

## Vermont Attorney General's Office Civil Rights Unit's

### Annual Report on Hate Crimes in Vermont and the Bias Incident Reporting System

#### Overview of the Civil Rights Unit

The Civil Rights Unit (CRU) enforces Vermont laws that (1) protect victims of hate crimes; (2) protect Vermonters from discrimination and harassment in the workplace; (3) ensure fair employment practices, including reasonable accommodation for workers with disabilities, protection for nursing mothers, and parental and family leave, National Guard leave; and (4) protect workers who request flexible work arrangements. The CRU provides guidance and direction to the Attorney General's Office on social justice issues confronting Vermonters and collaborates with the Office's Appellate Division on a range of civil rights issues affecting Vermonters at the national level: immigration policy, racial justice, and sex discrimination and/or gender and LGBTQ+ equity issues.

The CRU produces informational materials and conducts regular outreach efforts with a wide range of stakeholders, including trade groups, educational institutions, civil rights advocates, immigrant support organizations, and youth entering the workforce. It also provides training and legal guidance for attorneys, business owners, human resources professionals, and labor representatives on topics ranging from employer drug testing to workplace harassment. In addition, the CRU provides instruction to new police officers regarding hate crime investigations.

Representatives from the CRU regularly provide legal guidance to the Vermont Legislature and the Office of Legislative Council regarding civil rights and fair employment practices legislation.

#### Executive Summary

Historically, much of the CRU's efforts have been focused on enforcement of fair employment laws, public education and outreach, and national civil rights laws or litigation that affect Vermonters. In more recent years, however, as Vermont and the country experienced a rise in reported hate crimes and other bias incidents, the CRU has focused more closely on the types of incidents reported in Vermont. Over time, it appeared that that bias incidents generally fell into three broad categories: (1) **hate crimes** (*i.e.*, standalone criminal acts that were motivated by bias); (2) **civil harassment offenses** (*i.e.*, non-criminal harassment that nonetheless violated civil fair employment, housing, or public accommodation laws); and (3) **biased but protected speech / conduct** (*i.e.*, offensive, biased actions that were subject to First Amendment protections). The CRU observed that Vermont's many law enforcement agencies did not regularly work together to address bias incidents — especially those that did not involve an underlying crime.

In response, the CRU launched the Bias Incident Reporting System (BIRS) in January 2019. BIRS is a voluntary program in which local, state, and federal law enforcement authorities (criminal and civil) share information with each other regarding bias incidents and look for a broader range of supports for those harmed by bias incidents, including referrals to civil enforcement agencies like the Vermont Human Rights Commission or community justice or victim services professionals. Although the First Amendment places strict limits on whether or how government may sanction many categories of biased speech, it does not limit efforts to provide support for those harmed by it. One aim of BIRS is to encourage government and community partnerships to address those needs.

Although BIRS was not designed to be a robust data collection tool, this first report does offer some basic data collected during the first two years of CRU's administration of BIRS. Among other things, the data shows that there was a substantial increase in reported bias incidents for the period June - September 2020, as Vermonters joined others around the world to protest the murder of George Floyd and re-examine the police and the criminal justice system. The data also shows that most reported offenses involved damage to property, and that race was the predominant factor in the cases reported to the CRU via BIRS.

This first half of 2021 has also seen the passage of federal and state laws that will directly address what counts as a hate crime and how these crimes and other bias incidents may be reported. The CRU expects to refine BIRS to take these changes into account and to substantially develop its relationship with community groups in order to provide greater opportunities for restorative justice and conflict resolution.

In the next year, the CRU will continue to develop BIRS in several respects, including:

- Expanding data collection and public reporting of this data;
- Expanding education outreach efforts, including advanced professional training, quarterly community meetings, and written guidance on responding to bias incidents; and
- Deepening community relationships to enhance opportunities to refer appropriate cases to restorative justice or other methods of conflict resolution.

See Section III.B. below for further details.

## **Hate Crimes and Bias Incidents in Vermont**

### **I. Hate Crimes and Bias Incidents**

Before looking closely at how Vermonters can respond to hate in their communities, it is useful to identify the types of misconduct they may encounter. Some actions are subject to criminal sanctions, some are subject to civil sanctions, and some fall into a broad category of misconduct, such as hateful or biased speech, that lies outside the reach of the legal system. This section provides a brief overview of (1) hate crimes; (2) civil harassment offenses; and (3) other biased actions that lie outside the formal justice system. It also offers a look at the concept of "hate speech" as it applies to these three categories.

#### **A. Vermont's Hate Crime Law**

From a legal perspective, a hate crime has two essential elements. The first element is an actual or attempted criminal act. If there is no underlying crime, there can be no hate crime. The second element is bias motivation – *i.e.*, the crime must have been motivated by bias against the victim's identity, such as their race, religion, gender, or sexual orientation. If prosecutors cannot establish this unlawful, biased motivation beyond a reasonable doubt, they cannot obtain a conviction for a hate crime.

Vermont's hate crime law, 13 V.S.A. §§ 1454-1466, contains two components:

### 1. Criminal Penalties.

- **Increased penalties in criminal cases.** A person being prosecuted for a crime (e.g., crimes of violence or destruction of property) would face a higher sentence if the prosecutor can prove the conduct was **maliciously motivated** by the victim's actual or perceived race, color, religion, national origin, gender identity, ancestry, age, service in the armed forces of the United States, disability, sexual orientation, or gender identity. **(13 V.S.A. § 1455).**
- **Burning of Cross or Religious Symbol.** Intentionally and maliciously burning a cross or other religious symbol with the intent of terrorizing or harassing a particular person or persons is a separate felony of its own, punishable by up to 2 years in prison and a fine of up to \$5,000. **(13 V.S.A. § 1456).**

**Special Note:** Effective May 18, 2021, Vermont enacted H. 428, a bill that amends the definition of a hate crime to replace the "malicious motivation" standard with a mixed-motive standard that permits enhanced penalties if the criminal conduct is "motivated in whole or in part" by the victim's membership in a protected category — which now also includes service in the National Guard. For more details on this amendment, see Section IV. below.

### 2. Civil Remedies.

To supplement the remedies available to those injured by hate crimes, Vermont law provides a range of options private parties or the Attorney General's Office may seek in the civil court system — regardless of whether the conduct results in criminal prosecution. The civil remedies include (1) a private right of action to seek damages or injunctive relief; and (2) the right of the Attorney General's Office to seek an injunction or impose state penalties.

- **Private Action to Seek Damages.** Any person injured as a result of a hate crime may sue the perpetrator in civil court for compensatory damages (e.g., lost income, property damage, emotional distress), punitive damages, and attorneys' fees. **(13 V.S.A. § 1457).**

Currently, Vermont law does not permit the Attorney General's Office to file suit to seek those remedies on behalf of victims. The Attorney General's Office and CRU have advocated for a change in the law that allows them to provide such assistance.

- **Hate Crime Injunctions.** Vermont law also permits the victims of hate crimes or the Attorney General's Office to seek an injunction from a civil court to keep perpetrators from engaging in future misconduct or contacting the victims. Hate crimes injunctions are entered into the same database that state and local law enforcement use to track relief from abuse orders. **(13 V.S.A. §§ 1458-1465).**

In addition, violation of a civil hate crime injunction is itself a criminal offense. The first violation is punishable by up to 1 year in jail. A second violation can result in up to 3 years in prison.

When the CRU learns of a potential hate crime, it assesses whether a hate crime injunction is warranted and, no less importantly, whether the victim and their family wish to seek one. In some cases, an injunction may not be feasible because the perpetrator remains unidentified or because a criminal court has issued an order providing similar restrictions upon the defendant. Where an injunction may be legally feasible, the CRU defers to the choice of the victim and their family. In all cases, the CRU pursues legal action only when desired by the persons affected by the conduct.

- **State Penalties.** Finally, Vermont law authorizes the Attorney General's Office to seek additional sanctions in the form of fines of up to \$5,000 for each violation of the hate crime law, including violations of a hate crime injunction. **(13 V.S.A. § 1466).**

### B. Federal Hate Crime Laws

Federal law addresses hate crimes under a broad range of federal statutes.

- **The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (18 U.S.C. § 249).** Prohibits acts of violence (or attempted acts with a dangerous weapon) against a person because of their actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.

The Shepard-Byrd Act is the only federal hate crime statute expressly addressing violence against the LGBTQ+ community.

- **Criminal Interference with Right to Fair Housing (42 U.S.C. § 3631).** Prohibits the actual or threatened use of force to interfere with a person's housing rights because of their race, color, religion, sex, disability, familial status, or national origin.
- **Damage to Religious Property, Church Arson Prevention Act (18 U.S.C. § 247).** Prohibits (1) intentionally defacing, damaging, or destroying any religious real property, because of the religious, racial, or ethnic characteristics of anyone associated with that property; or (2) using actual or threatened force to interfere with a person's enjoyment of their right to exercise their religious beliefs.
- **Violent Interference with Federally Protected Rights (18 U.S.C. § 245).** Prohibits the actual or threatened use of force to interfere with a person's right to engage in federally protected activities — such as public education, employment, jury service, travel, or the enjoyment of public accommodations — because of the person's race, color, religion, or national origin.
- **Conspiracy Against Rights (18 U.S.C. § 241).** Prohibits two or more people from conspiring to injure, threaten, or intimidate a person in their free exercise or enjoyment of any federal constitutional or statutory rights.

Federal hate crimes are prosecuted by the U.S. Department of Justice (USDOJ), including the U.S. Attorney's Office (USAO) for the District of Vermont. Although federal hate crimes laws sometimes overlap with Vermont's state laws, they are generally narrower in scope. For

example, Congress limited the Shepard-Byrd Act to violent crimes; it did not address threats of violence or crimes involving property damage or loss.

As explained more fully in Section II below, BIRS seeks to ensure that information regarding hate crimes reaches the USAO and, where applicable, the FBI. They may lend especially helpful assistance on incidents involving actors from outside of Vermont's borders.

### C. Civil Harassment Offenses

Biased conduct can be unlawful even if it does not involve the commission of a crime. For example, discriminatory harassment at the workplace violates state and federal civil laws guaranteeing equal employment opportunity. Harassment in housing or while using public accommodations (e.g., restaurants, stores, schools, or parks) may violate other civil laws guaranteeing equal access or opportunity. The CRU refers to this category of conduct as "civil harassment offenses."

In most cases, victims of civil harassment offenses can seek justice in a private court action to recover damages, obtain restraining orders, or seek other relief appropriate to their circumstances. Moreover, to make it easier to pursue such private claims, state and federal civil rights laws also provide for the awarding of attorney's fees.

In addition, many civil harassment offenses may also be enforced by government authorities, including the CRU and the Vermont Human Rights Commission. The role of BIRS in sharing information among these agencies is addressed in Section II below.

### D. Biased but Protected Speech / Conduct

Vermonters also recognize that hate spreads in many forms, especially the way we communicate with each other. They also recognize that words, images, and symbols can cause harm, even if they are within the category of legally-protected speech or expressive conduct. Even though the First Amendment may prevent government actors from sanctioning the speaker in such cases, it does not prevent government from exploring ways to support those harmed by the speech or responding with its own speech opposing hateful statements or ideologies.

To that end, BIRS also encourages broader communication about a third category of conduct the CRU calls, "Biased but Protected Speech / Conduct" — *i.e.*, speech or conduct that while biased and deeply offensive to members of the community, may nonetheless be constitutionally protected under the Vermont and federal constitutions.

Awareness of such conduct helps identify areas of community conflict that warrant collective action to support harmed communities and to offer a collective voice to oppose ideas that divide communities.

#### 1. What is "hate speech"?

What is hate speech? In the U.S., "hate speech" is not a legally-defined term. It does not refer to a crime or a violation of civil law. In this country, it is a term used in public discussion to describe a broad range of statements, symbols, images, or other expressive conduct that projects hatred toward, or superiority to another group.

Before government may respond to hateful speech, it must determine first whether the speech in question is legally protected by the First Amendment (as well as Vermont's constitution). The

First Amendment protects from government action not only the ideas we favor but many that we oppose and find deeply offensive.

Courts often call government attempts to punish disfavored speech “viewpoint discrimination” and rarely will tolerate it. For example, the U.S. Supreme Court recently invalidated a federal agency’s refusal to register the name of a rock band because the agency found the name to “disparage the members of a racial or ethnic group.” See *Matal v. Tam*, 137 S.Ct. 1744 (2017). In a concurring opinion, Justice Kennedy, joined by Justices Ginsburg, Kagan, and Sotomayor, observed,

*A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.*

*Id.* at 1769.

## 2. True threats and Unlawful Incitement

Courts have long recognized, however, that certain narrow categories of speech lie outside of the First Amendment’s protection. Most relevant for current purposes are categories of speech known as “true threats,” *i.e.*, serious expressions of an intent to cause death or bodily injury.

In considering whether a statement is a true threat, courts examine not only the words themselves, but the context. For example, a political candidate’s statement that they plan to “clobber” their opponent at an upcoming debate is likely to be viewed as colorful or vehement language, rather than a true threat to commit an assault. Courts are especially protective of speech that is political in nature or that concerns public figures.

A second category of speech that falls outside First Amendment protections is “unlawful incitement” — statements that are both intended to cause, and likely to cause others to engage in imminent unlawful action.

Again, context is important. For example, one athletic coach might urge their team to “destroy” the opposing team when the whistle blows. Another coach might urge a group of parents wielding baseball bats to “destroy” the opposing team as they head out to the parking lot. One of these cases reflects vehement but lawful speech; the other reflects unlawful incitement.

It is true that many forms of speech are hateful and harmful. However, unless the speech fits into one of the few narrow exceptions to the First Amendment (and Vermont’s state constitution), it lies outside the reach of the court system and cannot be punished by the government.

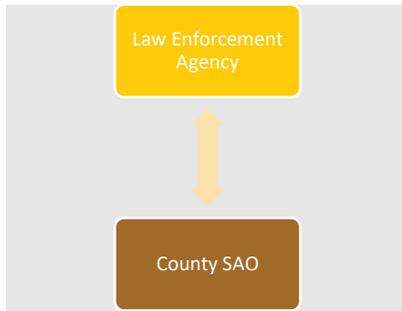
That does not mean there can be no response, however. The First Amendment’s free speech protections only limit government action against speakers; it does not limit government action to help those harmed by the speech. For example, government can partner with the community to provide support to those harmed by biased but protected speech. It can also use its own voice to join with communities in opposing such biased speech or the ideas they promote.

Of course, government can only provide that supportive response if it knows about those harms. BIRS seeks to increase that knowledge and provide an environment for supportive, rather than punitive action against legally-protected speakers.

## II. How the Bias Incident Reporting System (BIRS) Works

### A. Before BIRS

In most cases, reports of hate crimes made to a police department or sheriff's office were not shared among different law enforcement partners. Instead, the flow of information was confined between the law enforcement agency and the county State's Attorney's Office (SAO):



In addition, if the investigating law enforcement agency did not find evidence of a criminal law violation, the information may not have been shared at all.



Worse, well-meaning members of that law enforcement agency might not know that other government agencies may be able to help the person who made the complaint. An honest response of, "Sorry, there's nothing our agency can do," may have missed opportunities for other forms of justice and also may have led to the perception that the law enforcement agency does not care about the problem.

### B. After BIRS

#### 1. Information Sharing About Hate Crimes

Under BIRS, law enforcement agencies are encouraged to report hate crimes to the CRU and/or to the Department of State's Attorneys and Sheriffs' (DSAS) Bias Incident Coordinator. DSAS may in turn alert other prosecutors' offices that may be empowered to provide support or take their own enforcement action. It also encourages those prosecutors' offices receiving complaints directly from the public to share that information with the concerned law enforcement agency. The graph below, for example, illustrates the typical flow of BIRS information among local and state authorities and the USAO.



Such information-sharing serves a variety of purposes, such as:

- Avoiding unnecessarily duplicative or conflicting investigations;
- Creating more opportunities to “connect the dots” and assess whether the hate crime is connected to another, unsolved incident;
- Providing opportunities for collective support or enforcement. For example, the USAO and FBI may be able to lend investigative support to criminal conduct carried out via the Internet from outside Vermont; and
- Alerting authorities to critical incidents that may spark additional criminal activities (e.g., copycat crimes or retaliation).

In most cases, the hate crime is prosecuted by the SAO for the county where the crime occurred. Nonetheless, broader channels of communication allow coordination among other agencies, as needed. In some cases, prosecutors opt for federal, rather than state, prosecution.

For example, in 2019, the CRU received a BIRS notification that the Barre Police Department received a complaint of a man threatening a family on the basis of their race and national origin. The Washington County SAO as well as federal authorities (USAO and FBI) were alerted as well. The Barre PD then worked together with the FBI to investigate the case for potential violations of federal law. The USAO later indicted the man on charges of criminal interference with the family’s federal right to equal housing. The man served nearly a year in prison and was sentenced to an additional three years of supervised release. See [Vermont USAO, Man Sentenced for Federal Hate Crime \(November 3, 2020\)](#).

## 2. BIRS and Civil Harassment Offenses

BIRS also provides for broader communication if the bias incident — whether a hate crime or not — violates civil federal or state laws prohibiting harassment or discrimination on the basis of race, religion, and other protected categories.



For example, a local police department may receive a complaint that a farmworker was threatened by their supervisor in a dispute over pay. Even if the actions in question would not support a criminal threatening charge (a decision typically made by the County SAO), the farmworker may have multiple avenues of relief:

- Claims of employment discrimination may be addressed by the CRU or by the federal Equal Employment Opportunity Commission (EEOC);
- Claims of unpaid wages may be addressed by the Vermont or U.S. Departments of Labor; and
- Any claims regarding working conditions or farm operations may be addressed by the Vermont or U.S. Departments of Agriculture.

BIRS thus seeks to replace responses like, “Sorry, we cannot help you,” with ones like, “Let’s see who can help.”

BIRS cannot guarantee there will be a remedy for all cases but nonetheless aims to examine each case and pursue possible avenues of relief.

### 3. BIRS and Biased but Protected Speech

As discussed above, hate knows many forms — including speech protected by the First Amendment. For much of our country’s history, the government’s inability to punish speakers for engaging in protected speech was often the end of the story.

One goal of BIRS is to encourage a broader, remedial approach. Although the First Amendment might bar the government from punishing the speaker, it does not bar the government from looking for alternative means to address the needs of the victim or community harmed by the biased but protected speech. Thus, BIRS encourages law enforcement to report such cases to the Attorney General’s Office as well to share information about conflict in a community and provide the opportunity to explore potential supports for the victim or affected community.

For this category of bias incidents, the government’s authority is often at its weakest and the community’s power is often at its strongest. For the government, punishing biased but protected speech is flatly forbidden. There can be no arrest, no prosecution, no lawsuit. For the community, the absence of a government action creates the opportunity for collective responses without the risk of interfering with a court case. A broad range of community groups, from restorative justice professionals to advocacy and support organizations, often play the greatest role in responding to the needs of individuals or groups harmed by biased but protected speech.

BIRS seeks to alert more government authorities to conflicts arising from biased but protected speech so that they can seek more opportunities to partner with the community to provide support outside of the court system. Such efforts may include:

- Exploring whether individuals are eligible for victim’s assistance funding or other financial supports for childcare, security, and the like;
- Referring parties to local restorative justice centers to address immediate or longstanding conflicts;

- Introducing individuals to fellow neighbors or local organizations (e.g., NAACP, Pride Center of Vermont) who can provide emotional and social support and work together to find a collective solution to local conflicts; and
- Participating in community events to speak out against acts of bias or to work with stakeholders on progressive ideas to tackle both individual and systemic bias affecting Vermonters.

### III. BIRS Data for 2019-2020

#### A. Bias Incidents Reported to CRU

The CRU may learn of a reported bias incident from any number of sources, including individual community members, community organizations, government agencies, prosecuting authorities, and media reports. In some instances, the CRU can determine at the outset that a reported incident lies outside of the Attorney General’s Office’s legal authority. For purposes of its own tracking, the CRU classifies the complaint based upon the nature of the allegations, rather than by the outcome of a given investigation or enforcement action.

For the most part, the CRU tracks bias incidents by using two basic categories:

1. **“Bias Incident Reports”** are public complaints to the CRU alleging one of more bias incidents. Such complaints may include allegations of hate crimes, civil harassment offenses, or biased but protected speech or conduct.

It is also important to note that, for CRU tracking purposes, a “report” reflects an allegation of one of more bias incidents. It does not reflect a factual or legal conclusion about the allegations.

2. **“CRU Files Opened”** reflects instances where the CRU determines that a given bias incident report may warrant CRU monitoring or follow-up. The CRU may open a file for a variety of reasons, including responding to bias incident complaints, analyzing media reports regarding bias incidents, or tracking information provided by law enforcement partners. The CRU Files Opened are a subset of the Bias Incident Reports identified in paragraph 1 above.

For calendar years 2019 and 2020, the CRU logged the following matters:

Table 1: Bias Incidents Logged by CRU				
Month	Bias Incidents Reported	CRU Files Opened	Bias Incidents Reported	CRU Files Opened
	2019		2020	
January	2	2	0	0
February	6	6	3	3
March	0	0	1	0
April	0	0	1	1
May	2	1	6	4
June	4	3	10	7

July	4	2	14	11
August	4	3	16	13
September	5	4	10	6
October	3	2	8	7
November	0	0	6	4
December	0	0	5	4
Total	30	23	80	60

As noted above, not every bias incident reported to the CRU resulted in the opening of a case file for follow-up by a CRU investigator. In some cases, the CRU simply referred the complainant to the appropriate agency at the intake stage, without the need to assign a CRU investigator.

In other cases, the CRU was able to resolve the complainant's concerns during the intake process. For example, in 2019 CRU was able to resolve at the intake stage two different complaints regarding biased but protected speech. The first involved objections to an editorial challenging the extent of race discrimination in Vermont. The second involved a resident's objection to their neighbor's flying confederate and Trump flags from their front porch. In both instances, the CRU spoke to the complainants to ensure there were no safety or legal violations involved and to discuss how individuals and communities may safely respond to speech protected by the First Amendment.

In other cases, CRU determined at the intake stage that a complaint did not involve allegations of biased conduct at all. For example, one 2020 report concerned a longstanding conflict between two neighbors. During the intake process CRU learned that the complainant was not alleging that bias was at issue. The CRU then referred the complainant to local law enforcement.

In cases where the CRU did open a file, the assigned investigator's role included efforts to ensure that agencies with enforcement authority were aware of the incident and to communicate with them regarding the status of investigations, any enforcement proceedings, or opportunities for informal resolution.

<b>Disposition</b>	<b>2019</b>	<b>2020</b>
Perpetrator Not Identified	11	29
Referred to SAO – Hate Crime Charged	2	7
Referred to SAO – Criminal Charges w/o Hate Crime	3	5
Referred to SAO – No Criminal Charges	0	5
Referred Complainant to HRC re Civil Violation	4	5
Victim Chose Not to Proceed	1	4

Biased but Protected Speech – CRU Complainant Outreach	1	3
Biased but Protected Speech – No identified victim or target	1	2
<b>Total</b>	23	60

Notable features from those CRU cases include:

- **Many of the alleged perpetrators were not identified.** In both 2019 and 2020 nearly half of the cases involved allegations of misconduct by unidentified perpetrators. In 2019, 11 of the 23 CRU files (48%) involved such allegations. In 2020, 29 of 60 cases (48%) involved allegations of misconduct where law enforcement was not able to identify the perpetrator. Such incidents included:

  - Graffiti espousing biased views (e.g., swastikas or racist statements);
  - Theft of, or damage to signs supporting the Black Lives Matter Movement.
- **Most cases involved criminal allegations.** In 2019, 14 of the 23 (61%) CRU files involved alleged crimes. For 2020, 44 out of 60 files (73%) involved allegations of criminal conduct. See Section II.C. below regarding categories of crimes alleged.
- **Allegations of civil violations were referred to the Human Rights Commission (HRC).** In 2019, four of the CRU-opened cases involved allegations of biased conduct that appeared to violate Vermont’s civil laws prohibiting discrimination, such as the Fair Housing and Public Accommodations Act. The CRU referred those cases to the HRC, which enforces the Act. In 2020, another five CRU cases involved alleged violations. The CRU referred those complainants to the HRC as well.

  - Because the HRC’s own intake and investigation process is confidential, the CRU does not know which referrals resulted in further HRC investigation or enforcement. Under BIRS, the CRU’s primary responsibility is to direct individuals to the agency or agencies that can assist them. It does not, however, become involved in further actions taken by those agencies.
- **Relatively few of CRU’s opened cases involved only biased but protected speech.** In 2019, only 2 of the 23 (9%) of CRU-opened cases involved biased conduct that was protected by the First Amendment. In 2020, only 5 of 60 CRU cases (8%) involved biased but protected speech.

  - This relatively small number is due, in part, to the CRU’s ability to address such claims at the intake stage, without the need to open a case file and assign an investigator. For example, if an individual contacted CRU to complain about upsetting political speech (such as signs or flags directing profanities at a political candidate), the CRU might be able to address the concerns immediately at the

intake stage — without the need to open a file and assign an investigator to the matter. In such instances, CRU would address the concerns voiced, but not designate the matter as an opened file.

- As noted above, when a complaint concerns constitutionally-protected speech, the CRU and other public actors have limited enforcement authority. Under BIRS, the CRU's role shifts to education and referral to community conflict resolution, if feasible. For a further discussion of restorative justice approaches to biased conduct, see Section III.B.3. below.
  - For example, in 2020 one BIPOC Vermont resident notified their local police department that they had seen a white individual driving in the neighborhood with what looked like neo-Nazi stickers in their car's rear window. The resident also expressed concern that the individual may have been flashing gang signs in the area. Subsequent investigation by the police department identified no criminal or legal violation. Nor were there any efforts by the individual, whose hand gestures had been mistaken for flashing gang signs, to harass local residents. After a brief discussion regarding First Amendment issues, the matter was closed.
- **Roughly 40% of Cases Referred for Prosecution Included a Hate Crime Charge.**
  - In 2019, 2 of 5 cases (40%) referred to the local SAO led to the filing of criminal charges that included a hate crime charge.
  - In 2020, 7 of 17 cases (41%) referred to the local SAO led to the filing of a hate crimes charge.
- **Criminal Court Cases Most Often Resulted in a Guilty Plea or Diversion.** A primary goal of BIRS is to facilitate timely investigations of alleged hate crimes and timely prosecutions of such cases by the local SAO or, where applicable, the USAO.
  - In 2019, both criminal cases that included a hate crime charge resulted in a guilty plea. One defendant pled guilty to the hate crime; the other pled guilty to the underlying crimes.
  - In 2020, 3 of the 7 cases filed with a hate crime charge resulted in diversion. The other 4 cases are still pending in court.

**It should be noted that the above numbers reflect only those cases the CRU learned of through the BIRS process.** Because BIRS is a relatively new system of voluntary reporting, it is possible that in 2019-2020 SAOs charged additional hate crime cases that were not shared with the CRU through the BIRS process. As BIRS continues to grow, the CRU anticipates more frequent communications with law enforcement partners about bias incidents brought to their attention.

#### B. Counties Reporting Bias Incidents

Each of Vermont's 14 counties elects a state's attorney to serve as its local prosecutor. Although the Attorney General's Office has concurrent authority to prosecute criminal cases anywhere in the state, Vermont has long relied primarily upon local SAOs to pursue criminal cases in local courts — including cases involving hate crimes.

Prior to BIRS, there was no process in place to learn where bias-related incidents were being reported in Vermont. Even within a given county, an SAO may not be aware of local bias incidents that did not result in an arrest or generate broad publicity. BIRS seeks to overcome information barriers so that Vermont’s public officials better understand what is happening in their communities and throughout the state.

The table below provides a geographic breakdown of bias incident reports provided to the CRU. Population figures from the 2010 Census are included as a frame of reference.

<b>County</b>	<b>Population</b>	<b>2019</b>	<b>2020</b>
Addison	36,777	2	1
Bennington	35,740	2	4
Caledonia	29,993	0	0
Chittenden	163,774	10	20
Essex	6,163	0	0
Franklin	49,402	3	4
Grand Isle	7,235	0	0
Lamoille	25,362	0	3
Orange	28,892	1	1
Orleans	27,037	0	3
Rutland	58,191	1	8
Washington	58,409	3	10
Windham	42,222	0	5
Windsor	55,062	4	17
Not Specified	N/A	4	4

Because BIRS is a voluntary program, the CRU expects these numbers to change as more law enforcement agencies become familiar with BIRS reporting.

### C. Types of Crimes Alleged

As indicated in the table below, most of the bias reports involving allegations of hate crimes involve non-violent offenses.

<b>Allegations*</b>	<b>2019</b>	<b>2020</b>
Assault	5	2
Disorderly Conduct	4	14
Criminal Threat	2	2
Private Property Damage	7	12
Public Property Damage	4	13

<b>Table 4: Offenses Alleged in Reported Hate Crimes</b>		
<b>Allegations*</b>	<b>2019</b>	<b>2020</b>
Suspicious Person/Circumstance	1	3
Undetermined**	0	1

\* Note that one case may involve multiple allegations. For example, an incident may involve alleged property damage and disorderly conduct.

\*\* The CRU uses the category, “Undetermined” where it receives an initial report of a “hate crime” but does not receive additional details.

**Special Note Regarding Public Property Offenses.** In the past several years, the CRU has received multiple inquiries from the public about why it did not pursue hate crime charges in cases involving racially-charged graffiti on roads or public works, such as bridges. For example, in July 2020 there were widely reported instances of graffiti on town roads that expressed opposition to the Black Lives Matter movement (e.g., “BLM is racist”). See, e.g., [Smalheer, Anti-BLM Graffiti Pops Up Around Windham County, Brattleboro Reformer \(July 22, 2020\)](#).

There are three parts to the answer. First, the cases reported to the CRU did not involve an identified suspect who could be called to account in criminal or civil court. Second, the decision whether to charge a suspect with a hate crime typically rests with the county SAO, not the CRU. The CRU’s authority extends only to seeking civil remedies, such as seeking a hate crimes injunction.

Third, even if law enforcement had identified the individual(s) responsible for the graffiti on public property, obtaining a hate crime injunction in such circumstances presents difficult legal issues. Vermont’s hate crime law, like those in many other states, provides for increased criminal or civil sanctions where the offense is motivated by bias against victim’s race, religion, or other personal characteristics. However, vandalism of a road, bridge, or other public property (e.g., a traffic sign) does not involve an individual victim. In this context, the victim of the vandalism is the “owner” of the damaged property — *i.e.*, which is a town or other governmental entity, which does not have a race, religion, or other personal characteristics. The impact public property vandalism exerts on community members may be a factor a court considers during sentencing but classifying the offense itself as a hate crime may be difficult.

The picture might change, however, if a public property crime involved vandalism that communicated specific, criminal threats toward one or more identified persons because of their race, religion, or other personal characteristics. In such circumstances, there is an individual victim (the target of the threats) whose injury may provide the basis of a hate crimes charge.

In either case, it remains vital that Vermonters continue to report such bias incidents and draw together to oppose the spread of hatred in their communities.

#### D. Reported Victims by Category

The following table illustrates that in Vermont racial bias is a dominant factor in reported hate crimes.

<b>Table 5: BIRS Reports by Victim Category</b>		
	<b>2019</b>	<b>2020</b>
Race/Color	13	34
National Origin/ Ancestry	4	5
Religion	4	8
Sexual Orientation	2	6
Gender Identity	1	4
Age	0	1
Disability	0	0
Service in Armed Forces	0	0
Organized Group Vandalism	4	9

Notes re Table 5:

- Incidents may include more than one bias element. For example, a reported crime involves racial and transphobic bias.
- The final category, “Organized Group Vandalism” refers to acts of public property vandalism expressing support for organizations supporting a broad range of hate-based ideologies: racism, xenophobia, etc.

#### IV. Looking Ahead: 2021 and Beyond

##### A. Changes to Vermont and Federal Hate Crime Laws.

##### 1. CRU Will Provide Training of and Education about Vermont’s New, More Practical, Mixed-Motive Standard

As discussed above, Vermont law had long defined a hate crime as an (1) actual or attempted criminal offense that is (2) maliciously motivated by the victim’s actual or perceived race, color, religion, and other protected characteristics. **(13 V.S.A. § 1455)**.

In recent years, as more Vermonters have stood up to oppose hatred in their communities, concerns began to arise that Vermont’s “malicious motivation” standard for hate crimes was unnecessarily strict and failed to take into account that most people act on the basis of several, mixed motives.

In response to these concerns, the Vermont Legislature introduced a new bill, H. 428, now Act 34, that eliminated the malicious motivation standard. The bill also added service in the National Guard as a legally-protected category in the hate crimes law.

The CRU testified in support of the bill, noting that other states, such as California and New York, have long embraced a mixed-motive standard for proving hate crimes. See Cal. Penal Code § 422.55; NY Penal Code § 485.0.

Governor Scott signed Act 34 into law on May 18, 2021. The new law immediately went into effect. The new standard, reflected in a revision to 13 V.S.A. § 1455, provides that a hate crime is defined as an actual or attempted crime “**motivated in whole or in part**, by the victim’s actual or perceived protected category.” (Emphasis added).

The protected categories include “race, color, religion, national origin, sex, ancestry, age, service in the U.S. Armed Forces or the National Guard, disability, ... sexual orientation, gender identity, and perceived membership in any such group.” *Id.*

Act 34 goes on to explain that “the victim’s actual or perceived protected category or categories need not be the predominant reason or the sole reason for the defendant’s conduct.”

The CRU is currently revising the hate crimes curriculum at the Vermont Police Academy to reflect the new standard. In doing so, the CRU will be able to educate law enforcement officers about how to enforce this new and more flexible standard to investigate and pursue perpetrators of hate crimes. It also anticipates working with community partners to educate local officials and communities on the new, more realistic standard.

## 2. CRU Will Collaborate with Community and Law Enforcement Partners in Responding to New Federal Hate Crimes Laws

Even as Vermont has increased its attention to hate crimes and other bias incidents, the federal government is now promising to do the same. Recent legislation, such as the **COVID-19 Hate Crimes Act**, includes new federal mandates for the U.S. Department of Justice (DOJ) to provide guidance to state, local and tribal law enforcement agencies on improved hate crime reporting and analysis. In addition, the **Khalid Jabara and Heather Heyer National Opposition to Hate, Assault, and Threats to Equality (NO HATE) Act of 2021** opens the door for new federal grants to support state or local authorities to improve access to hate crime reporting and referrals to community support services. The CRU already has an existing online portal for reporting hate crimes (<https://ago.vermont.gov/cru-contact-form/>) and a toll-free number, **(888)-745-9195**. However, as DOJ issues new guidelines and offers new grants, the CRU will work with local community partners to identify opportunities to improve community access to justice through these grants

### B. Further Development of BIRS

#### 1. Improving Data Collection and Reporting Capabilities.

As discussed in Section II A above, BIRS was initially designed to improve lines of communication among often-siloed government agencies so that they could work more collaboratively in addressing different types of bias incidents. With time it has become clear that BIRS could also offer information in the form of data. The CRU has expanded BIRS data collection and reporting capabilities so that it can produce more detailed information about the types of cases reported and handled — all while maintaining the legal privacy interests of the persons involved in those matters. Such information gathering for subsequent reporting will include:

- Additional demographic information, including age, race, nationality, and gender of victims and of offenders;

- Summary data on cases referred to local, state, or federal prosecutors, including criminal charges and case outcomes;
- Sanctions imposed for legal violations and remedies (monetary or otherwise) obtained by victims;
- Summary data regarding the number and type of referrals to community justice or other restorative justice sources.

The CRU anticipates that the next 12-18 months will build a sufficient body of information on new bias incident reports to enable a more detailed analysis of the data. Such information may, for example, offer perspectives on whether, or to what extent, Act 34's change to the definition of "hate crime" affects the number of hate crime allegations, prosecutions, or civil actions.

## 2. Educating Government and the Public

In the next year the CRU plans to expand its education and outreach efforts to better inform government officials and the public about hate crimes, bias incidents, BIRS, and other responses in our communities. Such efforts will include:

- In-person and remote training for prosecuting agencies and law enforcement;
- Online training materials suitable for use by educators or community organizations;
- Quarterly, town hall-style meetings throughout different regions in the state;
- School presentations and forums;
- Creating pamphlets and other materials — available in multiple languages — that explain options available to victims of bias incidents and offering guidance for community responses; and
- Creating a bias incident response guide for local government officials.

## 3. Deepening Community Relationships

The future of BIRS also includes concentrating the CRU's efforts at broadening its connections with community organizations. In some instances, community organizations are better suited for responding to bias incidents, specifically those bias incidents that either (1) do not violate the law or (2) may be unsuitable for the criminal justice or civil court system.

The last two years have demonstrated to the CRU that many bias incidents do not fit neatly into the formal legal system. For example, some conflicts involve neighbors flying flags or displaying political banners that others find offensive or unsettling. Although such behavior may be legally protected First Amendment speech, it is nonetheless true that it may also generate conflict or fear in a community. As the Supreme Court recognized a decade ago:

*Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain." When it comes to speech about how we govern ourselves, the Court has observed, "We cannot react to that pain by punishing the*

*speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.*

*Snyder v. Phelps*, 562 U.S. 443, 461-62 (2011).

However, the fact that government cannot punish First Amendment-protected speech does not mean that it and the community are powerless to provide support for those harmed by bias incidents. The First Amendment does not, for example, bar state or local governments from providing resources or support to persons or communities harmed by protected speech. Nor does it prevent government from working with communities to pursuing non-punitive, restorative justice outside of the court system.

The next phase of BIRS' development will work in this direction: developing relationships with community organizations to identify a range of solutions to address conflict at the local level, without the involvement of law enforcement or the court system. The CRU is already actively discussing such connections with local community justice centers, victim's rights advocates, and leaders from historically marginalized communities.

There is much work ahead for BIRS, and few signposts to road map to follow — a feature common to innovation in government. In the next year and beyond, the CRU will spend much time listening to communities and learning how best to approach bias incidents and community conflicts that do not belong in the court system. We can also expect many difficult conversations ahead; we have had a number of them already. However, undertaking such efforts is the only path forward. In the CRU's next report, we hope to outline the progress BIRS has made and share some of the lessons we have learned along the way. We also hope to include comments provided to us by community members about their concerns and ideas for the future.

## Conclusion

Vermont is a special place for many reasons. However, it is not immune to bias in personal beliefs or in its institutions. The data above make clear that race remains a dominant concern, although other aspects of a person's core identity may be the target of someone else's hatred. Efforts to enforce criminal or civil laws that prohibit biased conduct or provide relief to victims are critical to our justice system. The still-developing BIRS is part of that ongoing effort to provide justice — even as Vermonters recognize that they cannot arrest or litigate their way out of this longstanding problem.

As we write the next chapters of our state's history, we must recognize that solutions must come from all places in our community. The Attorney General's Office and the CRU remain committed to playing their role and lifting up others who also seek to build and sustain communities that are free and safe for everyone.

Published: January 6, 2022