympathy for bigotry or prejudice of any variety. Such hateful attitudes have no place in a democratic, pluralistic society such as America. However, recognizing that bigotry is antithetical to the basic tenets of this nation, government should address the problem in a manner that protects fundamental liberties, such as those provided under the First Amendment.^{139/}

The Supreme Court recently marked the boundaries of permissible government action to regulate conduct that expresses bigoted thoughts in two cases, R.A.V. v. City of St. Paul,

^{138/} Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

^{139/} See, e.g., United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("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."), overruled on other grounds by Girouard v. United States, 328 U.S. 61 (1946).

Minnesota,^{140/} and Wisconsin v. Mitchell.^{141/} In R.A.V., a white youth was charged under St. Paul's bias-motivated disorderly conduct ordinance for burning a cross on the lawn of a black family.^{142/} The Supreme Court struck down the ordinance and dismissed the charge, holding that although government may regulate certain broad categories of speech^{143/} consistent with the First Amendment, such regulation must be content neutral.^{144/} In the case of flag-burning, for example, a state may not prosecute on the basis of a law banning flag desecration, because the prosecution would be based on hostility to the message expressed.^{145/} On the other hand, it may prosecute on the basis of a law

^{140/} R.A.V. v. City of St. Paul, Minnesota, 505 U.S. _____, 112 S. Ct. 2538 (1992).

^{141/} Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

^{142/} The ordinance stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn., Legis. Code § 292.02 (1990), cited in R.A.V., 112 S. Ct. at 2541.

^{143/} These categories include obscenity, defamation and "fighting words." R.A.V., 112 S. Ct. at 2543. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969), which stands for the proposition that speech may be restricted only when it is "directed to inciting or producing imminent lawless action." Id. at 446. People For the American Way argues that Brandenburg applies to speech transmitted via telecommunications, but that "in light of serious questions that have been raised about the extent of any alleged causal relationship between 'hate speech' and actual violent crime, it is extremely unlikely that this standard could be met with respect to most forms of speech over the media." Reply Comments of People For the American Way at 2.

^{144/} Id. at 2544-45 (government "may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed").

^{145/} The First Amendment places a "content discrimination limitation" on a state's power to regulate speech. Id.

banning fires in open places, because this prosecution would be content neutral.^{146/} The Court in R.A.V. applied this reasoning to the St. Paul ordinance, and concluded that it was unconstitutional on its face because it attempted to sanction certain types of expression.^{147/}

In Mitchell, a black teenager exhorted his companions to "move on some white people" after discussing a scene from the movie Mississippi Burning.^{148/} The group severely beat a white teenager, who remained comatose for four days. After Mitchell's conviction for aggravated battery, his sentence was enhanced (from a maximum of two years to a maximum of seven years) pursuant to Wisconsin's "penalty enhancement" statute for hate crimes.^{149/} On appeal, the Wisconsin supreme court ruled the statute unconstitutional because "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees."^{150/} The United States Supreme Court, in a unanimous opinion, overruled the state court's decision, holding that Wisconsin's penalty enhancement statute did not violate Mitchell's First Amendment rights.

^{146/} Id. at 2544 (discussing Texas v. Johnson, 491 U.S. 397 (1989)). See also West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

^{147/} R.A.V., 112 S. Ct. at 2550.

^{148/} Mitchell, 113 S. Ct. at 2196.

^{149/} The Wisconsin statute enhances a maximum penalty for a crime whenever a defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" Wis. Stat. § 939.645(1)(b) (1989-1990).

^{150/} Mitchell, 113 S. Ct. at 2197-98 (quoting State v. Mitchell, 169 Wis. 2d 153, at 171).

The Supreme Court reaffirmed its view that not all conduct can be labeled speech whenever the actor intends to express an idea.^{151/} This, however, did not dispose of the First Amendment argument, because, as the Court noted, under a penalty enhancement statute, the same criminal conduct may be punished more severely if the motive was discriminatory. The Court distinguished consideration of motive as a factor in setting punishment from punishment of a defendant's abstract thoughts or beliefs.^{152/} The Court stated that consideration of a defendant's motive as a factor in sentencing is the traditional prerogative of sentencing judges, but consideration of abstract beliefs for the same purpose would violate a defendant's First Amendment rights.^{153/}

The Court held that Wisconsin, having found that crimes motivated by bigotry "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest,"^{154/} may redress these harms through penalty enhancement.^{155/} The Court stated that any ensuing "chilling effect" on free speech is "far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases."^{156/} Finally, the Court explained that the First Amendment allows speech to be used for evidentiary purposes,

^{151/} "Thus, a physical assault is not by any stretch of the imagination expressive conduct." Id. at 2199.

^{152/} Id. at 2199-2200.

^{153/} Id. According to the Court, the lower court's reliance on R.A.V. was misguided because, whereas the Minnesota ordinance "was explicitly directed at expression (i.e., 'speech' or 'messages'), the statute in this case is aimed at conduct unprotected by the First Amendment." Id. at 2201 (citations omitted).

^{154/} Id.

^{155/} "[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.'" Id. (quoting 4 W. Blackstone, Commentaries *16).

^{156/} Id.

subject to relevancy, reliability, and other rules of evidence.^{157/} For these reasons, the Supreme Court found that Mitchell's First Amendment rights had not been violated by application of Wisconsin's penalty enhancement statute.

NTIA recognizes the power of telecommunications in disseminating voice, video, or textual messages to large audiences.^{158/} However, the fact that telecommunications technology can extend and amplify speech does not change the governing First Amendment analysis. Although R.A.V. holds that the government may not control hate speech by content-based regulation, Mitchell makes clear that hate speech may be used as evidence of bigoted motive for purposes of sentence enhancement once a defendant has been convicted of a crime.

In addressing the First Amendment aspects of this study, several commenters forcefully asserted that rather than trying to control hate speech, government should encourage more speech.^{159/} MPAA said that "the best answer to speech that promotes intolerance is more speech and discourse"^{160/} The Society for Electronic Access recognized Congress' legitimate interest in eradicating hate crimes, but cautioned that such efforts should not abridge the First Amendment.^{161/} It noted that education and the use of telecommunications to spread more speech about the damage of bigotry and hate crimes will

^{157/} Id. at 2201-02 (discussing Haupt v. United States, 330 U.S. 631 (1947) (conversation showing defendant's sympathy to Germany and Hitler allowed as evidence for a treason trial)).

^{158/} See supra notes 27-29 and accompanying text.

^{159/} Comments of EFF at 2; Comments of NATPE at 2; Comments of National Institute at 3; Comments of SEA at 6; Comments of Dick at 5; Reply Comments of Alliance for Community Media at 3; Reply Comments of ADL at 2; Reply Comments of Kadle; Reply Comments of MPAA at 2; Reply Comments of Nasam; Reply Comments of People For the American Way at 2.

^{160/} Reply Comments of MPAA at 2 (emphasis in original).

^{161/} Comments of SEA at 6.

lead to a reduction of hate crimes.^{162/} According to the ADL, "the best answer to hate speech is not laws driving it underground, but decent people speaking out, and society making such hatred unfashionable and unacceptable."^{163/}

The Electronic Frontier Foundation agreed with the time-honored notion that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil through the process of education, the remedy to be applied is more speech, not enforced silence."^{164/} People For the American Way echoed this view, stating that telecommunications can be used for the "open exchange of feelings and ideas which is necessary to promote mutual respect and understanding," and noting that "efforts to silence hate speech may have the effect of 'making martyrs out of the racists.'"^{165/} Moreover, trying to eliminate hate speech from any form of telecommunications could have the unintended consequence of silencing the expression of other minority groups.^{166/}

This view of the commenters -- that the only proper response to hate speech is more speech -- is consistent with the theory that free speech serves an "enlightenment function." This notion, which is well recognized in First Amendment jurisprudence and policy,^{167/} posits

^{162/} Id.

^{163/} Reply Comments of ADL at 2.

^{164/} Comments of EFF at 2 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

^{165/} Reply Comments of People For the American Way at 2.

^{166/} Comments of National Institute at 1.

^{167/} "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth" Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), overruled on other grounds by Brandenburg v. Ohio, 395 U.S. 444 (1969). Texas v. Johnson, 491 U.S. 397, 419 (1989). See also Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984); Eisenstadt v. Baird, 405 U.S. 438, 457 (1972) (Douglas, J.,

(continued...)

that exposure to competing ideas, and the ability of ideas to be accepted, is "the best test"^{168/} of the truth of such ideas. The enlightenment function of the First Amendment has been described as "presuppos[ing] that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be folly; but we have staked upon it our all."^{169/}

The commenters submitted many illustrations of speech to counter hate speech. On computer bulletin boards, for example, it is common for an individual who transmits offensive speech (which may or may not be hateful) to be "flamed," or confronted by the other users, and perhaps be banished from that particular bulletin board by the other users.^{170/} For mass media, commenters offered more generalized examples promoting tolerance. As noted above, NATPE has commissioned the production of several PSAs targeting racist attitudes

^{167/} (...continued from preceding page)
concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943); Nimmer, Nimmer on Freedom of Speech § 1.02 (1984); Susan Gellman, Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333, 381 (1991).

^{168/} Abrams, 250 U.S. at 630 (Holmes, J. dissenting).

^{169/} Associated Press, 52 F. Supp. at 372. But see, e.g., Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989), for a description of "outsider's jurisprudence," a critique of current First Amendment analysis, and suggestions on how racist speech could be sanctioned by government consistent with the First Amendment. Matsuda asserts that "[t]olerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay." Id. at 2323.

^{170/} For a description of "flaming," or verbal confrontation on the communications network when a user transmits offensive or hateful speech, see Comments of EFF at 4-5; Comments of Harnett at 1; Comments of Dick at 5. See also supra notes 89-92 and accompanying text (recounting controversy between Prodigy and the ADL over anti-Semitic messages on a Prodigy bulletin board and overwhelming ratio of positive to negative messages).

and has created incentives for others to produce such PSAs.^{171/} On cable access channels, programming has been produced specifically responding to previously-aired hate speech.^{172/}

2. Recommendations

NTIA agrees with the commenters that the best response to hate speech is more speech, and not government censorship or regulation. While the electronic media can be used to disseminate messages of bigotry and prejudice, they can also be a powerful tool for promoting tolerance, equality, and harmony. The private sector and government should intensify their efforts to make strong statements supporting tolerance and abhorring bigotry. Such action does not involve sanctioning speech or punishing thought. Rather, it seeks to educate and inform people about the evils of racism and bigotry, and the harmful effects that such notions have on American society and culture. Congress could, moreover, declare "A Month of Tolerance," which could serve as an opportunity to discuss these issues. Obviously, national coverage of such discussions would rely heavily on telecommunications and the electronic media. Another possible government response, advocated by NATPE, is that government "should encourage others in the communications and entertainment industries to use their resources . . . to effectively educate their audiences, young or old, about the destructive impact of intolerance of any kind."^{173/} Finally, NTIA will follow up this report by arranging meetings with industry and affected groups to discuss further hate crimes and hate speech involving the use of telecommunications.

^{171/} Comments of NATPE at 3-5. See also Marky Mark To Appear in Anti-Bias Ads, N.Y. Times, Feb. 18, 1993, at A5 (description of how private groups can pressure relatively high visibility public figures to make anti-bias PSAs); Lynne Heffley, TV Review: Voices of Hate vs. Voices of Reason, L.A. Times, June 7, 1993, at F11 (description of the television show Face the Hate, produced by Rysher Entertainment).

^{172/} See Bigotry and Cable TV, *supra* note 67, at 6-21 (discussing hate programming in three communities, and the overwhelming response of counterprogramming).

^{173/} Comments of NATPE at 3.

The federal government also could use existing mechanisms to bring together parties to talk and negotiate. For example, the Community Relations Service (CRS) of the U.S. Department of Justice was created by the Civil Rights Act of 1964 to assist communities and individuals in resolving disputes, disagreements, and difficulties relating to discriminatory practices based on race, color, or national origin.^{174/} With fourteen offices throughout the country, CRS actively assists communities to resolve conflicts arising from discriminatory practices. It publishes guides and brochures, and operates a telephone hotline (1-800-347-HATE) to provide information on how to avoid conflicts based on discrimination and resolve peacefully and voluntarily any conflicts that do arise.^{175/} In response to the presentation of Race and Reason over a Kansas City, Missouri, public access channel (which was also the subject of a contentious legal battle),^{176/} the CRS brought together several parties to establish the groundrules for the production of the program and to defuse potential racial tensions and violence.^{177/} As one commenter to this proceeding noted, the long term result was "valuable discourse."^{178/}

^{174/} 42 U.S.C. § 2000(g) (1988). Originally, CRS was established as part of the Department of Commerce, but it subsequently was transferred to DOJ by the Reorganization Plan No. 1 of 1966.

^{175/} CRS also sponsors discussions and presentations for civic groups, business leaders, secondary schools, universities, law enforcement agencies, and public officials. In addition, it has sponsored collaborative projects with non-profit organizations to develop community response models.

^{176/} The Ku Klux Klan's attempts to air Race and Reason in Kansas City prompted city officials to terminate its public access channel. The Klan and others brought suit claiming that their First Amendment rights were being violated. The suit was settled when Kansas City agreed to allow the public access channel to air the programming. Bigotry and Cable TV, *supra* note 67.

^{177/} Telephone Conversation with Robert Wesley, CRS, Kansas City, Missouri (June 8, 1993).

^{178/} Comments of Dick at 5.

B. LEGAL REMEDIES

NTIA's primary recommendation to combat hate speech emphasizes the need for more speech, rather than seeking remedies through regulation. However, when the issue turns to deterring conduct, government can and does enact laws prohibiting some forms of hate-motivated activity.

1. Criminal Penalties a. Discussion

Many illegal acts involving the use of telecommunications can be prosecuted under existing federal and state criminal laws. One federal law that specifically targets telecommunications is Section 223(a) of the Communications Act of 1934,^{179/} which prohibits the use of telephones in interstate communications to annoy, abuse, threaten, or harass individuals.^{180/} Federal law also makes it a crime to make bomb or arson threats over the telephone,^{181/} or to use any interstate facility of commerce, including the telephone, radio, or television, to incite riots.^{182/} These laws can be used to prosecute illegal conduct committed with biased intent. Similarly, all states have criminal statutes that punish conduct at the core of the typical hate crime (e.g., murder, assault, intimidation).

^{179/} 47 U.S.C. § 223(a) (1988).

^{180/} This statute was used, for example, to prosecute and convict an individual who made a series of harassing and threatening anti-Semitic telephone calls to the Jewish National Fund in 1988. See United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990).

^{181/} 18 U.S.C. § 844 (1988). There also are federal criminal penalties for transmitting any ransom demand or any threat to kidnap or injure any person over interstate communications. 18 U.S.C. § 875 (1988).

^{182/} 18 U.S.C. § 2101 (1988). In addition, hate crimes may be prosecuted under 18 U.S.C. § 241 (1988), which criminalizes conspiracies to interfere with a citizen's exercise of any right or privilege secured by the Constitution or U.S. law, or 18 U.S.C. § 245 (1988), which imposes criminal penalties for threatening, intimidating, or interfering with individuals who seek to exercise specified protected federal rights.

However, in response to the increase in bias-related violence, many states have apparently concluded that their general criminal statutes do not sufficiently deter such conduct. Thus, most states have enacted various forms of "penalty enhancement" statutes,^{183/} which typically increase penalties for actions -- already punishable under existing criminal laws -- taken "because of" or "by reason of" the victim's race, religion, color, or other general characteristics.^{184/} Under these laws, evidence of illicit motive is an essential element of the crime^{185/} and must be proved beyond a reasonable doubt in order to secure a conviction.

^{183/} In 1991, ADL identified 46 states with hate crime statutes, of which 31 are based on or similar to ADL's model legislation providing for enhanced penalties for certain bias-motivated crimes. Anti-Defamation League of B'nai B'rith, Hate Crime Statutes: A 1991 Status Report 1-2 & App. A (1991). Since that report was issued, Utah also enacted a hate crimes statute. See Utah Code Ann. § 76-3-203.3 (1992).

^{184/} Many state hate crime statutes enhance penalties only for offenses committed because of the victim's race, color, religion, or national ancestry. See, e.g., Colo. Rev. Stat. Ann. § 18-9-121 (West 1990); Idaho Code §§ 18-7902, 18-7903 (1987); Mont. Code Ann. §§ 45-5-221 to -222 (1991). However, other states have also increased penalties for criminal acts committed because of the victim's gender, sexual orientation, and disability. See, e.g., Cal. Penal Code §§ 422.6-.7 (West Supp. 1993) (gender, sexual orientation, and disability); Conn. Gen. Stat. Ann. § 53a-181b (West Supp. 1993) (sexual orientation); Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd 1992) (gender, sexual orientation, and disability).

State hate crime statutes also differ in the types of offenses that are subject to increased penalties. See, e.g., Cal. Penal Code § 422.6 (West Supp. 1993) (injuring, intimidating, or interfering with another's enjoyment of any right secured by state or federal laws and Constitutions); Conn. Gen. Stat. Ann. § 53a-181b (West Supp. 1993) (intimidation); Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd 1992) (assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, or mob action). In Oklahoma, the Malicious Intimidation and Harassment Act, Okla. Stat. Ann. tit. 21, § 850(b)-(c) (West Supp. 1993), criminalizes the production or transmission of any telephone or electronic message or any broadcast that is likely to incite imminent violence. See also supra note 133 and accompanying discussion.

^{185/} See Note, Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes, 106 Harv. L. Rev. 1314, 1316 (1993).

Congress is now considering a penalty enhancement statute, H.R. 1152, the "Hate Crimes Sentencing Enhancement Act of 1993."^{186/} If enacted, the statute would require the United States Sentencing Commission to amend its existing sentencing guidelines "to provide sentencing enhancements of not less than [three] offense levels for offenses that [qualify as] hate crimes."^{187/} Like state penalty enhancement statutes, H.R. 1152 would increase the permissible sentences for existing federal crimes, such as those described above,^{188/} if committed with biased motive. Unlike those state statutes, however, H.R. 1152 would not make motive an element of the underlying crime, but would introduce evidence of illicit motive in the sentencing phase of a criminal proceeding.^{189/}

Penalty enhancement statutes raise difficult questions of law and policy. As a matter of law, there has been considerable disagreement among state courts about the constitutionality of

^{186/} H.R. 1152 passed the House of Representatives on Sept. 21, 1993, H.R. 1152, 103d Cong., 1st Sess. § 2 (1993). A companion bill, S. 1522, was introduced on Oct. 6, 1993, S. 1522, 103d Cong., 1st Sess. § 2 (1993).

^{187/} The sentencing guidelines specify the factors to be taken into account, such as the acts committed and the harm that resulted, in determining the severity of punishment for a particular crime. Offense levels refer to points or weights attributed to severity characteristics of various crimes. See generally United States Sentencing Commission, Guidelines Manual 288-89 (amended Nov. 1, 1992) (application of offense levels in calculating length of prison sentences).

The bills define a hate crime as "a crime in which the defendant intentionally selects a victim [or] the property [that] is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of any person."

^{188/} See supra notes 179-180 and accompanying text.

^{189/} The Supreme Court has permitted the introduction of relevant evidence of bias at sentencing, even over First Amendment objections. See Dawson v. Delaware, 503 U.S. _____, 112 S. Ct. 1093, 1098 (1992) (relevant evidence of bias motivation may be introduced in the sentencing phase); Barclay v. Florida, 463 U.S. 939, 942-44 (1983) ("the defendant's membership in the Black Liberation Army . . . [was] related to the murder of a white hitchhiker" and, therefore, proper for the sentencing judge to take into consideration).

such statutes.^{190/} As discussed above,^{191/} however, the U.S. Supreme Court's recent decision in Wisconsin v. Mitchell held that the First Amendment does not prohibit government from adopting a penalty enhancement statute similar to the Wisconsin law, or akin to H.R. 1152.^{192/} Nonetheless, the effectiveness of such legislation as a means of deterring the use of telecommunications in the commission of hate crimes remains unclear.

There is little information on the prevalence of hate-motivated federal crimes, particularly crimes involving the use of interstate telecommunications, that would be useful in analyzing whether enactment of H.R. 1152 would affect the use of interstate telecommunications to advocate or encourage hate crimes. To be sure, the FBI's first report on hate crimes identifies a total of 4558 bias-related crimes in 1991.^{193/} However, the FBI does not indicate how many of those cases involve violations of federal, as opposed to state, law. Indeed, because the Bureau's data come from state and local law enforcement agencies, the vast majority of the incidents reported likely involve violations of state law.

^{190/} Three courts found enhancement statutes unconstitutional on various grounds. See State v. Mitchell, 169 Wis. 2d 153, 485 N.W.2d 807 (1992), rev'd sub nom. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (First Amendment); State v. Wyant, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992) (First Amendment/state free speech); Richards v. State, 608 So. 2d 917 (Fla. App. 3rd Dist. 1992) (vagueness/overbreadth). Three courts have upheld such enhancement statutes against challenges based on several grounds. See State v. Plowman, 838 P.2d 558 (Or. 1992) (First Amendment/state free speech and due process); In Re Joshua H., 17 Cal. Rptr. 2d 291 (Cal. App. 6th Dist. 1993) (First Amendment, vagueness, overbreadth/state due process); Dobbins v. State, 605 So. 2d 922 (Fla. App. 5th Dist. 1992) (First Amendment).

^{191/} See supra notes 148-157 and accompanying text.

^{192/} In Mitchell, the Court noted that a sentencing enhancement bill considered by Congress in 1992 (H.R. 4797, which was identical to H.R. 1152) would have the same effect (and, presumably, would be subject to the same First Amendment treatment) as the Wisconsin statute under review in that case. Mitchell, 113 S. Ct. at 2198 n.4.

^{193/} FBI Press Release, supra note 10, at 1.

Most importantly, as noted above,^{194/} the FBI's data collected pursuant to HCSA do not specify whether any of the intimidation incidents reported involve telecommunications, as opposed to face-to-face confrontations. Nor does HCSA require compilation of statistics regarding telephone harassment, which is proscribed under 47 U.S.C. § 223(a).

b. Recommendation

As an initial matter, we recommend that the FBI consider modifying its collection of statistics on hate crimes^{195/} to include those that use telecommunications, as well as a breakdown of the data accumulated according to whether federal or state law has been violated. Such improved data collection would assist in any future evaluation of the need for further federal regulatory or legislative action regarding hate crimes that use telecommunications.^{196/} In considering such modifications, the FBI would, however, need to evaluate carefully the likelihood that such changes would achieve their intended purpose, as well as any resource implications that would result from their adoption. The costs of such modifications (e.g., software design and additional training for the federal and state personnel involved) should be considered as well as the benefits of any additional statistics collected. The paucity of data on the occurrence of federal hate crimes involving telecommunications does not provide a basis, on telecommunications policy grounds, for determining whether a federal penalty enhancement statute like H.R. 1152 should be adopted at this time.

^{194/} See discussion *supra* p. 27.

^{195/} HCSA mandated government collection of hate crimes statistics through 1994. HCSA § (b)(1). However, the FBI has indicated that the collection of hate crime statistics will become a permanent part of its Uniform Crime Reporting Program. Letter from Louis J. Freeh, Director, Federal Bureau of Investigation, to Sen. Paul Simon, Committee on the Judiciary, United States Senate (Oct. 15, 1993) (on file at NTIA).

^{196/} Because the states have taken a variety of approaches to criminalizing conduct that specifically involves the use of telecommunications, see, e.g., Okla. Stat. Ann. tit. 21, § 850(b)-(c) (West Supp. 1993), examining state experience with such approaches would be valuable in future evaluations.

2. Civil Remedies
a. Discussion

Although criminal prosecution will likely be the most direct government response to hate crimes, civil proceedings can also be powerful tools for punishing or deterring bias-related incidents.^{197/} Most importantly, a civil action affords the victim an opportunity to receive compensation from his or her assailant for injuries suffered during an assault. Moreover, civil causes of actions have other features that make them a valuable bulwark against hate crimes.

First, trial procedures and the rules of evidence in civil trials are less favorable to the defendant than is the case in criminal proceedings.^{198/} As a result, in cases where there are evidentiary problems related to the stricter standards applicable in the criminal context, the victim of hate-based conduct will likely have a better chance of obtaining relief via a civil suit than the state will have of successfully prosecuting the perpetrator under the applicable hate crime statute.^{199/}

Second, when the victim of a bias-related injury prevails in a civil case, any money damages awarded can serve to punish the perpetrator, as well as to compensate the victim. In some cases, the punitive aspect of compensatory damages will be severe indeed. For example,

^{197/} Generally speaking, civil actions are brought by individuals (as opposed to the government, as is the case with criminal proceedings) to enforce private rights or to redress personal injuries. A court typically grants a prevailing plaintiff in a civil case either monetary damages or an injunction against current or future conduct by the defendant.

^{198/} For example, the burden of proof in civil cases is significantly lower than the "beyond a reasonable doubt" standard that applies in criminal trials. Further, while the plaintiff in a civil action may call the defendant to the witness stand, the Fifth and Fourteenth Amendments prevent the government from compelling a criminal defendant to testify against himself or herself.

^{199/} See P. Finn & T. McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review 36 (Oct. 1987) (draft report submitted to the U.S. Dep't of Justice), reprinted in HCSA Hearings, supra note 11, at 159.

collection of a \$12.5 million judgment against white supremacist Tom Metzger entered by an Oregon court for his role in the hate murder of Mulugeta Seraw^{200/} ultimately stripped Metzger of virtually all of his assets, including his home.^{201/} Similarly, to settle a \$900,000 federal court judgment for its part in the 1987 attack on civil rights marchers in Forsyth County, Georgia, the nation's largest Ku Klux Klan group, the Invisible Empire Knights of the Ku Klux Klan, was compelled to surrender its name, assets, publishing arm, and membership and subscribership lists.^{202/} Although these penalties will not destroy these groups, such penalties may slow their activities.

Third, monetary damages are not the only remedy in a civil action. An injunction can also be issued to bar perpetrators from continuing offensive conduct in the future, whether against the plaintiff or any member of the plaintiff's group.^{203/} Moreover, violation of an injunction is a serious offense that brings swift and severe punishment. As a result, injunctive relief is particularly useful in remedying instances of vandalism, for which monetary and criminal penalties are typically minimal.^{204/}

^{200/} That judgment was recently upheld by a state court of appeals. Berhanu v. Metzger, 119 Ore. App. 175 (1993).

^{201/} See Dees & Fiffer, supra note 135, at 275.

^{202/} Lynne Duke, Klan Unit Gives Up Assets in Rights Suit Settlement, Wash. Post, May 20, 1993, at A1.

^{203/} See Finn & McNeil, supra note 199, at 36, reprinted in HCSA Hearings, supra note 11, at 159. For an example of an instance where injunctive relief was used to terminate bias-related harassment, see Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982) (permanent injunction issued); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981) (preliminary injunction issued).

^{204/} See Finn & McNeil, supra note 199, at 36, reprinted in HCSA Hearings, supra note 11, at 159.

For all of these reasons, civil actions can be an effective weapon for combating hate crimes.^{205/} This explains, at least in part, why a number of states have enacted statutes creating a civil cause of action for victims of hate crimes.^{206/} Federal law also authorizes civil actions to remedy private and government violations of individual civil rights.^{207/} However, the general federal civil rights statutes, 42 U.S.C. §§ 1981, 1982, and 1985(3),^{208/} are sufficiently narrow in their scope or uncertain in their application to limit

^{205/} Some observers have advocated that states should create civil causes of action for victims of hate speech. See Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

^{206/} In most cases, these causes of action arise from the same conduct that is punished in the state's hate crime statute. See, e.g., Colo. Rev. Stat. Ann. § 13-21-106.5 (West 1992); Idaho Code § 18-7903(b) (1987); Ill. Ann. Stat. ch. 38, para. 12-7.1(c) (Smith-Hurd 1992); Mass. Gen. Laws Ann. ch. 266, § 127B (West 1990); Mo. Ann. Stat. § 537.523(1) (Vernon Supp. 1993); R.I. Gen. Laws § 9-1-35(a) (1985); Wash. Rev. Code Ann. § 9A.36.080(4) (West Supp. 1993). Any civil causes of action under such statutes would be in addition to actions that a victim might bring under general state tort law, such as battery or intentional infliction of emotional distress.

^{207/} See 42 U.S.C. §§ 1981-1988 (1988 and Supp. III 1991).

^{208/} Section 1983 generally prohibits discriminatory conduct by individuals acting "under color of" state law. Because very few hate crimes (as that term has been defined for purposes of this report) are committed by state government officials, NTIA does not discuss Section 1983 in this report.

Section 1986 permits civil suits against any individual who, having knowledge that a violation of Section 1985 is about to occur and having the ability to prevent it, neglects or refuses to do so. Because success under Section 1985 is a prerequisite to any relief under Section 1986, we have focused our attention in this report on the former provision.

Finally, Section 1988 discusses which law (i.e., federal or state) should apply in proceedings under the civil rights statute and authorizes the award of reasonable attorney's fee to the prevailing party. Because these provisions are not substantive in nature, NTIA does not address them here.

their usefulness as a weapon against hate crimes, including those that use telecommunications.^{209/}

As noted above,^{210/} there are few situations in which an individual can commit a crime solely by the use of a telecommunications medium. Similarly, although telecommunications-disseminated threats alone may interfere with rights protected by Section 1982,^{211/} Sections 1981 and 1985(3) likely do not reach perpetrators whose only "weapons" are words and the telecommunications facilities by which they are delivered. On the other hand, the latter two provisions apply to conspiracies and, as discussed in Section III,^{212/} telecommunications facilities have been used to form and actuate conspiracies to commit a crime or to violate an individual's civil rights. The following discussion will consider whether and to what extent

^{209/} Other federal statutes may also provide some protection for victims of hate crimes, including telecommunications-related incidents. For example, the Civil Rights Act of 1964 authorizes civil remedies for discrimination or segregation in places of public accommodation. See 42 U.S.C. §§ 2000a-2, 2000a-3 (1988). The Voting Rights Act of 1965 empowers the U.S. Attorney General to bring civil actions to prevent interference with voting rights. See id. §§ 1973i(b), 1973j(d). Federal law also permits civil causes of action against private interference with fair housing rights. See id. § 3617. Finally, the Americans with Disabilities Act of 1991 allows individuals to file civil suits to remedy violations of any of the rights secured by that legislation. See 42 U.S.C. § 12203 (Supp. III 1991).

Although these statutes may be of value in some circumstances, their applicability is limited in several important respects. These statutes do not cover discrimination predicated on sexual orientation, one of the four categories identified in HCSA. Moreover, the statutes discussed protect against interference with the exercise of specifically defined and enumerated federal rights. They would not be available to those hate crime victims who are targeted simply because of who they are, rather than because of what they are doing (e.g., entering a hotel or restaurant, voting, renting a home).

^{210/} See supra notes 179-180 and accompanying text.

^{211/} See infra note 232 and accompanying text.

^{212/} See discussion supra at p. 30.

the federal civil rights laws could apply to acts of hate committed by conspirators who use telecommunications to carry out the aims of their conspiracy.

Section 1981 provides, in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens^{213/}

The Supreme Court has held that Section 1981 bars certain forms of race-based discrimination.^{214/} Moreover, the Court has also ruled that the term "race" should be given the meaning that prevailed when the statute was enacted in the late 19th century.^{215/} Accordingly, Section 1981 can be used to remedy private discriminatory conduct based on "ancestry or ethnic characteristics."^{216/}

Nevertheless, while the protections of Section 1981 may be available to members of a wide range of ethnic groups, its coverage is by no means complete.^{217/} For example, the statute

^{213/} 42 U.S.C. § 1981 (1988). The "full and equal benefit" language is actually the second of three clauses in Section 1981. The first clause prohibits discrimination in the making and enforcement of contracts. The third clause prohibits discriminatory application of "punishment, pains, penalties, taxes, licenses, and exactions of every kind." Because the types of conduct covered by the first and third clauses are not present in the typical hate crime, our discussion of Section 1981 focuses on the "full and equal benefit" clause.

^{214/} Runyon v. McCrary, 427 U.S. 160 (1976).

^{215/} Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).

^{216/} Id. at 613.

^{217/} Indeed, it is not clear precisely which racial or ethnic groups may successfully invoke Section 1981. Although the Court's opinion in Al-Khazraji lists thirteen different groups that were considered distinct "races" in the years after the Civil War (including Arabs, gypsies, Germans, and Finns), id. at 611, that discussion is dicta.

(continued...)

does not apply to discrimination based on religion^{218/} or sexual orientation^{219/} -- two of the four "hate" motives specifically mentioned in HCSA.^{220/} As a result, Section 1981 is not available to all potential victims of hate crimes, including those involving telecommunications. It is true, nevertheless, that many hate crimes are racially and ethnically-motivated offenses and, thus, are cognizable under the statute.^{221/}

It is also unclear whether the statute will even permit protected victims to prosecute claims against many perpetrators of bias-related offenses.^{222/} Although the Supreme Court has

^{217/} (...continued from preceding page)

Thus far, the Court has held only that blacks, Runyon, 427 U.S. at 160, whites, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), Arabs, Al-Khazraji, and Jews, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987), are protected "races" for purposes of Section 1981. However, lower federal courts have concluded that the statute covers other ethnic groups as well. See, e.g., MacDissi v. Valmont Indus., Inc., 856 F.2d 1054 (8th Cir. 1988) (Lebanese); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) (Puerto Ricans); Von Zuckerstein v. Argonne Nat'l Lab., 760 F. Supp. 1310 (N.D. Ill. 1991) (Chinese, "East Indians"). Indeed, Congress might violate the "equal protection" guarantees of the Fifth and Fourteenth Amendments if it recognized a right of action under Section 1981 for some racial or ethnic groups, but not others.

^{218/} Al-Khazraji, 481 U.S. at 613.

^{219/} E.g., Albert v. Carovano, 839 F.2d 871 (2d Cir. 1987).

^{220/} The Supreme Court has also held that Section 1981 does not cover discrimination on the basis of national origin, Al-Khazraji, 481 U.S. at 613, or gender, Runyon, 427 U.S. at 167.

^{221/} Of the 4755 hate offenses reported to the FBI in 1991, more than 70% were directed at whites, blacks, and Jews -- individuals who may invoke Section 1981 under existing Supreme Court precedents. See FBI Press Release, supra note 10, at 3 (although the FBI treats crimes against Jews as religiously-motivated, as noted above, the Supreme Court has ruled that Jews are a "racial" group for purposes of Section 1981).

^{222/} In contrast, it seems apparent that conduct that would constitute a hate crime under HCSA (assuming proof of bias) would also be actionable under Section 1981. See, e.g., Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), rev'd on
(continued...)

construed Section 1981 as reaching discriminatory conduct by private parties,^{223/} it has explicitly so held only in cases construing the first clause of the statute -- relating to the making and enforcement of contracts. However, most (but not all) lower courts have concluded that the "full and equal benefit" clause protects individuals only against "state action," that is, government-adopted, or government-sanctioned, discrimination.^{224/} As a result, if the victim of a racially-motivated attack by a member of a telecommunications-based conspiracy sought to bring a claim under Section 1981, he or she could only hope that the attack took place in a federal circuit that construes Section 1981 to cover private conduct.

Section 1982 states that:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.^{225/}

^{222/} (...continued from preceding page)
other grounds, 481 U.S. 615 (1987) (vandalism of property); Carey v. Rudeseal, 703 F. Supp. 929 (N.D. Ga. 1988) (assault); Hawk v. Perillo, 642 F. Supp. 380 (N.D. Ill. 1985) (assault).

^{223/} Runyon, 427 U.S. at 160.

^{224/} See, e.g., Shaare Tefila Congregation, 785 F.2d at 525-26 (4th Cir. 1986); Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978); Brooks v. American Broadcasting Cos., Inc., 737 F. Supp. 431, 440 (N.D. Ohio 1990); Spencer v. Casavilla, 717 F. Supp. 1057, 1059-60 (S.D.N.Y. 1989), vacated and remanded on other grounds, 903 F.2d 171 (2d Cir. 1990); Rochon v. Dillon, 713 F. Supp. 1167, 1172 (N.D. Ill. 1989); Chiles v. Crooks, 708 F. Supp. 127, 132 (D.S.C. 1989); Provisional Gov't of Rep. of New Afrika v. American Broadcasting Cos., Inc., 609 F. Supp. 104, 109 (D.D.C. 1985); Williams v. Northfield Mt. Herman School, 504 F. Supp. 1319, 1332 (D. Mass. 1981). But see Franceschi v. Hyatt Corp., 782 F. Supp. 712, 718 (D.P.R. 1992); Carey v. Rudeseal, 703 F. Supp. 929 (N.D. Ga. 1988); Hawk v. Perillo, 642 F. Supp. 380 (N.D. Ill. 1985); Vietnamese Fishermen's Ass'n, 518 F. Supp. at 1008-09 (dicta); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894, 901 (E.D. Mo. 1969).

^{225/} 42 U.S.C. § 1982 (1988).

In 1968, the Supreme Court construed that language to preclude "all racial discrimination, private as well as public, in the sale or rental of property."^{226/} In a subsequent decision, the Court clarified that Section 1982 also safeguards an individual's right "to use property on an equal basis with white citizens," as well as his or her right "not to have property interests impaired because of . . . race."^{227/} Finally, as was the case with respect to Section 1981, the Court has interpreted the phrase "racial discrimination" to encompass discriminatory conduct based on "ancestry or ethnic characteristics."^{228/}

Accordingly, Section 1982 can provide effective redress for some victims of hate crimes that involve destruction of property or impairment of property rights.^{229/} Like Section 1981, however, Section 1982 only reaches discrimination based on race or ethnicity;^{230/} it does not authorize a cause of action for property damage committed out of hatred for the victim's gender, national origin, religion, or sexual orientation.^{231/} Thus, the statute would likely provide a cause of action for a storeowner who receives death threats and slurs in telephone

^{226/} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (emphasis in original).

^{227/} Memphis v. Greene, 451 U.S. 100, 120, 122 (1981).

^{228/} Shaare Tefila Congregation, 481 U.S. at 617.

^{229/} See, e.g., Emanuel v. Barry, 724 F. Supp. 1096 (E.D.N.Y. 1989) (arson of a Jewish family's barn; court dismissed plaintiffs' Section 1985(3) claim, but found that complaint stated a cause of action under Section 1982); Stirgus v. Benoit, 720 F. Supp. 119 (N.D. Ill. 1989) (firebombing of a black woman's house).

^{230/} See Shaare Tefila Congregation, 481 U.S. at 617-18 (Section 1982 reaches the same sorts of "race" discrimination as are proscribed by Section 1981). The protection offered by Section 1982 is, nevertheless, more narrow than that afforded by Section 1981, because Section 1982, by its terms, authorizes suits only by citizens.

^{231/} Moreover, Section 1982 does not apply to personal injuries resulting from racially-motivated violence. As a result, it will be of use to victims in only a fraction of hate crime cases. In this regard, of the 4755 hate crimes reported to the FBI in 1991, fewer than one-third involved, even arguably, destruction of property or impairment of property rights. See FBI Press Release, supra note 10, at 1.

calls from individuals intent on putting him or her out of business,^{232/} so long as the proprietor is being victimized because he or she is (for example) black, Jewish, or Korean.

Section 1985(3) provides, in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.^{233/}

In Griffin v. Breckenridge, the Supreme Court ruled that this language applies to private conspiracies,²³⁴ as well as to combinations operating under the color of state law.^{235/}

Such conspiracies, of course, may use telecommunications to further their illegal activities.

^{232/} See supra note 2 and accompanying text.

^{233/} 42 U.S.C. § 1985(3) (1988). Section 1985(1) addresses conspiracies to prevent an officer of the United States from performing his or her duties. Section 1985(2) reaches conspiracies to obstruct justice or to intimidate parties, witnesses, or jurors in any court of the United States. The second and third clauses of Section 1985(3) address conspiracies (a) to prevent state officials from securing for all persons within that state the equal protection of the laws and (b) to prevent citizens from supporting and advocating the election of a candidate for President, Vice President, or Congress. Again, because such conduct is not an element of the usual hate crime, NTIA's analysis of Section 1985 is limited to the quoted language in Section 1985(3).

^{234/} A conspiracy is "[a] combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act." Black's Law Dictionary 280 (5th ed. 1979).

^{235/} 403 U.S. 88 (1971) (overturning Collins v. Hardyman, 341 U.S. 651 (1951)).

Further, in Griffin and subsequent decisions,^{236/} the Court identified four essential elements of a successful claim under Section 1985(3):

- (1) a conspiracy;
- (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and
- (3) an act in furtherance of the conspiracy;
- (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.^{237/}

However, to avoid transforming the statute into a "general federal tort law,"^{238/} the Court further refined the second element to require that (a) there "must be racial, or perhaps otherwise class-based, invidiously discriminatory animus" behind the conspirators' actions,^{239/} and (b) the conspiracy must be "aimed at interfering with rights constitutionally protected against private, as well as official, encroachment."^{240/}

Victims of many bias-related offenses, including those incidents involving the use of telecommunications, would likely be able to prove the first, third, and fourth elements of a Section 1985(3) claim. Our review of the descriptions of myriad hate crimes indicates that perpetrators of such offenses frequently act in concert. In those instances, their victims will

^{236/} Bray v. Alexandria Clinic, 113 S. Ct. 753 (1993); United Bhd. of Carpenters v. Scott, 463 U.S. 825 (1983); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979).

^{237/} Carpenters, 463 U.S. at 828-29.

^{238/} Griffin, 403 U.S. at 102.

^{239/} Id.

^{240/} Carpenters, 463 U.S. at 833. At least one Supreme Court Justice has argued that creation of these two subelements rests on an overly restrictive reading of Section 1985(3). Bray, 113 S. Ct. at 771-75 (Souter, J., concurring in part and dissenting in part). See also Ken Gormley, Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 Tex. L. Rev. 527, 564-75 (1985).

generally have little difficulty proving the existence of a conspiracy. As for the third element, the occurrence of a crime necessarily implies some act in furtherance of a conspiracy to commit that crime.^{241/} Finally, the personal injuries or property damages that result from many acts of hate will be sufficient to satisfy the fourth element.^{242/}

A victim's ability to bring a successful Section 1985(3) claim concerning a telecommunications-related act of hate would seem to hinge, therefore, on whether he or she can prove the second, "equal protection," element. As noted above, the Supreme Court has held that this element includes a requirement that the conspiracy be "aimed at interfering with rights constitutionally protected against private, as well as official, encroachment."^{243/}

^{241/} An act in furtherance of the conspiracy "need not be pleaded against each defendant, because a single overt act by just one of the conspirators is enough to sustain a conspiracy claim even on the merits." Waller v. Butkovich, 584 F. Supp. 909, 931 (M.D.N.C. 1984). See also In re North Dakota Personal Injury Asbestos Litigation, 737 F. Supp. 1087, 1095 (D.N.D. 1990).

^{242/} It is less clear, however, whether victims of bias-related "intimidation" or threats will be able to satisfy this element.

^{243/} The "equal protection" element also requires proof that the conspiracy was motivated by "racial, or perhaps class-based" animus. However, the Supreme Court has offered little gloss on this phrase apart from a statement (in dicta) that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans," Carpenters, 463 U.S. at 836, and its holdings that Section 1985(3) reaches discriminatory conduct against black people, Griffin, but does not apply to "conspiracies motivated by economic or commercial animus," Carpenters, 463 U.S. at 838, or to discriminatory conduct against "women seeking abortion," Bray, 113 S. Ct. at 759.

In the absence of direction from the Supreme Court, a number of federal courts have concluded that Section 1985(3) reaches only conspiracies directed at blacks and their civil rights supporters. See, e.g., Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); Wilhelm v. Continental Title Co., 720 F.2d 1173, 1175-77 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

However, most federal courts, taking a more expansive view of the statute, have held that its protected racial and class-based groups include whites, e.g., Triad Associates,

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Recently, moreover, the Supreme Court seemingly narrowed the range of federally-protected rights that can be vindicated (as against private conspiracies) by a civil action under Section 1985(3).

In Bray v. Alexandria Clinic, the Court reiterated that the statute applies only to private conspiracies "aimed at interfering with rights . . . protected against private, as well as official, encroachment."^{244/} Accordingly, a person cannot base a Section 1985(3) claim on violations by private individuals of rights secured by the Bill of Rights or the Fourteenth Amendment, because those rights are safeguarded only against government encroachment.^{245/} Thus, for example, if a telecommunications-based conspiracy results in someone being killed, the victim's survivors cannot sue the murderers under Section 1985(3) because the Fifth and Fourteenth Amendments do not apply to private actions.^{246/}

^{243/} (...continued from preceding page)

Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), women, e.g., Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) (and cases cited therein), Jews and other religious groups, e.g., Jews for Jesus v. Jewish Comm. Rel. Council of New York, 968 F.2d 286 (2d Cir. 1992); Ward v. Connor, 657 F.2d 45 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982), and Native Americans, Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, 781 F. Supp 1385 (W.D. Wis. 1992), rev'd on other grounds, 991 F.2d 1249 (7th Cir. 1993). On the other hand, most courts have concluded that the protections of Section 1985(3) do not extend to homosexuals, e.g., DeSantis v. Pacific Tel. & Tel., 608 F.2d 327 (9th Cir. 1979); Todd v. Navarro, 698 F. Supp. 871 (S.D. Fla. 1988); Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987), or disabled individuals, D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1485-87 (7th Cir. 1985); Wilhelm, 720 F.2d at 1175-77. Contra Trautz v. Weisman, 819 F. Supp. 282, 292-95 (S.D.N.Y. 1993).

^{244/} 113 S. Ct. at 764 (quoting Carpenters, 466 U.S. at 833).

^{245/} Id. See also Carpenters, 466 U.S. at 830-34.

^{246/} Similarly, Section 1985(3) would not aid the white females who received threatening phone calls because they socialized with blacks, see Klanwatch Decade Review, *supra* note 81, at 32, even if those calls emanated from a conspiracy. The women's First Amendment right of free association is secured only against government action.

With respect to the range of federal rights protected from private conspiracies, the Court opined that "[t]here are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude and, in the same Thirteenth Amendment context, to the right of interstate travel)."^{247/} It further concluded that, in order to be actionable under Section 1985(3), impairment of a federal right "must be a conscious objective" of the conspiracy, rather than merely one of its effects.^{248/} The Bray decision raises questions about the continuing efficacy of Section 1985(3) as a remedy against violations of federal rights by private conspiracies, whether or not those may be deemed hate crimes.^{249/}

^{247/} Bray, 113 S. Ct. at 764. See also Novotny, 442 U.S. at 379 (Section 1985(3) claim cannot be based on alleged violation of Title VII of the Civil Rights Act of 1964). The Court's focus on the Thirteenth Amendment as the source of protected federal rights suggests its view that the only rights safeguarded by Section 1985(3) are those deriving from the U.S. Constitution. Prior Court opinions have expressed a similar conviction. See, e.g., Carpenters, 463 U.S. at 833 (announcing the quoted language). However, other Court opinions imply that the rights protected by Section 1985(3) may also stem from a federal statute, Novotny, 442 U.S. at 376, or even state law, Carpenters, 463 U.S. at 833-34.

If Bray is controlling as to the scope of individual rights secured by Section 1985(3) as against private conspiracies, that decision calls into question lower federal court rulings that Section 1985(3) covers private deprivations of rights secured by federal and state law. Compare Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988); Martinez v. Winner, 771 F.2d 424 (10th Cir. 1985); McNutt v. Duke Precision Dental and Orthodontic Lab., 698 F.2d 676 (4th Cir. 1983); Nieto v United Auto Workers Local 598, 672 F. Supp. 987 (E.D. Mich. 1987); Thompson v. Int'l Ass'n of Machinists, 580 F. Supp. 662 (D.D.C. 1984) (statute protects only rights stemming from federal law) with Life Ins. Co. of North Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (statute also protects rights guaranteed by state law).

^{248/} Bray, 113 S. Ct. at 765.

^{249/} The most highly publicized effect of the Court's decision was to eliminate Section 1985(3) as a tool to prevent anti-abortion groups from blocking access to abortion clinics. See, e.g., Ruth Walker, A Long Shadow Across Roe v. Wade, Christian Sci. Monitor, Jan. 20, 1993, at 18; Joan Biskupic, High Court Rules U.S. Civil Rights Law Cannot Bar Antiabortion Blockades, Wash. Post, Jan. 14, 1993, at A1; Tony

(continued...)

b. Recommendation

The foregoing discussion suggests two principal conclusions. Civil actions can help combat the effects of hate crimes by both compensating victims and punishing perpetrators. Second, federal civil rights laws provide useful, but incomplete protection for the victims of bias-related offenses. Moreover, at least in the case of Section 1985(3), recent case law has arguably narrowed its applicability to a degree that its continued utility as a weapon against private hate crimes is open to question. From a civil rights/civil liberties perspective, these considerations might suggest that those statutes should be amended to provide more complete shelter for all victims of bias-motivated civil rights violations.

From a telecommunications policy perspective, the argument is less clear-cut. Although telecommunications facilities obviously play a role in some conspiracies to commit hate crimes, available data do not indicate the prevalence of such conspiracies are. Consequently, unless the federal government gathers more information on the use of telecommunications in the commission of hate crimes,^{250/} there are not sufficient grounds to recommend, as a matter of telecommunications policy, amendment of the federal civil rights laws.

C. TECHNOLOGIES THAT CAN PROTECT OR EMPOWER TARGETS OF HATE SPEECH

An area of inquiry separate from the criminal and civil laws punishing acts of hate involves advances in technology, which empower individuals to protect themselves and their families by preventing or limiting the number or impact of messages of hate delivered via telecommunications to their homes or places of work. The Notice reviewed the potential effect of new technology in two areas: new telephone services, such as caller ID, and channel blocking technology for video services. We discuss each separately.

^{249/} (...continued from preceding page)
Mauro & Mimi Hall, Clinic Blockades Get a Boost, USA Today, Jan. 14, 1993, at 4A. The broader implications of the decision appear to have gone unnoticed.

^{250/} See discussion supra at pp. 45-46.

1. New Telephone Services: Caller ID and Call Trace
a. Discussion

Among new telephone services, caller ID is offered today on an intrastate basis by local exchange carriers using recent developments in telecommunications network technology. It is one service among many that can be supported by signalling system seven (SS7) technology,^{251/} and employs "common channel signalling" to pass a calling party's number as part of the signalling message that sets up a call prior to connection.^{252/}

With caller ID service, a subscriber can see the calling party's telephone number on display equipment -- a separate device or part of the telephone -- which is purchased and owned by the subscriber.^{253/} Current forms of caller ID display the number associated with the calling device. Because public telephones are not associated with a specific subscriber, caller ID is of little use in identifying callers from such telephones.^{254/} Some future versions of caller ID might involve the transmission of the subscriber associated with the calling party's number, or other information. In some versions of caller ID, the calling party can "block" transmission of the calling number to the subscriber.

^{251/} See Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 6 FCC Rcd 7646, 7658 (1991). SS7 is an advanced out-of-band signalling system that rapidly passes signalling information in a digital format. For a description of SS7, see National Telecommunications and Information Administration, U.S. Dep't of Commerce, NTIA Special Pub. No. 91-26, The NTIA Infrastructure Report: Telecommunications in the Age of Information 189 (1991).

^{252/} For a description of caller ID service, see, e.g., Rules and Policies Regarding Calling Number Identification Service, Notice of Proposed Rulemaking, 6 FCC Rcd 6752 (1992) (FCC Caller ID Proceeding); Reply Comments of the National Telecommunications and Information Administration (filed Mar. 16, 1992) in FCC Caller ID Proceeding (NTIA Caller ID Comments).

^{253/} See FCC Caller ID Proceeding, 6 FCC Rcd at 6752.

^{254/} Caller ID would display the number of the public telephone, however.

From the perspective of a caller ID subscriber, it is clear how he or she could use the service to screen messages, including messages of hate. A subscriber could choose not to receive a particular call, when, for example, that person does not recognize the displayed number, or when no calling party number is displayed (if, for example, the calling party has blocked the number).

Caller ID may aid in the apprehension of people making harassing phone calls, because their telephone number would be displayed to the intended victim; conversely, caller ID subscribers could decide whether to answer a call based on whether they know the calling number. With the exception of calls placed from public telephones, caller ID might discourage harassing calls from being made, because threats and intimidation often rely on anonymity. Answering machines or voice mailboxes can play a role similar to that of caller ID in screening calls, although users must listen to at least part of the incoming message to do so.

Call trace service may also aid victims of harassing phone calls. That service employs the same signalling mechanism as caller ID, and enables a subscriber to request that the local exchange carrier make a record of an incoming call, including the originating number, the time the call was made, and the location of the telephone from which it was made. The record can then be forwarded directly to law enforcement personnel, but generally is not made available to the subscriber.^{255/} Although call trace, like caller ID, would not be able to identify a person calling from a public telephone, it may discourage some parties from placing harassing or annoying calls, and provides a mechanism to alert law enforcement personnel of the call and identify the caller, if appropriate. Call trace does not, however, give a subscriber the ability to identify a calling party's number prior to accepting a call.

^{255/} For a description of call trace service, see, e.g., North Am. Telecommunications Ass'n, Memorandum Opinion and Order, 3 FCC Rcd 4385, 4392 (1988). Call trace can be used even when a caller has blocked delivery of a number to the called party.

Services such as caller ID and call trace could enable consumers to protect themselves from unwanted messages of hate by allowing them to make informed choices on whether to accept a call, and to identify the source of harassing calls they do receive.^{256/} However, several factors complicate the picture, particularly the privacy issues.

Caller ID has been subject to considerable controversy over the competing privacy rights of callers and called parties.^{257/} This has slowed approval of the service by state regulatory commissions. While regulators in all but eleven states allow local exchange carriers to provide some form of caller ID, states that have not taken action on petitions to provide the service include such populous ones as California, Texas, and Pennsylvania.^{258/} In Pennsylvania, the state supreme court ruled that caller ID violated the state's wiretap law, which prevents the use of a "trap and trace" device without consent of all parties.^{259/} In

^{256/} Seven parties addressed the issue of Caller ID and call trace in their comments. The comments of the five Regional Bell companies addressed primarily this issue. See Comments of Ameritech; Comments of BellSouth; Comments of Southwestern Bell; Reply Comments of Bell Atlantic; Reply Comments of Pacific Telesis. Two additional commenters addressed this issue. See Comments of Bailon at 2; Comments of People For the American Way at 3.

All of these commenters agreed with the view expressed in the Notice that new network services can deter harassing and intimidating calls, including those relevant to this study. Mr. Bailon offered an even more expansive view of the protections offered by new technology, such as the ability of a telephone answering machine to protect against unwanted calls. See Comments of Bailon at 2.

^{257/} See, e.g., David B. Hack, Caller I.D. and Automatic Telephone Number Identification (Congressional Research Service Issue Brief, updated June 11, 1993). Call trace also raises privacy issues. However, because the commenters did not devote much attention to that service, our discussion of those privacy issues will highlight caller ID, which was addressed in some detail by commenters and which, as noted, has been the subject of extensive public debate.

²⁵⁸ See id.; Comments of Southwestern Bell at Attachment 1.

²⁵⁹ The court did not reach the question, addressed by a lower court, whether caller ID would violate state constitutional privacy guarantees. Barasch v. Bell Tel. Co., 529

(continued...)

Texas, the state public utility commission (PUC) had rejected Southwestern Bell's application to provide caller ID, based on a similar wiretap statute.^{260/} However, a new state law that took effect on September 1, 1993,^{261/} allows carriers to offer caller ID under certain conditions upon approval of the PUC. If Southwestern Bell's application to provide caller ID is approved, Texas would become the 40th state in which caller ID is available to consumers.^{262/}

At issue for caller ID have been the privacy interests of caller ID subscribers, who use caller ID to determine which calls to answer, and calling parties, who may wish to preserve the anonymity of their numbers.^{263/} NTIA asked in the Notice that commenters address such privacy issues with respect to the use of telecommunications to commit hate crimes. In response, several parties noted that the use of caller ID or call trace to prevent the reception of hate messages necessarily emphasizes the privacy interests of the called party -- the caller ID subscriber.^{264/}

Generally, state and federal regulators have sought to balance the privacy interests of caller ID subscribers and calling parties by requiring that local exchange carriers offer "blocking" options for calling parties. Such options include permitting a caller to block delivery of his

^{259/} (...continued from preceding page)
Pa. 523, 605 A.2d 1198 (1992) (citing the Wiretapping and Electronic Surveillance Control Act, 18 P.S.C. §§ 5701-5781).

^{260/} Application of Southwestern Bell Tel. Co., 18 Texas P.U.C. Bulletin 1287 (1993) (citing Tex. Penal Code Ann. §§ 16.02-.03 (Vernon 1992) and Tex. Code Crim. Proc. Ann. art. 18.20, 18.21 (Vernon 1992)).

^{261/} 1993 Tex. Gen. Laws 659.

^{262/} See Sylvia Moreno, Agreement Near on Caller ID, The Dallas Morning News, Oct. 21, 1993, at 14D.

^{263/} See NTIA Caller ID Comments, supra note 252, at 10.

^{264/} See, e.g., Comments of Southwestern Bell at 4.

or her number on a call-by-call basis ("per-call" blocking),^{265/} for each telephone line that the caller controls ("per-line" blocking), or some combination of these options.^{266/} In addition, some caller ID offerings allow the subscriber automatically to decline calls in which the calling party has blocked display of his or her number ("blocking the blocker"), or that the subscriber preselects.^{267/}

In part because of these privacy issues, caller ID is not offered on an interstate basis.^{268/} The FCC has not yet decided to authorize an interstate caller ID service, and no carrier has attempted to offer one.^{269/} However, none of the commenters provided information to establish a link between interstate telephone calls and hate crimes. We are unaware of any information that shows the extent to which harassing or intimidating calls motivated by bias, or other calls carrying messages of hate, are made on an interstate basis.

^{265/} E.g., Tex. Gen. Laws 659 (requires per-call blocking at no charge to each telephone subscriber).

^{266/} In 1992, NTIA urged the FCC to adopt a "per-call" blocking option for interstate caller ID, as the best balance of the privacy interests of the parties.

^{267/} See, e.g., Reply Comments of Pacific Telesis at 3 (call block allows a customer to automatically block the receipt of up to 10 numbers).

^{268/} Pacific Telesis raises in its reply comments the lack of national uniformity for caller ID. It notes, for example, that "*67" is used for various, although similar, call blocking functions in different areas of the country. It reports that some local exchange carriers cannot pass calling party number information to interexchange companies until the issue of blocking options and codes is decided. Pacific Telesis does not now pass such information on to interexchange carriers, because it does not know whether a call will be interstate or intrastate. See Reply Comments of Pacific Telesis at 5. Moreover, national uniformity would help consumers better understand caller ID's operation and features. Pacific Telesis believes that national legislation is needed to ensure such uniformity. Id.

²⁶⁹ A bill now pending in Congress would amend the federal wiretap law, 18 U.S.C. § 3121, to specifically allow caller ID service. S. 612, 103d Cong., 1st Sess. (1993).

Although the privacy issues discussed above have slowed nationwide deployment of a uniform caller ID service, other factors have affected its deployment even within local areas. First, as noted above, caller ID service requires deployment of SS7 technology in local exchange carrier central offices and by interexchange carriers. The Bell Operating Companies are projected to convert a total of only 53.6% of central offices to SS7 capability by 1994.^{270/} Increased private sector infrastructure investment, and programs such as the President's National Information Infrastructure initiative,^{271/} may encourage more rapid deployment of SS7.

Intrastate caller ID service, where it is available, provides calling number information to consumers only for "local" calls (i.e., within LATA boundaries).^{272/} For caller ID to operate for interLATA calls, the relevant signalling information containing the calling party's number must be passed from the originating local exchange carrier to an interexchange carrier, which in turn then must provide the information to the "terminating" local exchange. The Bell company commenters claim that, in many situations, interexchange carriers either are not capable of passing on the information, because they are not using common channel signalling, or are unwilling to pass on the information without a monetary charge to the local exchange carrier.^{273/} Some major interexchange carriers will then, the commenters report,

^{270/} See FCC, Trends in Telephone Service 19, Table 11 (Mar. 1993).

^{271/} National Telecommunications and Information Administration, U.S. Dep't of Commerce, National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025 (1993).

^{272/} The term "LATA" stands for "Local Access and Transport Area." There are 194 such areas, established as part of the AT&T antitrust consent decree. See United States v. Western Elec. Co., 569 F. Supp. 990 (D.D.C. 1983). The Bell Operating Companies subject to the decree may not provide interLATA service.

^{273/} See Comments of Ameritech at 2-3; Comments of Southwestern Bell at 4-5; Reply Comments of Bell Atlantic at 2; Comments of BellSouth at 2-3.

"strip off" the information, even though transport costs are negligible, and the interexchange carrier may incur additional cost to remove the information.^{274/}

b. Recommendation

New services such as caller ID and call trace, as well as answering machines and other customer premises equipment, could arguably reduce the incidence (and the harmful effects) of hate crimes using telecommunications by allowing consumers to prevent the delivery of some unwanted calls, including those intending to deliver messages of hate. Available evidence suggests that caller ID, in particular, might be a valuable tool for reducing harassing or intimidating telephone calls.^{275/} For that reason, the FCC and state regulators should consider the utility of caller ID and similar services in preventing or limiting hate-related telephone calls when determining whether to permit the offering of such services.

2. Channel Blocking for Video Services

a. Discussion

The Notice mentioned two possible ways in which the reception of video channels, and the messages they carry, could be blocked by cable television subscribers.^{276/} First, the Cable Communications Policy Act of 1984 requires that cable system operators, on request of a subscriber, make available by sale or lease a device known as a "lockbox," or parental key

^{274/} See Comments of BellSouth at 3. The commenters state that they have asked the FCC in the FCC Caller ID Proceeding to require that interexchange carriers deliver the calling party number information, unaltered and at no charge, to the local exchange carriers when a call is made. Two parties urge NTIA to participate in the FCC rulemaking in support of such FCC action. See Comments of BellSouth at 3; Reply Comments of Bell Atlantic at 2.

^{275/} Bell Atlantic, which has offered caller ID within its operating territories for more than five years, reports that the service has "drastically" reduced annoyance calls within those areas. Comments of the Bell Atlantic Telephone Companies at 1, 2-3, 7 nn. 11-12 (filed Jan. 6, 1992) in FCC Caller ID Proceeding. According to Bell Atlantic, nearly 75% of its caller ID subscribers take the service "to help stop abusive telephone calls." Id. at 3.

^{276/} Notice, 58 Fed. Reg. at 16,342.

through which subscribers can prevent viewing of particular cable services at their homes during times they select.^{277/}

Second, we described provisions of the 1992 Cable Act that, although not specifically applicable to messages of hate, are an example of another approach to limiting the delivery of undesirable messages to cable subscribers. Specifically, Section 10(b) requires cable system operators to block leased access channels that carry indecent programming, as defined by the FCC. A consumer wishing to view such programming must request, in writing, that the system unblock the channel.^{278/} Section 10(c) requires the FCC to promulgate regulations to enable a cable operator to prohibit the use of public, educational, and governmental (PEG) access channels to transmit obscene or sexually explicit material, or "material soliciting or promoting unlawful conduct."^{279/} The 1992 Cable Act also requires that when a cable system provides "premium channels" (defined as those offering "X," "NC-17" or "R" rated movies) free of charge, it must provide advance notice to consumers and give them a right to have those channels blocked.^{280/}

Comment on these "video blocking" examples was limited. People For the American Way stated that cable "lockboxes" can "enable consumers to prevent unknown programs from entering their homes."^{281/} There was no comment on the desirability of applying the approach in the 1992 Cable Act to prevent the transmission of programming intended to

^{277/} 47 U.S.C. § 544(d)(2) (1988). The Notice also observed that consumers can achieve a similar result with the aid of channel blocking technology available on many advanced television receivers.

^{278/} See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (1992) (1992 Cable Act) (codified at 47 U.S.C. § 532(j)(1)).

^{279/} See *id.* § 10(c).

^{280/} See *id.* § 15, codified at 47 U.S.C. § 544(d)(3).

^{281/} See Reply Comments of People For the American Way at 2.

advocate or encourage crimes of hate or acts of violence against designated groups or individuals. However, several parties, including the Alliance for Community Media, American Civil Liberties Union, and People for the American Way, have argued, among other things, that the FCC's rules implementing Sections 10(b) and 10(c) of the 1992 Cable Act^{282/} impose content restrictions on speech in violation of the First Amendment.^{283/} In April and May of 1993, the United States Court of Appeals for the District of Columbia stayed the effect of the FCC's rules.^{284/} On November 23, 1993, the court ruled that it is unconstitutional for the government to authorize cable operators to ban indecent materials from leased and PEG access channels. The court remanded the case to the FCC for consideration of the "legality and/or desirability" of permitting cable operators to segregate and block indecent material from leased access channels.^{285/}

^{282/} The FCC had adopted its rules implementing Section 10(b) in Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order, 8 FCC Rcd 998 (1993) (Indecent Programming on Cable Access Channels). The FCC had adopted rules implementing Section 10(c) in the same proceeding, Indecent Programming on Cable Access Channels, Second Report and Order, 8 FCC Rcd 2638 (1993).

^{283/} See Motion for Stay Pending Review, Alliance, No. 93-1169 (D.C. Cir. filed Mar. 8, 1993); Motion of Petitioners DAETC and ACLU for a Stay Pending Review, Denver Area Educ. Telecommunications Consortium, Inc. v. Federal Communications Comm'n, No. 93-1171 (D.C. Cir. filed Mar. 12, 1993) (consolidated with No. 93-1169); Emergency Motion for Stay Pending Review and For Expedited Consideration of Petition for Review, Alliance, No. 93-1270 (D.C. Cir. filed Apr. 16, 1993) (consolidated with No. 93-1169).

^{284/} On April 7, 1993, the court stayed the effect of the rules implementing Section 10(b). Alliance for Community Media v. Federal Communications Comm'n, No. 93-1169, 1993 U.S. App. LEXIS 16,277 (D.C. Cir. Apr. 7, 1993) (order granting unopposed emergency motions for stay and for expedition). On May 7, 1993, the court also stayed the effect of the rules implementing Section 10(c). Alliance, No. 93-1169 (D.C. Cir. May 7, 1993) (order granting motions for stay).

^{285/} Alliance, No. 93-1169, 1993 U.S. App. LEXIS 30126, *10-*12 (D.C. Cir. Nov. 23, 1993).

b. Recommendation

In the future, variations of the approaches described above, based on more sophisticated technology, could conceivably give consumers greater control over the programming they receive. However, the First Amendment and implementation aspects of such approaches should be carefully considered.

V. CONCLUSION

Ultimately, hate crimes are a manifestation of the bigotry that remains in U.S. society. The United States should take steps to combat all forms of prejudice and discrimination, not just those that culminate in a crime, while retaining the virtues of robust debate necessary for a pluralistic society. From the perspective of telecommunications policy, NTIA's report provides recommendations of some ways in which the federal government can address bias-related crimes that involve the use of telecommunications. However, hate crimes will cease only when society rids itself of the prejudice that motivates them.

APPENDIX A
List of Commenters

INITIAL COMMENTS

Ameritech Operating Companies (Ameritech)
Bailon, Gilbert (Bailon)
BellSouth Telecommunications, Inc. (BellSouth)
Capital Cities/ABC, Inc. (Capital Cities/ABC)
Dick, Steven, Ph.D (Dick)
Electronic Frontier Foundation, Inc. (EFF)
Harnett, David A.
National Association of Television Program Executives (NATPE)
National Institute Against Prejudice & Violence (National
Institute)
Society for Electronic Access (SEA)
Southwestern Bell Telephone Company (Southwestern Bell)
Wranitzky, Helen

REPLY COMMENTS

Kadle, Carl (Kadle)
Nasman, Keith (Nasman)
Block, Arthur R.
Alliance for Community Media
Motion Picture Association of America, Inc. (MPAA)
Bell Atlantic
Pacific Telesis Group (Pacific Telesis)
People For the American Way
Anti-Defamation League of B'nai B'rith (ADL)