Session 502 | State Attorneys General Roundtable: Leadership Lessons and Strategies

Session Description:

As top law enforcement officials, State Attorneys General play a critical role in safeguarding citizens, and enforcing criminal and civil rights laws. Join us for an interactive discussion featuring Nevada Attorney General Aaron D. Ford, former Hawaii Attorney General David Louie, and Special Assistant Attorney General James Toma (on behalf of California Attorney General Rob Bonta). Forty (40) years after the murder of Vincent Chin, our panel will share the solutions their states are implementing to address Anti-Asian hate. In addition, our panel will also share their leadership lessons and insights on their landmark cases and significant priorities, and trending topics, such as the impact of the Dobbs decision.

Moderator:
Ireneo A. Reus III, Managing Attorney, The Reus Law Firm

Speakers:
Attorney General Aaron D. Ford, Attorney General, State of Nevada
Former Hawaii Attorney General David Louie, Partner, Kobayashi Sugita & Goda, LLP
Special Asst. Attorney General James Toma, Special Assistant Attorney General, State of California Department of Justice
The written materials from the California Attorney General’s Office are included to show how Attorney General Rob Bonta took a leadership role in ensuring that state and local law enforcement officials across California have the necessary information and tools to continue to respond appropriately and swiftly to hate crime activity. In addition, the excerpts provided by former Hawaii Attorney General David Louie from his book, titled “From the Desk of the Attorney General: A Memoir” provides in-depth analysis and insights about Attorney General Louie’s leadership moments and decision-making process on wide-ranging issues.
Subject: California Laws That Prohibit Hate Crimes and/or Provide Enhanced Penalties for Specified Hate-related Acts

TO: ALL DISTRICT ATTORNEYS, CHIEFS OF POLICE, SHERIFFS, AND STATE LAW ENFORCEMENT AGENCIES

This bulletin is designed to ensure that state and local law enforcement officials across California have the necessary information and tools to continue to respond appropriately and swiftly to hate crime activity. Such events are damaging to the residents and communities we are entrusted to serve, particularly when they involve threats of violence.

Hate crimes are serious crimes that may result in imprisonment or jail time for offenders. The California Department of Justice (DOJ) provides this updated summary to local law enforcement agencies about the multiple California criminal laws that prohibit hate crimes and/or provide enhanced penalties for specified hate-related acts. This bulletin also briefly summarizes the Ralph Civil Rights Act and the Tom Bane Civil Rights Act, which provide civil remedies for certain hate crime activity in California. Further, this bulletin provides an overview of the statutory requirements for agency hate crimes policies and best practices for hate crimes investigations. Finally, this bulletin identifies experts in civil rights enforcement and hate crime investigation and prosecution at the California Department of Justice who are available to provide technical assistance in your effort to enforce these laws in your jurisdiction.

For more information about Hate Crime statistics and trends in California, please visit the California Attorney General’s OpenJustice website at https://openjustice.doj.ca.gov/data.

Thank you for your efforts to report hate crimes in your jurisdiction to DOJ, and all that you are doing to protect public safety.

California Penal Code Sections on Hate Crimes

California law recognizes that certain crimes are more serious where a victim is singled out because of their actual or perceived disability, gender, including gender identity and gender expression, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. These offenses are referred to as hate crimes, and can serve as a stand-alone crime under California Penal Code section 422.6, as an aggravating factor under section 422.7, or as an enhancement under section 422.75.
§ 422.55 Definition of a Hate Crime – Defines “hate crime” as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: disability, gender, nationality, race or ethnicity, religion, sexual orientation; or because of the person’s association with a person or group with one or more of these actual or perceived characteristics.

§ 422.56 Relevant Hate Crime Terms – Provides relevant statutory definitions, including that “gender” is defined as including “gender identity and gender expression,” and “in whole or in part because of” is defined that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.

§ 422.6 Threats and Vandalism to Interfere with Civil Rights – Makes it a stand-alone crime to willfully injure, intimidate, interfere with, oppress, or threaten, by force or threat of force, another person’s free exercise or enjoyment of their civil rights (§ 422.6, subd. (a), (c)), or knowingly deface, damage, or destroy their property (§ 422.6, subd. (b)), because of that person’s actual or perceived protected characteristic(s).

To prove interference with another’s civil rights by force (§ 422.6, subd. (a)), a prosecutor must establish the following elements:

1. The defendant, by force, injured, intimidated, interfered with, oppressed, or threatened another person in the free exercise or enjoyment of any legally protected right or privilege.

2. The defendant did so in whole or in part because of the other person’s actual or perceived protected characteristic(s), or because of the other person’s association with a person or group having one or more of these characteristics.

3. The defendant did so with the specific intent to deprive the other person of the free exercise or enjoyment of the legally protected right or privilege.

To prove interference with another’s civil rights by threat of force (§ 422.6, subds. (a), (c)), a prosecutor must establish the following elements:

1. The defendant, by threat of force, injured, intimidated, interfered with, oppressed, or threatened another person in the free exercise or enjoyment of any legally protected right or privilege.

2. The threat of force, if consisting of speech alone, threatened violence against a specific person or group.

3. The defendant had the apparent ability to carry out the threat (the threat must be one that would reasonably tend to induce fear in the alleged victim).

4. The defendant did so in whole or in part because of the other person’s actual or perceived protected characteristic(s), or because of the other person’s association with a person or group having one or more of these characteristics.
5. The defendant did so with the specific intent to deprive the other person of the free exercise or enjoyment of the legally protected right or privilege.

To prove interference with another’s civil rights by *defacing, damaging, or destroying their property* (§ 422.6, subd. (b)), a prosecutor must establish the following elements:

1. The defendant knowingly defaced, damaged, or destroyed another person’s real or personal property.

2. The defendant did so in whole or in part because of the other person’s actual or perceived protected characteristic(s), or because of the other person’s association with a person or group having one or more of these characteristics.

3. The defendant did so with the specific intent to intimidate or interfere with the other person’s free exercise or enjoyment of a legally protected right or privilege.

A conviction under section 422.6 is a *misdemeanor* that can be punished by up to a year in county jail and/or up to a $5,000 fine, and up to 400 hours of community service. (Pen. Code, § 422.6, subd. (c).)

§§ 422.7 and 422.75 Allegations to Elevate Misdemeanors to a Wobbler – Provide that if a person commits a crime and is motivated in part by the fact that the victim has one or more of the protected characteristics in section 422.55, the criminal offense will be considered a “hate crime.”

§ 422.7 (penalty enhancement) – If the defendant is convicted of a misdemeanor that was motivated by bias, the prosecution may use this in aggravation and seek an enhanced punishment beyond those imposed for misdemeanors. The penalty enhancement shall be charged in the accusatory pleading, and may not be used in the case of a person being punished under Penal Code section 422.6. (Felony wobbler: 16 months, or two or three years in county jail and/or fine up to $10,000; or one year in jail.)

A prosecutor must establish the following elements:

1. The defendant committed the underlying crime intending to interfere with another person’s legally protected right or privilege.

2. The defendant did so in whole or in part because of the other person’s actual or perceived protected characteristic(s).

3. The defendant either:
   i. caused physical injury or had the ability at that time to cause a violent injury; OR
   ii. caused property damage in excess of $950; OR
   iii. has been convicted previously under section 422.6, subdivision (a) or (b); OR
   iv. has been convicted previously of a conspiracy to commit a crime described in section 422.6, subdivision (a) or (b).

§ 422.75 (felony enhancement) – Provides for an enhanced sentence for any felony if the prosecutor can establish that it was committed as a hate crime.
A prosecutor must establish the following element:

1. The defendant committed the underlying crime in whole or in part because of the alleged victim’s actual or perceived protected characteristic(s), or association with a person or group having one or more of these actual or perceived characteristics.

A felony hate crime sentence enhancement can add an additional one, two, or three years in state prison on top of any other sentence the defendant receives for the underlying felony. (§ 422.75, subd. (a).) If convicted of acting in concert with another person to commit the felony hate crime, the felony hate crime sentence enhancement increases to two, three, or four years in prison. (§ 422.75, subd. (b).) If convicted of committing a felony hate crime while using a firearm, the court may lengthen the sentence at its discretion. (§ 422.75, subd. (c).) Prior felony hate crime convictions can add an additional one year in state prison for each prior conviction. (§ 422.75, subd. (d).)

Additional Crimes and Enhancements that Fall within the Hate Crimes Umbrella

In addition to sections 422.7 and 422.75, other hate crime-related statutes prohibit or provide enhanced penalties for specified hate-related acts.

§ 190.2, subd. (a)(16) Special Circumstances – Provides a death penalty or sentence of life in prison without possibility of parole for first-degree murder motivated by a victim’s race, color, religion, nationality, or country of origin. A prosecutor must establish that the defendant intended to kill because of the deceased person’s real or perceived protected characteristic(s).

§ 190.03, subds. (a), (c) Relevant Factors for Determination of Penalty – Provides for life in prison without possibility of parole for first-degree murder motivated by a victim’s actual or perceived protected characteristic(s). The prosecutor must prove the defendant committed the murder, in whole or in part, because of the deceased person’s actual or perceived protected characteristic(s).

§ 302 Disturbing Religious Meetings – Establishes that it is a misdemeanor to intentionally disturb a group of people who have met to worship, whether such disturbance occurs within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting. (Penalty: up to one year in county jail and/or up to a $1,000 fine.)

§ 594.3, subd. (b) Vandalism of a Place of Worship – Provides that it is a felony to knowingly vandalize a place of worship or a cemetery as a hate crime. (Penalty: 16 months, or two or three years in county jail.)

§ 1170.8 – Place of Worship Aggravating Circumstance – Provides as an aggravating factor the fact that a robbery, arson, or assault with a deadly weapon or by means of any force likely to produce great bodily injury was committed upon a place of worship, or against a person while that person was within a place of worship.

§ 1170.85, subd. (b) Particularly Vulnerable Victim Aggravating Circumstance – Provides that age or disability of a victim may be considered circumstances in aggravation if those characteristics render the victim particularly vulnerable or unable to defend himself or herself.
§ 11411, subds. (a), (b) Terrorizing Private Property – Subdivision (a) provides that it is a misdemeanor to hang a noose, knowing it to be a symbol representing a threat to life, on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing them, or to hang a noose, knowing it to be a symbol representing a threat to life, on the property of a primary school, junior high school, college campus, public park, or place of employment, for the purpose of terrorizing any person who attends or works at, or is otherwise associated with, the school, park, or place of employment. Subdivision (b) provides that it is a misdemeanor to place or display a sign, mark, symbol, emblem, or other physical impression on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing them. (Penalty: up to one year in jail and/or a fine of up to $5,000, with increased fine for subsequent convictions.)

A prosecutor must establish the following elements:

1. The defendant placed or displayed a sign, mark, symbol, emblem, or physical impression on the private property of another person.

2. The defendant did not have authorization to place or display that sign, mark, symbol, emblem, or physical impression on the property.

3. The defendant intended to terrorize the owner or occupant of the property (or acted with reckless disregard of the risk of terrorizing the owner or occupant of the property).

§ 11411, subd. (c) Terrorizing Private Property, Pattern of Conduct – Provides that it is a misdemeanor or a felony to engage in a pattern of conduct for the purpose of terrorizing the owner or occupant of private property or in reckless disregard of terrorizing the owner or occupant of that private property by placing a sign, mark, symbol, emblem, or other physical impression on that property on two or more occasions. (Felony wobbler: 16 months, or two or three years in county jail, and/or up to a $10,000 fine; or one year in jail and/or up to a $5,000 fine.)

§ 11411, subd. (d) Desecration of a Religious Symbol – Provides that any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant or in reckless disregard of terrorizing them, or who burns, desecrates or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends, works at or is otherwise associated with the school shall be guilty of a felony or misdemeanor. (Felony wobbler: 16 months, or two or three years in county jail, and/or up to a $10,000 fine; or one year in jail and/or up to a $5,000 fine, as well as increased fines for subsequent convictions.)

A prosecutor must establish the following elements:

1. The defendant burned or desecrated a religious symbol on the private property of another; OR on the property of a school.

2. The defendant knew the object that they burned or desecrated was a religious symbol.
3. The defendant did not have authorization to burn or desecrate the religious symbol on the property.

4. The defendant intended (or acted with reckless disregard) to terrorize the owner or occupant of the property; OR intended to terrorize someone who attends the school, works at the school, or is associated with the school.

§ 11412 Religious Terrorism – Provides that it is a felony to attempt to discourage religious activities by threats of violence. (Penalty: 16 months, or two or three years in state prison.)

A prosecutor must establish the following elements:

1. The defendant caused or attempted to cause a person to refrain from exercising their religion (OR refrain from engaging in a religious service) by threatening injury upon any person or property.

2. The defendant directly communicated the threat to that person.

3. The person reasonably believed the threat could be carried out.

4. At the time the defendant made the threat, the defendant intended to cause the person to refrain from exercising their religion (OR refrain from engaging in a religious service).

§ 11413, subs. (a), (b)(2), (b)(9) Religious Terrorism by Destructive Device – Provides that it is a felony to explode, ignite, or attempt to explode or ignite any destructive device or any explosive in or about, or to set on fire, a place of worship or any private property if the property was targeted because of the protected characteristic(s) of the owner or occupant of the property and the purpose was to terrorize another or was in reckless disregard of terrorizing another. (Penalty: three, five, or seven years in county jail, and a fine of up to $10,000.)

A prosecutor must establish the following elements:

1. The defendant exploded or ignited (or attempted to explode or ignite) a destructive device or explosive, or committed arson, in or about a place of worship or private property.

2. The defendant committed the act with the intent to terrorize or with reckless disregard of terrorizing someone else.

Miscellaneous Penal Code Provisions Relating to Hate Crimes

§ 136.2 Protective Orders – Provides protection against further harm. Once criminal charges are filed under any criminal statute, hate crimes victims have the right to a court order prohibiting any additional harassment during the pendency of the criminal proceeding.

§ 422.87 Law Enforcement Agency Hate Crimes Policy – Requires any local law enforcement agency that updates an existing hate crime policy, or adopts a new hate crime policy, to include, among other things, the content of the model policy framework developed by the Commission on Peace Officer
Standards and Training (POST), information regarding bias motivation, a requirement that all officers be familiar with and carry out the hate crime policy, and information regarding the general underreporting of hate crimes, as well as a plan to remedy this underreporting.

§ 13519.6 POST Hate Crimes Policy Guidelines – Requires POST to develop guidelines and training on addressing hate crimes. The guidelines must include a model policy framework that all state law enforcement agencies must adopt and that the commission shall encourage all local law enforcement agencies to adopt.

§ 422.92 Law Enforcement Agency Hate Crimes Brochure – Requires every state and local law enforcement agency to make available a brochure on hate crimes to victims of these crimes and the public. In complying with this requirement, local law enforcement agencies may utilize the California Department of Justice’s standardized brochure, which is available at https://oag.ca.gov/hatecrimes in fourteen languages, and which allows for agencies to insert their own seal or graphic.

§ 1547, subds. (a)(12) & (13) Possible Reward for Hate Crime Information – Authorizes the Governor to offer a reward for information leading to the arrest and conviction of any person who has committed certain hate crimes.

§ 3053.4 Parole Conditions – Requires that as a condition of parole following a hate crime sentence, defendant must refrain from further acts of violence, threats, stalking, or harassment of the victim or victim’s family. “Stay away” conditions may also be imposed (additional requirement that you maintain a certain physical distance from victim).

§ 11410 Unprotected Activity Under the California Constitution – States that the urging of violence where death or great bodily injury is likely to result is conduct is not protected by the California Constitution; in this section the Legislature finds and declares that it is the right of every person, regardless of actual or perceived race or ethnicity, religion, gender, gender identity, gender expression, nationality, disability, sexual orientation, or association with a person or group with these actual or perceived characteristics, to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals.

§ 13023 Reporting to the Attorney General – Subject to funding, requires the Attorney General to direct local law enforcement agencies to report to the California Department of Justice information relative to hate crimes.

§ 13519.41 POST Hate Crimes Training – Requires POST to develop and implement a course of training for law enforcement officers and dispatchers regarding sexual orientation and gender identity minority groups in the state.

California Ralph Civil Rights Act and the Tom Bane Civil Rights Act

The Ralph Civil Rights Act, Civil Code section 51.7, provides that it is the right of every person in California to be free from violence or the threat of violence against their person or property because of their actual or perceived sex, race, color, ancestry, national origin, religion, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, immigration status, political affiliation, or position in a labor dispute. These listed characteristics are merely examples, and other bases
for a discrimination claim exist under the Act. The Tom Bane Civil Rights Act, Civil Code section 52.1, provides protection against interference or attempts to interfere by threat, intimidation, or coercion with a person’s exercise or enjoyment of any constitutional or statutory rights. Remedies for violations of the Ralph Civil Rights Act or the Tom Bane Civil Rights Act include restraining orders, injunctive relief, equitable relief to secure constitutional and statutory rights, actual damages, exemplary or punitive damages, a civil penalty of $25,000, and attorney’s fees. An action may be brought by the Attorney General, or any district attorney or city attorney, or by the individual harmed.

**Statutory Requirements for Department Hate Crimes Policies and Investigative Best Practices**

As discussed above, pursuant to Penal Code sections 13519.6 and 422.87, all state law enforcement agencies must adopt a hate crimes policy, and all local law enforcement agencies that choose to adopt or update a hate crimes policy must include certain statutory elements.1 The statutes require the California Commission on Peace Officer Standards and Training (POST) to create a model policy including the required statutory elements.2

**Statutory Requirements**

**Penal Code § 13519.6**

Penal Code section 13519.6 sets out the required elements for a hate crimes policy for state law enforcement agencies and encourages local law enforcement agencies to adopt such policies. This includes, but it is not limited to, the following general elements: (1) a message from the law enforcement agency's chief executive officer concerning the importance of hate crime laws and the agency's commitment to enforcement; (2) the definition of “hate crime” in section 422.55; and (3) references to hate crime statutes including section 422.6.

The statute also sets out a title-by-title specific protocol that agency personnel are required to follow. This includes, but is not limited to, the following specific elements: (A) preventing and preparing for likely hate crimes by contact with persons and communities who are likely targets, and forming and cooperating with community hate crime prevention and response networks; (B) responding to reports of hate crimes; (C) accessing assistance, including activating the Department of Justice hate crime rapid response protocol when necessary;3 (D) providing victim assistance and follow-up, including community follow-up; and (E) reporting.

**Penal Code § 422.87**

Penal Code section 422.87 expands upon the requirements of section 13519.6. It requires that any local law enforcement agency that updates an existing hate crimes policy or adopts a new hate crimes policy shall

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1 The recently-enacted “Khalid Jabara and Heather Heyer National Opposition to Hate, Assault, and Threats to Equality Act of 2021” (part of the larger “COVID-19 Hate Crimes Act,” Senate Bill 937) directs the U.S. Attorney General to create grants for state and local agencies to fund the creation of hate crime policies, the development of a standardized system of collecting, analyzing, and reporting the incidence of hate crimes, the establishment a unit specialized in identifying, investigating, and reporting hate crimes; the engagement in community relations functions related to hate crime prevention and education.

2 The POST Hate Crimes Model Policy provides a detailed overview of policy purposes, the full model policy, and sample forms. It can be found at [https://post.ca.gov/Portals/0/post_docs/publications/Hate_Crimes.pdf](https://post.ca.gov/Portals/0/post_docs/publications/Hate_Crimes.pdf).

3 For information see the California Department of Justice webpage or use the following link: [https://oag.ca.gov/sites/all/files/agweb/pdfs/civilrights/AG-Rapid-Response-TeamProtocol-2.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/civilrights/AG-Rapid-Response-TeamProtocol-2.pdf).
include certain specific elements. Some of these are duplicative of the requirements above, but include further specific requirements.

A new or updated agency policy must include specific definitions and information, including the definitions in sections 422.55 and 422.56 and the content of the POST model policy framework developed pursuant to section 13519.6.

The policy must also include information regarding bias motivation, which is defined as “a preexisting negative attitude toward actual or perceived characteristics referenced in section 422.55.” Depending on the circumstances of each case, bias motivation may include, but is not limited to, hatred, animosity, resentment, revulsion, contempt, unreasonable fear, paranoia, callousness, thrill-seeking, desire for social dominance, desire for social bonding with those of one's “own kind,” or a perception of the vulnerability of the victim due to the victim being perceived as being weak, worthless, or fair game because of a protected characteristic, including, but not limited to, disability or gender.

The statute specifically addresses the situation of suspected disability-bias hate crimes. The policy shall advise officers to consider whether there is any indication that the perpetrator was motivated by hostility or other bias, occasioned by factors such as dislike of persons who arouse fear or guilt, a perception that persons with disabilities are inferior and therefore “deserving victims,” a fear of persons whose visible traits are perceived as being disturbing to others, or resentment of those who need, demand, or receive alternative educational, physical, or social accommodations.

In recognizing suspected disability-bias hate crimes, the policy also shall advise officers to consider whether there is any indication that the perpetrator perceived the victim to be vulnerable and, if so, if this perception is grounded, in whole or in part, in anti-disability bias. This includes, but is not limited to, if a perpetrator targets a person with a particular perceived disability while avoiding other vulnerable-appearing persons such as inebriated persons or persons with perceived disabilities different than those of the victim, those circumstances could be evidence that the perpetrator’s motivations included bias against persons with the perceived disability of the victim and that the crime must be reported as a suspected hate crime and not a mere crime of opportunity.

The policy must include information regarding the general underreporting of hate crimes and the more extreme underreporting of anti-disability and anti-gender hate crimes and a plan for the agency to remedy this underreporting, including a protocol for reporting suspected hate crimes to the Department of Justice pursuant to section 13023.

The agency must include a checklist of first responder responsibilities, including, but not limited to, being sensitive to effects of the crime on the victim, determining whether any additional resources are needed on the scene to assist the victim or whether to refer the victim to appropriate community and legal services, and giving the victims and any interested persons the agency’s hate crimes brochure, as required by Penal Code section 422.92.

Finally, the policy must include the title or titles of the officer or officers responsible for assuring that the department has a hate crime brochure as required by Penal Code section 422.92 and ensuring that all officers are trained to distribute the brochure to all suspected hate crime victims and all other interested persons.
Investigative Best Practices

The Penal Code requires POST to create a model hate crimes policy, which, along with other model policies including from the International Association of Chiefs of Police, provide examples of agency best practices for investigating potential hate or bias crimes. The below is a summary of best practices from these model policies for successful law enforcement agency work on suspected hate or bias crimes.

Initial response

The success of an agency’s initial response to a suspected hate crime depends on officers evaluating the need for additional assistance, ensuring the crime scene is properly protected, preserved and processed, and providing support and information to victims.

Officers arriving at the scene of a suspected hate or bias crime should:

- Secure the crime scene and ensure the safety of victim(s), witnesses, and suspected perpetrator(s).
- Stabilize the victim(s) and request medical attention if needed.
- Ensure that the crime scene is properly protected, preserved, and processed, such that the nature and evidence is thoroughly documented. Collect and photograph physical evidence or indicators of hate crimes such as: hate literature, offensive graffiti, spray paint cans, threatening letters, symbols used by hate groups, other bias symbols. Only after complete documentation of the scene, so as to support future hate crime prosecution, should any physical evidence of the incident be removed. Evidence of an inflammatory nature that cannot be physically removed should be covered up and then removed when possible.
- Notify other appropriate personnel in the chain of command, including the supervisor on duty, depending on the nature and seriousness of the offense and its potential inflammatory and related impact on the community.
- Identify and photograph criminal evidence on the victim(s).
- Request the assistance of translators or interpreters when needed to establish effective communication with the victim(s) and witnesses.
- Conduct a preliminary investigation, recording information on the identity of the victim(s), the suspected perpetrator(s), and witnesses, as well as prior occurrences in the area or with the victim(s) or others who share protected characteristic(s) with the victim(s) or other protected characteristic(s).
- Ensure that the victim(s) receive an offer of victim confidentiality per Government Code section 5264.
- Record statements made by suspected perpetrator(s) (exact wording is critical), as well as their gestures and any physical markings such as tattoos that could indicate a bias motivation.
- Consider assigning one officer with specialized training to interview and help victim(s) in order to minimize trauma.
- Investigate whether bias was a motivation “in whole or in part” in the commission of the crime, pursuant to the definition of “bias motivation” in Penal Code section 422.56, discussed in detail above.
- Pursuant to Penal Code section 422.92, provide the agency’s Hate Crimes Brochure.
- Use proper techniques for interviewing people with disabilities and being aware of and providing
appropriate accommodations (such as ADA standards, Braille, visuals, translators for the deaf or hard of hearing, etc.).

- Explaining the likely sequence of events to the victim(s), including contact with investigators, prosecutors, and the media.  
- Referring victim(s) to support and outreach services in the community.
- Giving victim(s) the best possible contact information for those handling the law enforcement investigation so that they are able to obtain further information as the case develops.
- If necessary, and if the incident qualifies as a triggering event, contact the California Department of Justice and seek to have the Attorney General invoke the Department’s Hate Crime Rapid Response Protocol to provide aid to your jurisdiction.

Investigation

Investigators at the scene of or while performing follow-up investigation on a suspected hate or bias crimes are a critical next step in a successful investigation. Best practices for continued investigation include the following elements:

- Consider typologies of perpetrators of hate crimes and incidents, including but not limited to thrill, reactive/defensive, and mission (hard core).
- Use investigative techniques and methods to handle hate crimes or hate incidents in a professional manner.
- Fully investigate any report of hate crime committed under the color of authority pursuant to Penal Code sections 422.6 and 13519.6.
- Provide victim assistance and follow-up.
- Canvass the area for additional witnesses, making use of bilingual officers or translators where necessary based on primary language(s) of individuals in the relevant geographic area.
- Document the circumstances and apparent motives surrounding the event.
- Review other law enforcement records and reach out to local non-law enforcement officials and organizations to find out if other bias motivated incidents have occurred in that area.
- Identify if the victim(s) engaged in activities that advocated for a certain racial, religious, ethnic/national, sexual orientation, gender group, or other issue.
- Determine whether the incident coincided with a holiday that could be linked to a bias motivation, such as a religious holiday or commemoration of a previous event or individual’s death or birth.
- Determine if the suspected perpetrator(s) were previously involved with a bias crime or organized hate group.
- Examine suspected perpetrator(s) social media activity for potential evidence of bias motivation.
- Seek search warrants to examine contents of the suspected perpetrator(s) computer hard drive (if applicable) in order to determine if they are involved with hate groups.
- Appeal to witnesses to come forward with any information regarding the incident.
- Consider offering rewards for information leading to the capture and arrest of suspected perpetrator(s).
- Coordinate the investigation with agency, state, and regional intelligence operations. These sources can provide the investigating officer with an analysis of any patterns, organized hate

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groups, and suspects potentially involved in the offense.

- Coordinate with other law enforcement agencies in the area to assess patterns of hate crimes and/or hate incidents, and determine if organized hate groups are involved.

**Services for Victims of Hate Crimes**

In addition to the victim-facing protocols discussed above, agencies should consider providing the following support and services for victims of hate crimes or incidents:

- Allow the victim(s) to express the intense feelings aroused by the hate crime or incident at the scene and during any follow-up investigation.
- Provide information to the victim(s) concerning the investigation and prosecution of their case, both about their case in particular and the system in general.
- Provide the victim(s) with a Marsy’s Law card detailing their rights as a victim of crime. Under Marsy’s Law, California Constitution Article I, § 28, Section (b), every victim of crime has the right to receive a Marsy’s Law card, setting forth their rights as a victim of crime. Encourage victim(s) to seek out more information about these rights through the local systems-based victim services agency for further follow-up and next steps in the criminal justice process.
- If available, request the assistance of a systems-based or community-based victim advocate. Certain victim advocates provide on-scene response to provide victims in-crisis with warm support, advocacy, crisis intervention, resources, and accompaniment during the initial crime scene response including the entire criminal justice process. Most system and community-based victim advocates function under the direction of the local District Attorney’s Office, Law Enforcement Agencies, Probation Department, and in few instances under local non-profit agencies
- Provide referrals for cross-cultural counseling for victims of hate crimes. Consider partnering with community organizations to provide such resources.
- Recognize the bias-motivated crime for the serious crime it is to the victim(s).
- Address the crisis of victimization as well as confront the obvious hate and prejudice exhibited in the crime.
- Assist the victim(s) in completing and filing an application to the state's victim compensation fund, if applicable.

**Training**

All staff, including dispatch, desk personnel, volunteers, records, support staff, officers, supervisors, and managers should be properly trained on the department’s hate crimes policy. The agency should follow all legislatively mandated training requirements.

Pursuant to Penal Code section 13519.6, POST offers training and video courses to assist law enforcement in the identification, investigation, documentation and reporting of hate crimes. Trainers may also use other state and federal agencies that offer training courses, such as the U.S. Department of Justice, or

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6 For more information on POST training opportunities and available videos, visit the POST website at www.post.ca.gov.
community groups with expertise in hate crimes response.\textsuperscript{7} The California Department of Justice lists hate crimes education and training resources on its website.\textsuperscript{8}

**Reporting**

Data collection, documentation, and reporting are critical to an agency’s response to hate crimes. Best practices for reporting include the following:

- Ensure that hate crimes are properly investigated, documented, and reported to the California Department of Justice, pursuant to Penal Code section 13023, so that they may be reported by the State to the federal government.\textsuperscript{9}
- When documenting incidents, ensure hate crimes are clearly flagged to allow for required reporting. This is can be indicated by the title/penal code section identifying the report as a hate crime.
- The agency head or their designee should make a final determination as to whether the incident should be classified as a hate crime by the agency.
- Agencies shall develop procedures to preserve hate crime reports, ensure timely communication of crimes to prosecutors’ offices, and comply with legally mandated reporting.

**Contact Information**

The California Department of Justice takes great pride in assisting local law enforcement agencies in enforcing criminal and civil rights laws and protections. Should your agency or individual officers require technical assistance, please contact Division of Law Enforcement Acting Chief John Marsh at (916) 210-6300 or Senior Assistant Attorney General Michael Newman in the Department’s Civil Rights Enforcement Section at Michael.Newman@doj.ca.gov or (213) 269-6280.

\textsuperscript{7} The current list of resources available from the U.S. Attorney General is available at https://www.ojp.gov/feature/hate-crime/training-resources. In California, the Museum of Tolerance, for example, provides law enforcement agency training regarding responding to hate crimes, with information available at https://www.museumoftolerance.com/for-professionals/programs-workshops/tools-for-tolerance-for-law-enforcement-and-criminal-justice/hate-crimes/hate-crimes-courses-for-ca-agencies/.

\textsuperscript{8} The current list of resources is available at https://oag.ca.gov/civil/preveduc.

\textsuperscript{9} See 34 U.S.C. § 41305 (“Hate Crime Statistics Act” gives the U.S. Attorney General authority to collect hate crime statistics but does explicitly require reporting by state and local agencies).
Attorney General Bonta Releases 2021 Hate Crime Report, Highlights Resources to Support Efforts to Combat Hate

Press Release / Attorney General Bonta Releases 2021 Hate Crime Report, High...

Tuesday, June 28, 2022
Contact: (916) 210-6000, agpressoffice@doj.ca.gov

Amidst surge in reported hate crimes, Attorney General urges local partners across California to recommit themselves to taking action

Announces creation of a statewide hate crime coordinator position within the California Department of Justice

SACRAMENTO – California Attorney General Rob Bonta today released the 2021 Hate Crime in California Report and highlighted information and resources to support ongoing efforts across the state to combat hate. At 1,763 bias events in 2021, overall hate crimes reported in California increased 32.6% from 2020 to 2021 and are at their highest reported level since 2001. Reported hate crimes targeting Black people remain the most prevalent and increased 12.5% from 456 in 2020 to 513 in 2021, while reported anti-Asian hate crime events once again increased dramatically, rising 177.5% from 2020 to 2021, and reported hate crimes involving a sexual orientation bias also increased significantly, rising 47.8% from 2020 to 2021. Amidst this surge in reported hate crime events, Attorney General Bonta urges local partners and law enforcement to review the resources
highlighted today and to recommit themselves to taking action. The Attorney General continues to convene law enforcement, elected leaders, and community organizations at the local level across the state to help increase awareness around available resources and strengthen responses to hate crime in California. In addition, today, Attorney General Bonta is formally announcing the creation of a statewide hate crime coordinator position within the California Department of Justice's Criminal Law Division in order to further assist state and local law enforcement efforts to combat hate crime.

“Today's report undeniably shows that the epidemic of hate we saw spurred on during the pandemic remains a clear and present threat,” said Attorney General Bonta. “In fact, reported hate crime has reached a level we haven't seen in California since the aftermath of the terrorist attacks of September 11. As our state’s top law enforcement officer, I will continue to use the full authority of my office to fight back. We will keep working with our local law enforcement partners and community organizations to make sure every Californian feels seen, heard, and protected. While there is no single solution, it's up to all of us to heed the call, because when our communities feel empowered, they come forward. Now, more than ever, it is critical that we stand united — there is no place for hate in California.”

The California Department of Justice has collected and reported statewide data on hate crimes since 1995. Under California law, a hate crime is a criminal act committed in whole or in part because of a victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with someone with one or more of these actual or perceived characteristics. Hate crimes are distinct from hate incidents, which are actions or behaviors motivated by hate that may be protected by the First Amendment right to freedom of expression. Examples of hate incidents include name-calling, insults, and distributing hate material in public places. If a hate incident starts to threaten a person or property, it may become a hate crime. Historically, hate crime data has generally been underreported and the California Department of Justice recognizes that the data presented in its reports may not adequately reflect the actual number of hate crime events that have occurred in the state. Nevertheless, it is important to note that the total number of hate crime events reported in 2021 is the sixth highest ever recorded and the highest since hate crime events skyrocketed in 2001 in the aftermath of the terrorist attacks of September 11.
Some of the key findings from the 2021 Hate Crime in California Report include:

- Overall, reported hate crime events increased 32.6% from 1,330 in 2020 to 1,763 in 2021;
- Anti-Black bias events were the most prevalent, increasing 12.5% from 456 in 2020 to 513 in 2021;
- Hate crime events motivated by a sexual orientation bias increased 47.8% from 205 in 2020 to 303 in 2021;
- Anti-Asian bias events increased 177.5% from 89 in 2020 to 247 in 2021;
- Anti-Hispanic or Latino bias events increased 29.6% from 152 in 2020 to 197 in 2021;
- Among hate crime events involving a religious bias, anti-Jewish bias events were the most prevalent and increased 32.2% from 115 in 2020 to 152 in 2021; and
- From 2020 to 2021, the number of cases filed for prosecution by district attorneys and elected city attorneys involving hate crime charges increased by 30.1%.

In 2021, Attorney General Bonta issued a series of reports, guidance, and resources to help the public and law enforcement better understand and address hate crimes in California. Given the ongoing challenge presented by hate crime, the Attorney General urges leaders across the state and members of the public to review and make use of these important resources, which include a law enforcement bulletin summarizing applicable civil and criminal hate crime laws, guidance to prosecutors to help strengthen prosecution and enforcement, and brochures and fact sheets in more than two dozen languages to assist Californians in identifying and responding to hate crime events. Last year, Attorney General Bonta also released a special report on anti-Asian hate crimes during the pandemic, which offers important context and analysis regarding the recent increases in anti-Asian hate crime events.

Ahead of the release of last year’s report, Attorney General Bonta launched the Racial Justice Bureau, which, among other things, supports the California Department of Justice’s broader mandate to advance the civil rights of all Californians by assisting with new and ongoing efforts to combat hate and bias. Since last year, the Attorney General has also engaged with local leaders through roundtables in San Francisco, Oakland, Sacramento, San Diego, Riverside, Long Beach, Santa Ana, and San Jose. More broadly, the Attorney General is deeply committed to responding to the needs of historically marginalized and underrepresented communities and, last
year, also launched the Office of Community Awareness, Response, and Engagement to work directly with community organizations and members of the public as part of the effort to advance justice for all Californians.

Members of the public can further explore the most recent hate crime data on OpenJustice.

A copy of the 2021 Hate Crime in California report is available here.

###
The Attorney General’s Hate Crime Rapid Response Protocol
for Deployment of Department of Justice Resources

Statement of Purpose

The Attorney General is the chief law officer of the State. It is his duty to see that the laws of the State are uniformly and adequately enforced. (Cal Const., art. V, § 13.) Crimes motivated by hate impact both the individual victim of the crime and the community targeted. They also cause an injury to the State as a whole because of the pernicious impact of hate on all members of society. Because of this broad impact and the need for a coordinated and strong response, the California Department of Justice (Department) has developed a protocol for prioritizing the needs of local jurisdictions when faced with a significant hate crime event. When invoked, the protocol requires the deployment of the resources of the Department to aid and assist local and federal law enforcement authorities in the investigation of and response to possible hate crimes, and in the identification, arrest, prosecution, and conviction of the perpetrators of those crimes.

In order to ensure that the perpetrators of hate crimes are quickly identified and apprehended, Attorney General Rob Bonta reaffirms this protocol and directs that members of his senior staff carry out the delineated obligations when the protocol is invoked.

This protocol does not supplant the Department’s ongoing and active partnership with local and federal law enforcement authorities with respect to the investigation and prosecution of crimes, whether hate crimes or other forms of crime or victim’s services. Rather, it is the Attorney General’s intent that those agencies have access to the full resources of the Department of Justice at their disposal following a major hate crime incident.

DOJ Senior Staff Responsibilities

When invoked, the Rapid Response Protocol requires that numerous members of the Attorney General’s senior staff prioritize addressing the triggering hate crime event above any other work they may have ongoing. These senior staff shall include the Chief Deputy Attorney General, the Chief of Staff to the Attorney General, the Chief of the Division of Law Enforcement, the Director of the Bureau of Investigation, the Chief of the Division of Criminal Justice Information Services, the Chief Assistant Attorney General of the Division of Criminal Law, the Senior Assistant Attorney General of the Civil Rights Enforcement Section within the Division of Public Rights and the Manager of the Victims’ Services Unit within the Division of Criminal Law.
Events Qualifying for Invocation of Attorney General’s Rapid Response Protocol

While all hate crimes should be investigated and prosecuted to the fullest extent by the local law enforcement agencies with jurisdiction, the Rapid Response Protocol is designed to be invoked in response to the most complex and significant hate crime incidents, such as the following:

a) Hate crimes resulting in a death, especially in jurisdictions with fewer resources available to address the investigation and prosecution of a homicide or a hate crime;

b) acts of arson resulting in significant damage;

c) use of explosives; and/or

d) a mass casualty incident.

The occurrence of such a crime may qualify as a “triggering event.”

Individuals Authorized to Declare Occurrence of Triggering Event

The Attorney General or the Chief Deputy Attorney General, if the Attorney General is not available, shall have authority to declare that a triggering event has occurred.

Action to be Taken in Response to the Occurrence of a Triggering Event

Once a declaration is made that a triggering event has occurred, the Chief of Staff, the Chief of the Division of Law Enforcement, the Director of the Bureau of Investigation, the Chief Assistant Attorney General of the Division of Criminal Law, the Chief of the Division of Criminal Justice Information Services, and the Senior Assistant Attorney General of the Civil Rights Enforcement Section within the Division of Public Rights shall immediately coordinate and without delay take the following actions:

I. The Division of Law Enforcement – the Chief of the Division of Law Enforcement shall:

A. Contact the local police chief and/or county sheriff and the head of the local office of the Federal Bureau of Investigation that has responsibility for investigating hate crimes in the jurisdiction in which the triggering event has occurred, and shall advise them that the full resources of the Department of Justice will be made available to them on the highest of priorities basis.

B. Notify the Director of the Bureau of Investigation that a triggering event has occurred and direct the deployment of as many special agents and other relevant staff as necessary to the scene of the triggering event to assist local and federal authorities, to observe and evaluate the scene of the triggering event, and to prepare and deliver, within 24 hours of the occurrence of the triggering event, a report to the Attorney General on the facts and circumstances that are known as of that time. The special agent(s) and other Department staff shall also take whatever steps are necessary to assist local and federal authorities in transporting any physical evidence to the Department of Justice laboratories for analysis if those authorities determine such action is appropriate. The Chief shall further command the Director to immediately, and not later than 24 hours following a triggering event, deliver to relevant local and federal law enforcement any and all intelligence information that might assist those authorities in identifying the perpetrator(s).
C. Notify the Director of the Bureau of Forensic Services that a triggering event has occurred and instruct the Director to give the highest priority to any request for services that is related to the triggering event.

D. Notify the Criminalist Laboratories closest to the location of the triggering event that a triggering event has occurred and instruct the Director(s) to give the highest priority to any request for services that is related to the triggering event.

E. Notify the Commissioner of the California Highway Patrol that a triggering event has occurred and request that the Commissioner give the highest priority to any request for services that is related to the triggering event.

II. The Division of Criminal Justice Information Services – The Chief of the Division of Criminal Justice Information Services shall:

A. Notify the Director of the Bureau of Criminal Identification and Investigative Services that a triggering event has occurred and instruct the Director to give the highest priority to any request for services that is related to the triggering event.

B. Notify the Director of the Bureau of Criminal Information and Analysis that a triggering event has occurred and instruct the Director to give the highest priority to any request for services that is related to the triggering event.

III. The Division of Criminal Law – The Chief Assistant Attorney General of the Division of Criminal Law shall:

A. Contact the County District Attorney, City Attorney, and the United States Attorney having jurisdiction for the locale in which the triggering event occurred and offer them the full assistance of the Department of Justice.

B. Notify the Manager of the Victims' Services Unit that a triggering event has occurred. The Manager shall make immediate contact with the District Attorney’s Victim Services Center of the county in which the triggering event occurred (or any appropriate representative from the District Attorney’s Office, if the county does not have a Victim Services Center), and shall offer the full services of the Department’s Victims’ Services Unit. The Senior Assistant Attorney General of the Civil Rights Enforcement Section shall assist the Manager in responding to this directive.

C. Notify a Senior Assistant Attorney General within the Division that a triggering event has occurred and direct them to assign one or more Deputy Attorney(s) General, as needed, to coordinate with the assigned Deputy Attorney(s) General from the Civil Rights Enforcement Section to provide legal and technical assistance to the other sections of the Department of Justice with responsibility for carrying out the Protocol, and to the local law enforcement agencies in which the triggering event occurred.
IV. The Civil Rights Enforcement Section – The Senior Assistant Attorney General of the Civil Rights Enforcement Section in the Public Rights Division shall:

A. Assign one or more Deputy Attorney(s) General, as needed, to coordinate with the assigned Deputy Attorney(s) General from the Division of Criminal Law to provide legal and technical assistance to the other sections of the Department of Justice with responsibility for carrying out the Protocol, and to the local law enforcement agencies in which the triggering event occurred.

B. Provide support to local human relations commission or similar city, county, or independent body, as necessary, to support community response to the triggering event.

C. Provide relevant support to the Victims’ Services Unit in the Division of Criminal Law, and to the local law enforcement agencies in which the triggering event occurred.

V. The Chief of Staff to the Attorney General – The Chief of Staff shall:

A. Notify all executive staff directors of the invocation of the Rapid Response Protocol and direct them to make all resources available to those in the Department working with local and federal law enforcement to address the triggering event.
Hate Crimes

Crimes motivated by hate are not just attacks on individual innocent people – they are attacks on our communities and the entire State. It is the job of Attorney General Rob Bonta to see that the laws of the State are uniformly and adequately enforced.

The California Department of Justice (Department) has tools and resources to aid and assist local, state, and federal law enforcement authorities in the investigation of possible hate crimes, including the identification, arrest, prosecution, and conviction of the perpetrators of those crimes. If you wish to report a crime, please file a report with the local police or sheriff's department.

What Californians Need to Know to Protect Themselves and Others

What is the Difference Between a Hate Crime and a Hate Incident?

A hate crime is a crime against a person, group, or property motivated by the victim's real or perceived protected social group. You may be the victim of a hate crime if you have been targeted because of your actual or perceived: (1) disability, (2) gender, (3) nationality, (4) race or ethnicity, (5) religion, (6) sexual orientation, and (7) association with a person or group with one or more of these actual or perceived characteristics. Hate crimes are serious crimes that may result in imprisonment or jail time.
A **hate incident** is an action or behavior motivated by hate but which, for one or more reasons, is not a crime. Examples of hate incidents include:

- Name-calling
- Insults
- Displaying hate material on your own property.
- Posting hate material that does not result in property damage.
- Distribution of materials with hate messages in public places.

The U.S. Constitution allows hate speech as long as it does not interfere with the civil rights of others. While these acts are certainly hurtful, they do not rise to the level of criminal violations and thus may not be prosecuted. However, it is important to note that these incidents have a traumatic impact on the victims as well as on the community at large.

In California, under the Ralph Act, Civil Code § 51.7, your civil rights may be violated if you have been subjected to hate violence or the threat of violence – even where the incident does not rise to the level of a hate crime and may be otherwise constitutionally-protected from prosecution by the government – because of your actual or perceived: sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, immigration status, political affiliation, and position in a labor dispute. A civil violation may result in restraining orders, injunctive and/or equitable relief, damages, a civil penalty of $25,000, and attorney’s fees.

- **How to Spot a Hate Crime**
- **If you are a hate crime victim, you should**
- **Information for Victims**
- **What You and Your Community Can Do**
- **Prevention and Education**
Attorney General Bonta's Hate Crime Rapid Response Protocol

To ensure that local law enforcement officials have the resources they need to respond to major hate crime events, the Attorney General's office has developed the Attorney General's Hate Crime Rapid Response Protocol. The protocol calls for the prioritization of resources to ensure that the California Department of Justice makes available to locals skilled law enforcement special agents, lawyers who are experts on handling civil rights issues, victim services professionals, and others, in order to provide a comprehensive response to major incidents.

The Attorney General's Hate Crime Rapid Response Protocol acts as a supplemental resource to local, state, and federal enforcement agencies' investigation and prosecution of hate crimes. The Protocol ensures local agencies have access to the full resources of the Department of Justice at their disposal. Attorney General Bonta believes that through a strong cooperative and team effort, state, local, and federal law enforcement agencies will be in the best position to quickly and effectively respond to major hate crime incidents anywhere in California.

View the protocols: Protocol for Deployment of Department of Justice Resources

Hate Crime Materials

Brochure
The Attorney General has developed a hate crime brochure with information on how to identify and report hate crimes and services available to victims of hate crimes.

For convenience, the brochure is available in two formats and is available in the following languages:

**Brochure**

English  
Spanish  
Arabic  
Armenian (Eastern)  
Cambodian  
Chinese (Cantonese)  
Chinese (Simplified)  
Chinese (Traditional)  
Farsi  
French  
German  
Hindi  
Hmong  
Italian  
Japanese  
Korean  
Lao  
Portuguese  
Punjabi  
Russian  
Tagalog  
Telugu  
Thai  
Ukrainian  
Vietnamese
Fact Sheet

English
Spanish
Arabic
Armenian (Eastern)
Cambodian
Chinese (Cantonese)
Chinese (Simplified)
Chinese (Traditional)
Farsi
French
German
Hindi
Hmong
Italian
Japanese
Korean
Lao
Portuguese
Punjabi
Russian
Tagalog
Telugu
Thai
Ukrainian
Vietnamese

In addition, the Attorney General has adapted the hate crime brochure to encourage local community groups and LEA’s to customize the hate crime brochure. Below is the template with editable fields to add an agency logo, contact information and any additional information that might be relevant for their respective community. Hate Crime Brochure Template
Below are shareable graphics with information on where to report hate crimes, definition of a hate crime and a hate incident and steps an individual can take if they are a victim of a hate crime.

The graphics are available in the following languages:

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Annual Hate Crimes Report

The Attorney General publishes the Hate Crime in California Report annually assessing the number of hate crime events, hate crime offenses, hate crime victims, and hate crime suspects.

This report highlights hate crime trends, including the most common types of hate crimes broken down by protected class, as well as by city and county. The report puts these statistics in historical perspective by providing trend information on the number and types of hate crimes over the past ten years.

More information, including an analysis of the number and types of hate crimes over the past decade, can be found on the Attorney General's OpenJustice website.
From the Desk of the
ATTORNEY GENERAL

A Memoir

David M. Louie
In the Seat of Government

His historic *koa* wood desk in Hawai‘i’s state capitol gave David Louie a front-row seat for viewing—and shaping—the inner workings of government. In this incisive, behind-the-scenes memoir, the country’s first Chinese American state attorney general recalls the landmark cases of his time in office—environmental issues, Native Hawaiian rights, Internet safety, same sex marriage, human trafficking and even the unlikely concert hoax known as the “Wonder Blunder.”

“An eye-opening narrative of one attorney general’s experience as the top law enforcement official of his state. I thought I knew what responsibilities an AG handled but was surprised at the scope and depth of David Louie’s time in office, as he displayed a remarkable ability to navigate the intricacies of his job as a newcomer to the world of government. If you enjoy inside stories about politics, law and Hawai‘i, you will love this book!”

—Dale Minami, civil rights lawyer and recipient of the American Bar Association’s Thurgood Marshall Award and ABA Medal, the Association’s highest honor

“David Louie has produced a refreshingly candid and incisive account of the inner workings of government and the political machinations that underlie important policy decisions. As someone new to public office, he offers an unjaded perspective on the people and processes that shape government. His book is an important historical record of the many key measures undertaken during his years of service.”

—Colbert Matsumoto, chairman, Island Holdings, Inc.
From the Desk of the ATTORNEY GENERAL

A Memoir

David M. Louie
Governments must address the problems that confront their communities, and some of the most pressing problems of states and cities have roots in issues arising out of social inequality. Issues of race, gender and sexual orientation, to name a few, have been the battleground of conflict and upheaval for many years in Hawaii and throughout the nation. These issues are important because they go to the heart of how government can ensure that everyone can live, work and cooperate together for the greater good, with dignity and respect for all.

We have all been taught, since grade school, the lofty ideals of the Declaration of Independence and the Constitution, that promised that “all men are created equal” and should have equal opportunity and equal protection under the laws. I believe deeply in those ideals, and I think the majority of Americans do, too. Unfortunately, the reality of our society and communities does not always match such aspirational goals, and there are widespread inequities in wealth, socioeconomic status, power and opportunity. Many problems that governments and attorneys general must deal with, such as racial and sexual discrimination, poverty, crime and homelessness, have their roots in such inequities.

In addressing such problems, it’s important for those in government to have a perspective and understanding of the historical background that got us to this point, so that laws can be enforced and enacted, and policy solutions can be fashioned, with empathy and understanding to actually solve such problems and not exacerbate them.

My personal perspective on social justice matters, and what I brought to the table as attorney general in approaching such issues, was shaped in a number of different ways, primarily through the lens of race. This included growing up as a person of color, a minority, a Chinese American in mostly white communities, learning about my heritage and
identity in college, learning in law school about historical discrimination against Asian Americans, and living and working in Hawaii. My background in race and social justice issues affected the choices I made as to which issues I wanted to concentrate on when I was in office. More importantly, the legacy of governmental actions in these areas will affect how these and other new but related issues are dealt with in the future, both in Hawai‘i and nationally.

Matters of Race

Looking back, I believe that my experiences growing up made me aware of social justice and fairness issues and gave me an understanding of how marginalized people and communities can be harmed and impaired by discrimination and disparate treatment. I grew up in predominantly white communities as my father’s career took us to different places in California. There were few Chinese Americans in these communities, but I was generally accepted, had good opportunities and had good friends who were mostly white. When we would visit my grandparents in San Francisco’s Chinatown, it always seemed exotic and foreign, since it was so different from the white suburban communities where we lived. However, while the communities where we lived were familiar, I was always conscious that I was different, and there was always a slight sense of being an outsider and not quite belonging.

Although I did not personally suffer any significant incidents of overt racial discrimination and ignored the occasional slights, my parents certainly experienced discrimination. In 1961, we moved to La Cañada, a conservative wealthy white Los Angeles suburb, where my father had gotten a job as the minister of Christian education for the La Cañada Presbyterian Church. No realtor would sell our family a house in the community, because we were Chinese. At that time, many houses in California had restrictive deed covenants that prohibited sales to non-whites. It was embarrassing for the church and one of the most significant examples of discrimination that we experienced as a family. Thankfully, the church solved the issue by having a church member contractor build a new house and sell it to my parents. Those discriminatory deed restrictions were only struck down in California in the late 1960s.

Not all experiences of my family as people of color were ill-intentioned. Some were just born of ignorance. My mother recently
reminded me of an episode in the late 1950s when we lived in Davis, California, where a branch of the University of California was located. The Faculty Wives Club (hopefully now an anachronistic name) was throwing a going-away party and decided to have a Chinese-themed event. Some of the church women asked my mother if she would bring her opium pipe and wear her kimono. Such requests were stunning in both their ignorance and unwitting racist overtones. Chinese people did not all have opium pipes and use opium, heroin or other drugs. Kimonos were worn by Japanese, not Chinese women. Yet such statements were typical of the time, when even well-intentioned whites might try to relate to Asian Americans, but in ways that emphasized foreignness and differences.

As I grew up in the 1950s and 1960s, the myth of Chinese and Japanese Americans as model minorities was in vogue as examples of minorities who had achieved success by being quiet, industrious and hardworking, in contrast to the vocal protests, demonstrations and even riots of the civil rights movement. This myth favors Asian Americans over Blacks and Latinos but falls apart under scrutiny because it ignores vast historical differences between Asian Americans and Blacks, Latinos and Native Americans, who were subject to slavery, colonization and misappropriation of lands. The myth also obscures the struggles of other Asian and Pacific Islander communities who have not achieved economic success. Yet even with the possible advantages of this myth, Asian Americans have faced and continue to encounter discrimination in insidious forms like those experienced by my parents.

Of course, a lot of this passed me by as I was growing up. But when I attended Occidental College in the early 1970s, I began to learn about the history of Asian Americans in the United States. I met other Asian American students and learned about their efforts to get together, communicate and organize around civil rights issues, inspired by the civil rights movement. My older brother, Stephen, was active in the Asian American movement and traveled around the country meeting and working with other Asian American students and organizations. I attended some conferences for Asian American students and was active with the Asian American Student Association at Occidental. One of my advisors was Dr. Franklin Odo, who helped to create Asian American Studies and other ethnic studies programs, and became a prominent Asian American scholar and historian. It was a revelation to me to learn about Asian American history, as that is a subject not usually taught in
most schools. Even colleges and universities only began teaching such subjects in the 1970s and ’80s as a result of students of color demanding ethnic studies programs.

I had never consciously put a name on or thought about my experience as a person of color growing up in white communities, since it was just what I experienced. But this contact with the Asian American movement made me much more conscious of my identity as a Chinese American, the whole issue of being a person of color, and my understanding of the civil rights movement and the quest for social justice.

I became increasingly interested in learning about my heritage and identity and began studying more about Asia. In my junior year at Occidental, I received an international fellowship to undertake independent study and research for nine months in Hong Kong. There I became friends with some Chinese American students who fortuitously had arranged a two-month trip to the People’s Republic of China and invited me along. We were in the first wave of Americans allowed into China following President Richard Nixon’s “ping-pong diplomacy” initiative in 1972. Seeing the country of my ancestry, being in a nation of people who looked like me and seeing the accomplishments and energy of the Chinese people was a fantastic and affirming experience and made me proud of my heritage.

When I went to law school in Berkeley, I became friends with other Asian American law students and lawyers and learned much more about the history of Asian Americans. I became a teaching assistant for Asians and the Law, an undergraduate course about legal decisions involving Asian Americans. One of the most important cases we studied was *Korematsu v. United States*, in which the Supreme Court upheld the conviction of Fred Korematsu for refusing to comply with Executive Order 9066, a US presidential order resulting in the forced incarceration of 120,000 loyal Japanese American citizens during World War II. This case had been infamous for many decades, as the incarceration destroyed many Japanese American communities and a great deal of their wealth, based only upon flimsy racist claims by some military leaders that Japanese Americans were spies and saboteurs.

The course was taught by Dale Minami, a lawyer who had recently graduated from Berkeley and was active in Asian American civil rights issues. Minami and a team of my other law school friends, including Don Tamaki, Eric Yamamoto, Edward Chen, Lori Bannai and Leigh-Ann Miyasato, brought a lawsuit against the United States government
several years later that overturned the conviction of Korematsu using materials and papers uncovered by historian Peter Irons. Those documents showed that Order 9066 was based on false racist hysteria, that US military commanders concealed the true facts that Japanese Americans were not a military threat and that J. Edgar Hoover of the Federal Bureau of Investigation had determined that there was no espionage threat. Shockingly, even the United States solicitor general chose not to inform the Supreme Court of these facts and that the claim of national security to support the internment was based upon lies and falsehoods. In 2011, Neal Katyal, the acting solicitor general of the United States, issued an official confession of error, admitting that the solicitor general’s office was wrong in defending the country’s wartime internment policy based upon lies.

My friendships and contact with Asian American lawyers over the years kept me aware of civil rights issues and achievements in the Asian American legal community. Indeed, a number of these close friends went on to achieve notable milestones. Minami continued as a prominent civil rights lawyer and was recently honored with the 2019 American Bar Association (ABA) Medal for his work leading the Korematsu legal team. Edwin M. Lee, with whom I shared a house in law school, became the first Chinese American mayor of San Francisco, serving from 2011 to 2017. Chen, another housemate, became a United States district court judge. Hoyt Zia, the founding president of the National Asian Pacific American Bar Association (NAPABA), served as chief counsel for Export Administration at the US Department of Commerce during the Clinton administration. Yamamoto became a noted professor at the William S. Richardson School of Law at the University of Hawai‘i, publishing many social justice books and articles, including a recent book on the Korematsu case. I thought about emulating their achievements and public service when the opportunity came along to become attorney general.

Diversity in Hawai‘i

In reflecting on my experience as attorney general, another important factor in how I got here and what I did arose from living in Hawai‘i, which is relatively unique in the United States as a multicultural, multiracial state and community. I have benefited from being in Hawai‘i in immeasurable ways, not the least of which is that I have been able to succeed without experiencing disadvantage or discrimination related to issues of
race. Hawai‘i has long had a climate of racial tolerance along with a prevalent custom of friendly teasing about race in a gentle, nonthreatening way. This is not to say that issues of race do not exist here. Race always matters—I just believe that race matters differently in Hawai‘i than the way race matters in other states on the mainland.

Hawai‘i is probably the most diverse state in the Union, and Asian Americans have achieved substantial success here. Because Hawai‘i has been a welcoming place with a welcoming culture, along with a history of bringing foreign Asian laborers (Chinese, Japanese and Filipinos) to work on the sugar and pineapple plantations, Hawai‘i has developed an amazingly diverse population.

This cultural context, which I learned after moving to Hawai‘i, helps to explain the different perceptions of race between myself and Asian American friends who had grown up in Hawai‘i. At Occidental I had met and became friends with a number of Asian American students from Hawai‘i. Perplexingly to me, many of them did not seem to share my growing perceptions that Asian Americans were minorities who had historically experienced discrimination and should be concerned with social justice issues. My Asian American law student friends from Hawai‘i were much more conscious of social justice issues. But moving to Hawai‘i after law school showed me the differing experiences of Asian Americans in Hawai‘i from Asian Americans on the mainland.

Hawai‘i is a unique multicultural environment. Asians, not whites, are the majority population. In fact, some sources note that Hawai‘i is the only state with a majority Asian American population. There is a lot of intermarriage and mixing, and many people identify with multiple ethnicities. In 2020, the US Census Bureau released statistics for Hawai‘i’s population that noted for people who identified as only one race, Asians (Filipino, Japanese, Chinese, Korean and other Asian) comprised 37.6%, whites comprised 25.5%, Native Hawaiian and other Pacific Islanders comprised 10.1%, with 24.2% of the population identifying as two or more races. When people identified as more than one race (which leads to totals of more than 100%), Asians comprised 57.3%, whites comprised 43.5%, Native Hawaiian and other Pacific Islanders comprised 27%, Black or African Americans comprised 3.6% and Hispanics comprised 10.7%. Importantly, in the last forty years, Asian Americans have been in the governmental halls of power as governors, legislative leaders and judges, while also rising to prominence in the local business community.
But this has not always been the case. The historical background of economics, politics and government in Hawai‘i is very important to understand Hawai‘i’s current situation. For many years Hawai‘i was controlled by white business interests, even though there were significant minority communities. It was not until a political revolution occurred in the 1950s and the 1960s in Hawai‘i through the ballot box and organized labor that non-whites gained political representation. John A. Burns, who had worked to keep the Japanese Americans in Hawai‘i from being incarcerated in World War II, put together a Democratic political coalition to challenge the Republicans for control of the state. Japanese American soldiers such as Daniel K. Inouye came back from the war and were not satisfied to be second-class citizens in their own communities and sought political power. Hawai‘i was also undergoing labor strife, as the International Longshore and Warehouse Union (ILWU) was seeking to get decent wages and a piece of the pie that was controlled by the major corporations.

While the Democratic revolution did not happen overnight, it did happen, and the power of the ballot box allowed Asian American immigrant communities, who had created families, raised children and built houses, to go from being merely contract labor to becoming an integral part of the economic and power structure of the community. That Democratic revolution still reverberates and echoes in Hawai‘i’s politics today.

Hawai‘i’s success in fostering diversity throughout the community might serve as a model for how communities can deal with racial, ethnic and cultural differences. All of the racial groups in Hawai‘i have generally been very accepting of other races and cultures, which has led to a lot of interpersonal relationships and intermarriage. Perhaps Hawai‘i’s experience is due to being in a smaller geographic area or being on islands; perhaps this has been a function of the welcoming Native Hawaiian culture; perhaps there are other factors at work. Perhaps Hawai‘i is a bubble, an anomaly, that is not likely to be repeated on the mainland. Yet I remain hopeful that the experience of Hawai‘i can, in small and large ways, provide an example for our nation of successful diversity and complementary cultures that contribute to a better overall community.

Now this is not to suggest that life in Hawai‘i is all a bowl of cherries. There are differences. There is discrimination. There have always been people calling out the differences between the races. But the discrimination experienced in Hawai‘i over the last several decades has generally
not been against either whites or Asian Americans. Both groups constitute substantial portions of the overall population and tend to be considered majorities. Nonetheless, Native Hawaiians and other Pacific Islander groups have not fared as well, are disproportionately poorer and in important ways have been left behind. There are very few Blacks in Hawai‘i, and they have reported encountering discrimination. Recent immigrant groups such as Micronesians also face more issues of discrimination, poverty and homelessness than other Asian American groups.

However, let me address a persistent urban myth that I’ve heard over the years—that whites face systemic discrimination in Hawai‘i. Recently a friend on the mainland asked about this. That has not been my experience or observation at all. While I’m aware of some incidents involving whites and I have listened to a few new transplants to Hawai‘i casually complain about “driving while white” and being stopped by local Asian American cops, I think such instances are more likely due to people from the mainland acting (and driving) more aggressively than is normally seen here, which stands out and elicits a predictable reaction. Even when such instances occur, they do not in any way rival the frequent reports in the media of traffic stops, harassment, killings and overt racist behavior against Blacks, Latinos and Asian Americans on the mainland. Although there may be racial differences in Hawai‘i, in my view there are a lot less racial differences and discrimination here than in the rest of the United States.

To me, Hawai‘i’s diversity and accepting attitudes about race and culture have been important factors that have helped me to succeed, and they have led to good outcomes for Hawai‘i. A climate of inclusion and understanding leads to people working together for mutual success and shared goals, despite differences in race or culture, and is far more positive for a community than an environment of divisiveness and discrimination. In other words, diversity has helped to define, rather than divide, Hawai‘i.

**Practicing Law in Hawai‘i**

Being a lawyer in Hawai‘i, with its many races and ethnicities, also influenced and shaped my perspective on social justice issues while allowing me the opportunity to develop the skills, tools and perspective needed to serve as attorney general. Part of my perspective on social justice issues is based on simply living and experiencing how diversity in Hawai‘i has allowed many people of different races to succeed and flourish. When
I moved to Hawai‘i, I found its ethnic mix and large Asian American population to be very welcoming. The feeling of belonging and being a full part of the community is an intangible plus for Asian Americans in Hawai‘i. I have also had many friends and relatives from the mainland tell me that they always feel very comfortable in Hawai‘i because there are so many Asians here.

One of the major differentiating factors used by people in Hawai‘i is not specifically race, since Hawai‘i has so many people of different races, but whether a person is “local.” Although being “local” could sometimes be a marker for race, the more important and overriding question has been whether a person has local roots and understanding of local culture. One common question that comes up when people in Hawai‘i meet for the first time is, “Where you wen’ grad?”—in which someone is asking where you graduated from high school, not college. High school was often a determinant of neighborhood, income level and a family’s professional status, and knowing how to answer this question suggests that you are local.

Being Chinese American, I looked like a local, because of the many Asian Americans here. Until I opened my mouth, people would usually think that I was likely born and raised in Hawai‘i. As shown by the question above, an important part of being local was the ability to speak pidgin, a local Hawai‘i Creole-type amalgamation of many different languages, including Portuguese, Hawaiian, American English and Cantonese. Although many locally born Caucasians could speak pidgin, I could not, and my clumsy attempts would be met by gales of laughter from my friends.

When I was a young lawyer, I tried a case on Maui. After I won the trial and got a defense verdict, I asked to talk to the jury about the case to get feedback from them on how I did as a lawyer. When I met with some of the jurors, I was surprised that they did not want to talk about the case at all—my performance, my cross-examinations or my closing argument. Instead, they said they had a burning question for me. They said six of the jurors thought I was from the mainland, but six of the jurors thought I was local—but that I had gone to Punahou School (a somewhat exclusive private school and President Barack Obama’s alma mater) and that was why I “talked funny.”

Notwithstanding my lack of local roots, I have been blessed with being able to practice in Hawai‘i simply as a lawyer, without being pigeonholed as an Asian American lawyer, which might have occurred had I practiced on the mainland. Because of the many Asian American
lawyers in Hawai‘i, I never felt that my ethnicity was a distinguishing characteristic that affected my development as a lawyer. I have always felt that my abilities and talents (such as they are) have been evaluated in Hawai‘i primarily on my own merits, and not because I was an Asian American. In other words, I did not feel I had to overcome any negative baggage of being a minority lawyer or being perceived as less of a lawyer because I was a minority. I have had friends tell me they faced such challenges on the mainland, where some white lawyers regarded some minority lawyers of color as “affirmative action lawyers” who were less competent. Of course, that was is another misconception born of ignorance and racism.

In hindsight, even beyond the ability to practice law in Hawai‘i, I was the beneficiary of a timely confluence of national trends at law schools and law firms that greatly increased diversity in the field of law as I began my career. Indeed, my career as a lawyer coincided with the gradual integration of the world of law at a national level and the proliferation over time of more and more Black, Latino, Asian American and Native American lawyers. In the 1950s, the field of law was predominantly white. Lawyers for the business community, even in Hawai‘i, were predominantly white.

In 1977, when I got out of law school, the picture for lawyers of color was beginning to change, but slowly. On the mainland, more lawyers of color were being brought into the large mainstream law firms as associates. But there were few minority partners in the large firms, and the path was not particularly clear that there would be. There were few role models to follow, so many lawyers of color had to forge their own paths. Over the course of my career, the number of Asian American attorneys has grown dramatically, from around 10,000 in 1990 to more than 55,000 at present. Still, there are relatively few Asian American partners in major national law firms, despite the large numbers of Asian American associates in such firms. Becoming a partner in such firms is still a very difficult road. Fortunately, a number of Asian Americans have persevered and succeeded in becoming partners, as they help to integrate the profession and serve as role models and trailblazers for young lawyers and generations to come.

The story in Hawai‘i was very similar for many years. In the 1950s, the big law firms in Honolulu did not normally hire Japanese American or Chinese American lawyers, despite the large population of Asian Americans in the community and their graduation from some of the
very best law schools. It was not until the 1960s and ’70s that Asian American lawyers, primarily Japanese Americans, started to participate in the large mainstream law firms in Hawai‘i.

By the time I joined Case & Lynch in 1977, many of those barriers for Asian American lawyers in Hawai‘i had come down. Asian Americans were thoroughly involved in all aspects of state government, including the judiciary. While the major law firms in Hawai‘i were still mainly white, there were a significant number of prominent Asian American lawyers who were succeeding and commanding significant business and power. This was also true for the business community, as Asian Americans achieved higher and higher levels of success in the mostly white major business organizations in Hawai‘i. This trend has continued throughout my career and continues today.

My Perspective on Social Justice Issues as Attorney General

My personal experiences growing up as a person of color in white communities, along with my education as to the history of Asian Americans in America, sensitized me to issues of social justice. My experience living and working in Hawai‘i showed me the substantial benefits that diversity brings to the richness and success of a community. All of these experiences led me to want the Office of the Attorney General to be on the right side of history as such issues regarding equality and dignity arose. I thought it was my duty and responsibility to be aware of the arc of history on social justice matters, and to positively impact any such issues that might arise. While I was attorney general, marriage equality for same-sex couples and various Native Hawaiian issues came to the forefront. Both areas raise questions of equality, justice, righting historical wrongs and the idea of opportunity based upon merit, not on immutable characteristics such as the color of a person’s skin or sexual orientation. Those ideals come straight out of the constitutions of the United States and Hawai‘i and are guiding principles for the attorney general.

After I became attorney general in 2011, I looked and found that although there had been a number of Japanese American and Korean American attorneys general in Hawai‘i, I was the first Chinese American attorney general in the history of the United States. Until then, there were no Asian American attorneys general in any of the other states, but that changed quickly. Kamala Harris, who is part African American and part South Asian, became the attorney general of California in 2011. In 2015,
Douglas Chin succeeded me in Hawai‘i as the second appointed Chinese American attorney general. Then in 2019 in Connecticut, William Tong became the first elected Chinese American attorney general in the United States. I certainly hope that there are many more.

Given the many factors that go into a successful career as an elected politician, including race and demographics, it is obviously more difficult, but not impossible, for an Asian American to win a statewide race outside of Hawai‘i. While there have been a number of prominent and successful elected Asian American national politicians from other states, such as Norman Mineta and Gary Locke, most have been from Hawai‘i, such as US senators Daniel K. Inouye and Mazie K. Hirono. However, this picture has been changing recently, as more Asian Americans have successfully run for office in various states.

Being Chinese American and being aware of social justice issues were important factors in how I approached certain matters and problems where social justice aspects were involved. But there were many other issues that arose, especially on a day-to-day basis, where this perspective was not a primary factor in how I approached the job. To me, the most important factors on almost all issues were the ideals and principles of the constitutions of the United States and Hawai‘i and the lode-star of wanting to do what was right for the most people in Hawai‘i. Even when social justice issues were involved, my oath required fealty to those principles and precedents of the law.

All in all, the job of attorney general in Hawai‘i, as in other states, is about governing. It is about doing what is best for the people of Hawai‘i, doing the greatest good for the greatest number. It is about moving society forward, solving problems and hoping to leave things better than the way I found them. Sometimes the issues on the table had nothing to do with race or social justice. At other times, social justice and racial or gender equity factors were central to the calculus of governing and had to be recognized and taken into account, as they reflected where we have been and impact where we are going.

Sonia Sotomayor, an associate justice of the United States Supreme Court, got a lot of grief at her confirmation hearing for having once said, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” While those who sought to tear her down claimed that she was making race out to be an overriding factor, she clarified her remark to say that anyone would have an equal
opportunity to be a wise judge, regardless of their background or life experience. Thankfully, she was confirmed by the Senate to sit on the Supreme Court. The kernel of truth that I took from her remarks was that having a diverse background could provide a richer and more well-rounded approach to decision-making, so that her decisions would be better for having considered many viewpoints and not be confined to the narrow paths of the past.

There is much going on in the world today around race and how it affects people’s lives and their communities. The events of 2020 and 2021, including the numerous deaths of Black men such as George Floyd, the ensuing protests involving the Black Lives Matter movement, the sharp and horrific rise of thousands of anti-Asian violence attacks, and the scapegoating of Asian Americans in the shadow of the COVID-19 pandemic, have focused attention on race in America as never before. Information about the systemic racism that has harmed Black communities over many years has become more widespread in the national media, providing education about the pervasive roadblocks faced by Blacks. Many Asian American voices and organizations, such as Helen Zia and Stop AAPI Hate, have stepped up to denounce the recent incidents of anti-Asian hatred and discrimination and show that Asian Americans will fight for their rights. Unlike prior years, 2021 seems different, like an inflection point, where our nation may become more able to positively deal with the crippling legacies of racism, implicit bias and wealth disparities because of the overwhelming support this year from many whites, other communities of color, the media and large corporate businesses. Only time will tell whether our nation can begin to heal these wounds, deal with the scars of systemic injustice and move forward.
No Longer Invisible

There are moments in our lives, in the lives of nations and states, when history is made and things change for the better. Hawai‘i had one of those moments in 2013. In those moments, standing up and advocating for equal rights is one of the most important things an attorney general can do. It is a matter of simple social justice. The rights of gay and lesbian members of our community to be like everyone else, including the right to marry the person they love and have that marriage recognized and sanctified by the government, have been among the defining civil rights issues confronting the nation for several decades. Given my background and interest in civil rights and social justice issues, it was a great privilege to participate in a number of events that led to legalization of same-sex marriage in Hawai‘i. This was one of the most personally satisfying contributions I was able to make as attorney general.

Today a large majority of Americans and people in Hawai‘i agree that all people should have the right to be married and to live with the person they love, regardless of sexual orientation. However, the fight for marriage equality for gay and lesbian couples in Hawai‘i and in the entire United States was anything but easy, and was long and hard fought. Indeed, that fight has been just one facet of the long, historical fight for LGBTQ (lesbian, gay, bisexual, transgender and queer) people to be free from discrimination in many areas of life. There have been cultural, legal and political fights that were noisy and acrimonious, with both ugly and beautiful moments. These fights for the hearts and minds of people on these issues continue today throughout the nation in various places, although they generally seem to be relatively quiet now in Hawai‘i.

The fight in Hawai‘i over the legalization of same-sex marriage played out against the backdrop of legal battles across the nation in both state and federal courts, and in legislatures. These fights reached a watershed
moment in 2013 at the United States Supreme Court in the cases of *United States v. Windsor* and *Hollingsworth v. Perry*. The decisions in those cases sparked the actions of Gov. Abercrombie and the legislature to take up the issue, change the law and make same-sex marriages legal in Hawai‘i. The following is a short recap of the history that got us to the inflection point of change. Some of this I knew about because it happened in the news. Other parts I had to research and study as we handled various legal matters about these issues. I hope it’s not too much legalese, but it provides context for what was to come.

Great rights in cultural issues are often decided by the courts in ruling on mundane but complex technical issues. In the *Windsor* case, Edith Windsor sought a federal tax exemption as a surviving spouse when she inherited the estate of her deceased spouse. The same-sex couple had been married under New York law, which recognized such marriages. The federal Defense of Marriage Act (DOMA) barred federal recognition of same-sex marriage, so Windsor was denied this exemption. In June 2013, the US Supreme Court, in a 5–4 decision authored by Justice Anthony Kennedy, held in *Windsor* that DOMA violated the United States Constitution Due Process Clause. In the *Hollingsworth* case, decided on the same day as *Windsor*, although not directly addressing the constitutionality of same-sex marriage, the Supreme Court declined to overturn a series of lower federal court decisions that had struck down laws banning same-sex marriages as violations of the Equal Protection Clause. The Supreme Court held that the persons challenging the *Hollingsworth* case holdings did not have standing to bring such lawsuits. The practical effect of these two rulings was to allow the legalization of same-sex marriage.

For many decades, the fight for social justice for gay and lesbian couples had been ongoing. Gay and lesbian couples have long sought equal marriage rights and recognition that discrimination on the basis of sexual orientation should be prohibited. At the same time, some religious and socially conservative groups have actively fostered and promoted the ideas that discrimination by individuals and groups against gays and lesbians is a God-given right that the government should not infringe. Some fundamentalist religious groups have argued that their heterosexual marriages would somehow be harmed by allowing same-sex couples the identical right.

Hawai‘i’s supreme court was in the forefront of the fight for marriage equality. In 1993, in *Baehr v. Lewin*, the Hawai‘i Supreme Court became
the first state supreme court to issue a ruling regarding the legality of same-sex marriage. In an opinion authored by Justice Steven Levinson, the court held that under Hawai‘i’s Equal Protection Clause, denying marriage licenses to same-sex couples constituted discrimination based on sex that could only be justified if the state could show a “compelling interest” to justify such discrimination. The Court drew an analogy to *Loving v. Virginia*, a United States Supreme Court case that struck down bans against interracial marriages.

The Hawai‘i Supreme Court, however, was ahead of its time with its reasoning and analysis. This decision provoked a severe negative backlash across the nation and in Hawai‘i as many state legislatures, fearful that their state courts might rule the same way as Hawai‘i, rushed to enact constitutional amendments that stated that marriage could only be defined as a relationship between one man and one woman, thereby excluding gay couples. As a matter of legal analysis, any clause of a constitution is always considered a higher authority compared to mere statutes, so passing laws prohibiting same-sex marriage would not be enough. However, a constitutional amendment prohibiting same-sex marriage would be on an equal footing with the Equal Protection Clause, and the prohibition could stand. Numerous state legislatures across the country approved constitutional amendments with that goal in mind.

To overturn the *Baehr* decision, in 1997 a constitutional amendment defining marriage as being only between a man and a woman was proposed in Hawai‘i as well. However, the progressive legislators who supported gay rights came up with a subtle strategy that would allow them to fight another day. This simple strategy became legally important fifteen years later. The procedure in Hawai‘i for enacting constitutional amendments is a rigorous one by design. The framers did not want the Constitution to be amended lightly or easily. The procedure first requires approval by the legislature and then approval by the electorate. Sometimes it can take years to amend the Constitution.

If a constitutional amendment was adopted that said marriage is between a man and a woman only, and not same-sex couples, then it would enshrine the discrimination. More importantly, if times changed and became more accepting of gays and lesbians, then it would require another constitutional amendment to change and reverse the discrimination. So the progressive legislators in favor of marriage equality came up with a subtle twist and convinced their colleagues to enact a constitutional amendment which said only that the legislature would have the
power to define whether marriage could only be between a heterosexual couple. This critical distinction in wording meant that the power to change the statute resided in the legislature, which could also change its mind in the future without having to undergo the full and rigorous procedure for enacting a constitutional amendment.

In 1998 the constitutional amendment passed by a large margin of almost 70%, showing that Hawai‘i was still quite socially conservative and not ready to allow same-sex marriage. The legislature subsequently passed a law defining marriage as between a man and a woman. The Hawai‘i courts recognized that the Baehr decision would have to bow to the constitutional amendment and the political will of the electorate, and held that the Hawai‘i statute declaring that marriage was only between a man and a woman was valid.

In the twenty years following the Baehr decision, there was a gradual shift in national public opinion, as well as in Hawai‘i, about acceptance of gay and lesbian relationships. More gay and lesbian people came out and let their neighbors and friends know of their sexual orientation, while at the same time underscoring that they were normal human beings. More and more, heterosexual people began to understand that gay and lesbian co-workers, acquaintances and friends were not deviants or strange aliens. Even before the Baehr decision, the advent of the AIDS crisis in the 1980s, which mostly affected gay communities, also put a human face on the issue of sexual orientation as heterosexual people saw that those who were dying included people like themselves, friends and colleagues. Television shows and movies that had gay leading characters became more prevalent. Gays and lesbians were shown in the media as ordinary neighbors and members of the community. Gay Pride parades and participation in community life became more commonplace.

Gay and lesbian communities were also exerting increasing economic and political power. Openly gay political candidates were getting elected, even in conservative communities. Court challenges to discriminatory laws against gay and lesbian couples continued and were brought in federal as well as state courts. Gay couples were allowed to adopt children and proved that they could be good parents. While some states had prohibited gay marriage, other states had allowed such marriages. States that had allowed gay marriage had shown that such marriages did not mean the end of the world.

In pre-modern times, Hawai‘i had a long history of acceptance of gay men. The word mahu in the Hawaiian language referred to men who had
sexual relations with other men. The accounts of European ship captains such as Captain James Cook noted the existence and role of mahu in Native Hawaiian society. Mahu were not just accepted in Native Hawaiian culture, they were also given places of power and respect as teachers of hula and keepers of cultural traditions. However, the arrival of religious missionaries in Hawai‘i and the rise of European and American cultures resulted in Hawai‘i becoming much like the rest of the nation in denigrating mahu, gays and lesbians.

In the 1980s, 1990s and 2000s, Hawai‘i seemed to be accepting of gay and lesbians generally, in that there was no climate of open hostility or persecution. However, gays and lesbians were still not accorded full rights as citizens in a number of areas. While some legislation to address these deficiencies was pushed forward, the gay and lesbian communities in Hawai‘i, perhaps in reaction to the backlash from the Baehr decision, were not particularly aggressive in protesting such injustices publicly or bringing court challenges to discriminatory practices.

In 1997, at the same time the constitutional amendment prohibiting same-sex marriage was passed, Hawai‘i’s legislature passed a “reciprocal beneficiary” law, which provided same-sex couples with some of the rights and benefits that come with marriage but was noticeably weaker than marriage. In 2009, state representative Blake Oshiro introduced a bill that would provide greater recognition of the validity of same-sex relationships by creating “civil unions” as an alternative to marriage. This law would accord same-sex couples many of the benefits of marriage without calling it marriage. It was half a loaf, but better than no loaf at all. The law was passed in the House but tabled in the Senate. In 2010, the civil unions bill was passed by the Senate but was vetoed by then-governor Linda Lingle. In 2011, a substantively similar bill allowing civil unions was again passed by the legislature, but this time it was signed into law by Gov. Abercrombie.

My participation as attorney general with these issues began at the end of 2011, when a new federal lawsuit was filed in Jackson v. Abercrombie, directly challenging Hawai‘i’s law that prohibited same-sex marriage, on the basis of the Equal Protection Clause and the Due Process Clause. The new lawsuit named as defendants both Gov. Abercrombie and Loretta Fuddy, the director of the Department of Health.

The first question we had to determine was what was the position of the attorney general in dealing with this lawsuit? Should we defend a discriminatory law because it was existing law and followed the will of
the Hawai‘i electorate of fourteen years before? Or should we take the position that the law was unconstitutional and discriminatory? Should we do what I thought was the right thing to do, regardless of the fact that I had taken an oath to uphold and defend the Constitution and laws of the state of Hawai‘i and the United States?

I personally believed that the *Baehr* decision had been correct, if not politically palatable in its time. I also believed that gay and lesbian couples had a fundamental right to marry the person of their choice, regardless of sexual orientation or gender. Of course, my beliefs and predilections were not necessarily the decisive factor. So how to resolve the competing viewpoints and interests?

There were two precedential decisions of respected attorneys general on this issue. In 2009, California attorney general Jerry Brown, with the support of Gov. Arnold Schwarzenegger, refused to defend a court challenge against Proposition 8, a California initiative seeking a constitutional amendment prohibiting same-sex marriage. Instead, Brown told a federal court that Proposition 8 was unconstitutional. Brown’s decision not to defend Proposition 8 was reinforced in 2011 by California attorney general Kamala Harris, who also refused to defend the law.

In 2011, United States attorney general Eric Holder, with the support of President Barack Obama, chose not to defend the federal DOMA law, which was being challenged in federal courts on equal protection and due process grounds by Edith Windsor. Attorney General Holder was exercising the discretion of his office not to defend a position that he believed was unconstitutional and wrong.

Gov. Abercrombie was clearly a progressive liberal Democrat who believed in striking down discrimination and upholding civil rights. There was precedent. Should we do the same?

This is where politics reared its ugly head. The issue of same-sex marriage has always been highly contentious, with many proponents and opponents, not just in the community, but in the legislature as well. The legislators in Hawai‘i had debated these issues and taken opposing positions on numerous occasions as they considered civil union bills. Legislators always expect the attorney general to defend laws that the legislature has passed. If we chose not to defend the law in the *Jackson* lawsuit, then that would surely anger certain key members of the legislature.

The *Jackson* lawsuit was filed just before the 2012 legislative session started. In that session, Gov. Abercrombie was pushing some important initiatives and needed legislative support. I had my own
important legislative initiative to shepherd through the legislature that year. Charleen Aina (one of the key deputy attorneys general who helped on Native Hawaiian matters) and I had recently concluded negotiations to finalize an approximately $200 million settlement with the Office of Hawaiian Affairs (OHA) over disputes that had lasted thirty years, and we needed to get legislative approval.

A number of legislators, including those in leadership, were interested in the Jackson lawsuit and let me know that they believed that the attorney general should defend all laws passed by the legislature regardless of their merits. Moreover, some of the legislators intimated that if we did not defend the law, this could threaten the governor’s legislative agenda as well as threaten approval of any OHA deal. The legislature had previously considered and rejected prior proposals to resolve the OHA claims. We knew it might be hard to get the OHA settlement approved under the best of circumstances, but refusing to defend the law prohibiting same-sex marriage might make approval impossible. These were credible threats.

Ultimately, I believe that the attorney general has to do what he or she thinks is the right thing to do under the law and the Constitution, regardless of the political interests or pressures involved. The attorney general serves the entire state, including the governor, the cabinet, the legislators, all government employees and even the judiciary. Sometimes those interests compete and collide, and the attorney general has to determine what is required by law and the Constitution. Yet politics is often regarded as “the art of the possible,” so political consequences should always be considered, if not necessarily followed, as part of the decision-making process.

My solution to this dilemma came from the unique power of the attorney general to represent multiple clients with competing positions at the same time. Unlike private attorneys, the attorney general is not limited to representing only one client in a lawsuit, even if two or more clients have competing interests. Because the Jackson lawsuit plaintiffs had sued both Gov. Abercrombie and the director of health, although both were official representatives of the State, we could treat them as separate clients with different positions.

We came up with the strategy to have two teams of deputy attorneys general to separately represent each of the named defendants and take two different positions. Gov. Abercrombie’s team would take the position that the Hawai‘i law prohibiting same-sex marriage violated
the Equal Protection Clause and the Due Process Clause of the United States Constitution. Director Fuddy’s team would defend the existing law as presumptively constitutional and assert the right of the legislature to make laws without interference from the courts, to say no to same-sex marriage.

But conceiving of a strategy is not always the same as putting it into action. First, I needed to convince the governor that this was the proper strategy. I met with the governor in his large, spacious office, with two-story-high ceilings and lovely koa wood paneling, filled with wonderful artwork and the portraits of previous governors. The governor was sitting behind an old historic koa desk that had been made in the 1880s. It was a fitting environment for making big decisions on the future of the people and state of Hawai‘i.

Gov. Abercrombie and I talked about the Jackson lawsuit, the concerns raised by legislators and their leadership, and my procedural solution to such concerns. Gov. Abercrombie wanted to take a very strong, principled stance, just as President Obama and Gov. Schwarzenegger were doing, to say that, “Same-sex marriage is right. Prohibitions on same-sex marriage are wrong. The State of Hawai‘i will not support a law that is unconstitutional and violates equal protection.” While I agreed with the governor, I also wanted to accomplish our other goals at the legislature. After discussion, the governor agreed with my strategy.

I next met with the legislators who had voiced concerns and let them know that their voices and positions defending the law would be represented through a team of lawyers representing director Fuddy. They were fine with the strategy since it respected their position and authority. The lawsuit then went forward with the separate teams of deputy attorneys general representing opposing viewpoints. Some media commentators expressed surprise and criticized the dual positions, suggesting that the governor could not make up his mind.

Unfortunately, this criticism appeared to cause Gov. Abercrombie to reconsider his earlier approval of the strategy. I was called up to the governor’s office to discuss this. I brought along Jill Nagamine, one of the deputy attorneys general who was principally working on these matters, and several other deputies. I started to explain our strategy to the governor, but he angrily interrupted me to say that my proposed plan was all wrong. The governor, who can get very impassioned, kept raising his voice louder and louder, letting me know that the strategy I had convinced him to adopt was dumb and should be abandoned. When he
paused, I explained that although I personally supported his position, our plan was the best way forward.

The governor interrupted me again, emphatically arguing that this was a matter of equal protection and civil rights, and the State had to stand on the right side of history. Kate Stanley, one of the governor’s political advisors, perhaps alarmed at the heated discussion, leaned over to whisper that the governor did not mean any of this personally. We went back and forth like this for about ten to fifteen minutes. The governor argued loudly and passionately that I should change the strategy and not defend the law, while I kept meeting his objections and concerns with practical reasons why my plan was better, noting that he could publicly state that as governor he fully supported marriage equality. Finally, Gov. Abercrombie almost snarled at me and said, “All right, we’ll do it your way, but you’d better be right.” I told him not to worry, that it would be fine.

As we left the building, Nagamine remarked, “Geez, I thought we were going to be fired on the spot, because the governor was so upset.” I told them I had seen this movie before, that the governor did not mean any of his criticism personally, and that what they had seen was an occasional part of his thinking and decision-making process. Gov. Abercrombie was a passionate, caring man who at times would allow his emotions to be part of his thinking process. However worked up he might get, it was never personal, it was always about the ideas. I had not seen him get quite this worked up before, but this was a big, important issue.

The Jackson case proceeded with our strategy to assert two positions. The federal court initially upheld the validity of the statute, but that ruling was appealed and later vacated in light of the Supreme Court’s decisions allowing same-sex marriages.

Following Windsor and Hollingsworth, there was a groundswell of political activism across the nation in which various state legislatures took action to overturn earlier constitutional amendments and legalize same-sex marriage. Gov. Abercrombie, in consultation with the Senate president and the Speaker of the House, decided to call a special session of the legislature to pass a statute that would change the definition of marriage and allow same-sex couples to be married. The announcement about a special session caused a great deal of angst, hand-wringing and consternation in Hawai‘i. Voices both for and against gay marriage were raised, often in shrill and strident tones.
I was involved in helping to shepherd the passage of such a bill through the legislature. Jill Nagamine, James Walther, Deirdre Marie-Iha and Anne Lopez, a small group of deputy attorneys general who called themselves “The Flaming Marrys,” were principally involved in crafting and drafting legislation that would accomplish this goal. There were many drafts, as the team worked with the governor’s team, various legislators and advocacy groups. The bill was crafted to allow some exemptions for religious persons such as priests and ministers to decline officiating at marriage ceremonies.

The Senate took the bill up first. The Senate Judiciary Committee allowed testimony from many people both for and against the bill. The committee hearing occurred in the large legislative auditorium room, rather than one of the smaller conference rooms, because of the many senators sitting in on the testimony and the large number of people testifying. I personally testified in favor of the bill before a number of legislative committees regarding what the bill did and didn’t do, as well as how it addressed various related issues, such as religious freedom and the rights of clergy and others to refuse to engage in solemnization and other services ancillary to marriage ceremonies.

There were numerous courageous senators who spoke up in favor of the civil rights of same-sex couples, noting that it was simply a human right to choose to marry and live with a person that they loved. Senator Gil Kahele gave a memorable speech talking about the acceptance of mahu and same-sex relationships in Native Hawaiian culture. There were other senators who spoke against the bill, taking the side of the conservatives, the Catholic Church and other fundamentalist religious groups. The Senate quickly passed the bill by a large majority in a few days with a minimum of fuss.

The state House of Representatives appeared much more divided than the Senate on how it would deal with the bill. Hundreds of people signed up to testify, both for and against the bill. Representative Karl Rhoads, the House judiciary chair, also indicated that he would allow each person to speak for three minutes, which was longer than had been allowed in the Senate. The House proceedings thus became longer and more drawn out than the Senate proceedings. I also testified before the House committee. The hearing went on for days and days. The House committee members certainly had iron backsides as they listened to the voluminous testimony, some vocal, some emotional, some calm, some volatile. The House also had many representatives speak up and give
their reasons for and against the bill. I was particularly moved by the speech of Representative Richard Onishi, who spoke eloquently that this was a simple matter of civil rights, equality and dignity.

There was a great deal of drama as this process unfolded. There were daily noisy, loud and occasionally raucous demonstrations and rallies in the State Capitol rotunda, right outside of the House and Senate chambers, both for and against the bill. Busloads of people on both sides came to bear witness to the process and demonstrate their opinions. There were bands and bullhorns, shouting and chanting. The media, both television and print, had extensive coverage of the special session and the demonstrations. There were numerous interviews with legislators, supporters and opponents explaining their reasoning, their feelings and their passionate views.

It was clear to me that the decision of Gov. Abercrombie to call a special session was the right one. The issue of same-sex marriage was so important, and yet so contentious, that it was critical for the issue to be considered separately, apart from the thousands of bills that normally are considered in a regular legislative session. A singularly important issue such as this needed to get the attention and consideration it deserved, without the distractions of other bills and the normal legislative time constraints. If this issue had come up in regular session, it might become the subject of horse trading and compromises on other bills and interests, or might simply be too contentious to pass. A special session allowed the legislature, for better or worse, to provide clarity of purpose and intent on this issue.

In the middle of all of this hoopla, I encountered one of the genuinely weirdest moments I ever had with a legislator. Someone once asked what the worst thing about my job as attorney general was. There is no question that dealing with a few of the legislators was absolutely the worst part of it. Don't get me wrong—most of the legislators I worked with were intelligent, straightforward, well-meaning and principled people. But there were also a few petty tyrants, bullies and uninformed but overconfident egos trying to get their way.

Gov. Abercrombie and I were invited to meet with the Republican caucus in the House to discuss the bill and various issues surrounding the bill. Republicans in Hawai‘i are an endangered species. Since the events of the 1950s, Hawai‘i has been a very Democratic state with strong union ties. There were six or seven Republicans in the House out of fifty-one representatives. There have been several Republican
representatives who switched parties and became Democrats after being elected, realizing that they would be able to get more done as members of the majority caucus.

The governor and I were ushered into the Republican caucus room and began our conversation about the marriage equality bill. Predictably, the Republican caucus was almost universally against the idea of same-sex marriage. Only one of the Republican representatives was in favor of marriage equality. The others spent a great deal of time haranguing the governor and me, arguing that the bill was improper, the procedure of calling a special session was improper, same-sex marriage was immoral, etc.

The weirdest moment came when Richard Fale, one of the Republican representatives, took his turn to ask us questions. “Mr. Attorney General,” he began, “I am the only elected person in all of the United States of Tongan ancestry, and because of that I take it upon myself to represent the interests of all Pacific Island people. Mr. Attorney General, wouldn’t you agree that if not for the illegal overthrow of the Hawaiian kingdom in the 1880s by the United States government, we would not even have to think about or entertain the purely Western concept of same-sex marriage for Hawai‘i, and that we should not do so now?”

This question and statement was stunning in their absurdity, ignorance and hypocrisy. I understood that Fale was a devout Mormon, who wore his religion on his sleeve. The Mormon religion was and is a completely Western concept that Fale had embraced wholeheartedly, and yet here he was, trying to assert that Western concepts had no place in Hawai‘i. He was trying to posit that the Native Hawaiian sovereignty movement was antithetical to the issue of same-sex marriage. Moreover, he was simply wrong about same-sex relationships being a “Western” concept and having no place in Hawai‘i. Ancient Hawaiians had allowed for and respected homosexual relationships as embodied by mahu. Senator Kahele, a Native Hawaiian, had already made a floor speech noting this very history.

These thoughts went through my mind as I framed my response. I wanted to be polite, since Representative Fale was theoretically a client of the attorney general. So I began by saying that I disagreed with him that same-sex relationships were a purely Western concept, noting that such relationships were both common and respected in Hawaiian culture. I also told him that the overthrow of the Hawaiian kingdom had nothing to do with the constitutional issues of equal protection under the law and according dignity to same-sex couples.
When I paused, Gov. Abercrombie cut to the chase. “Young man,” he said, addressing Fale, “you took an oath to uphold the constitutions of the United States and Hawai‘i. I have been doing that in my career for the past five decades, and I suggest that you start doing so now yourself.” Fale had nothing to say.

The bill passed both houses of the legislature. As they say, timing is everything. We were at a momentous point in Hawai‘i’s history and the history of the United States. It was an opportunity to do the right thing, to provide equality, to bring people out of the shadows into the light. Fifteen years before, a number of courageous Hawai‘i legislators had similarly taken a stand in favor of same-sex marriage and had been voted out of office for their views. This time around, the culture and understanding of both the nation and Hawai‘i had changed, so there were no such repercussions.

Gov. Abercrombie had a big ceremony to sign the bill into law. The governor read from a letter from a family friend, “Finally—today, now—all those who have been invisible will be visible to themselves and the whole world.” He brought Nina Baehr to witness the signing and gave her one of the pens he used that officially made the bill into law. It was moving. I was proud and gratified to have been part of the effort.

But we were not done. Almost immediately, House representative Bob McDermott filed a lawsuit challenging the new law and seeking an injunction to prevent it from going into effect, claiming that it was unconstitutional. I had the privilege of arguing the motion in court for the State to defend the new law. The trial court gave due consideration to the arguments of the plaintiff and then dismissed the case, finding that the law was constitutional. The ruling was appealed and the lawsuit continued on for several years, finally getting a hearing before the Hawai‘i Supreme Court in December 2014, after I had left the office. The Hawai‘i Supreme Court upheld the ruling by the lower court and the power of the legislature to legalize same-sex marriage. The battle over the law for marriage equality in Hawai‘i was finished. Hawai‘i, after a long hiatus, had finally done the right thing to recognize that gay and lesbian people were not second-class citizens and should be accorded the dignity and respect that heterosexual couples enjoyed.

Since that time, Hawai‘i has not been a battleground over these issues, but the culture wars regarding the acceptance of gay and lesbian couples have continued in other states. Courts have continued to rule on conduct regarding these issues. In Kentucky, marriage licenses were
denied to gay and lesbian couples by a government clerk who claimed she did not have to follow the law. She was later removed from office. In Colorado, a bakery was cited for discriminating against a gay couple who wanted to purchase a wedding cake. That case went to the United States Supreme Court, which held that the governmental proceedings upholding the citation were flawed.

The continuing issue primarily seems to be whether people can discriminate against same-sex couples based upon the subjective claim that they are exercising their rights of religious freedom, which is impossible to prove or disprove. Undoubtedly, there will be more battles in the future, as a change in the law does not always result in a change in the hearts and minds of people. But I felt, and was proud of the fact, that we were on the right side of history with what we had done. ♠
Legacy of a Kingdom Past

Some of the most fascinating and complex legal issues that crossed my desk as attorney general involved Native Hawaiians. Hawai‘i has a unique history. It was once a kingdom, populated by native, indigenous people, that was illegally overthrown with the help of the United States, then became a territory of the United States, and later, a state. The echoes of that history and the manner in which Hawai‘i became a state reverberate today and affect many legal, political and social considerations for the people and the State. It is said that the past is prologue. Although native, indigenous Hawaiians are not now the majority of the people in Hawai‘i, the 2019 US Census Bureau data shows that about 10.1% of Hawai‘i’s population identifies as Native Hawaiian or other Pacific Islander when people identify as only one race, but that 27% of the population identifies as such when people identify as having two or more races or ethnicities. Hawaiians and people who identify as being part Hawaiian thus comprise a significant segment of the population and the community.

More importantly, since the overthrow of the kingdom of Hawai‘i, and similar to the history of other indigenous peoples, Hawaiians have often been treated poorly and have not shared in the bounty and riches derived by others from the resources of the islands. There has been and continues to be a palpable sense of injustice, dispossession, disenfranchisement and neglect visited upon the Hawaiian people in their own land.

It was in the context of this history that I had the privilege and responsibility as attorney general to analyze and deal with a number of important legal issues relating to Hawaiians. These were some of the same legislative issues we had to weigh when considering our legal strategy in the Jackson case about same-sex marriage. The genesis of these
issues regarding Hawaiians had occurred long before my time, and the issues were complicated and overlaid with the weight of history. The State has been dealing with legal issues concerning Hawaiians for many, many years, and there are prior Hawai‘i Supreme Court as well as United States Supreme Court decisions addressing some issues. But the courts have not provided definitive guidance on all matters. Issues involving Hawaiians often are simultaneously legal and political, raising constitutional questions, with historical and cultural dimensions, sometimes without much precedent.

These legal issues are complex, not just because of the history involved, but because many questions require political rather than legal solutions as a way to achieve reconciliation of past wrongs as well as a path forward. As with many issues that have political, cultural and historical dimensions, the tools of lawyers and legal solutions play an important part, though they do not always provide the answers needed. But those were the tools I had.

The legal issues that came to me regarding Native Hawaiians raised three fundamental questions that go to the heart of the purpose and structure of government, as well as to the tension between fundamental values enshrined in the United States and Hawai‘i constitutions. First, when should the courts defer to the political process for solutions? There is a dynamic tension between the courts and the legislature in many areas, including Hawaiian issues. The courts want to make sure that justice is done, and sometimes they are disappointed and frustrated by the slowness of legislators and politicians to deal with pressing as well as long-standing problems. Yet the political process, with a four-year gubernatorial and state senatorial cycle and a two-year cycle for the House, does not always lend itself to thoughtful, well-reasoned and comprehensive solutions. Still, this is the democratic process that we have for making policy. It is the role of the legislature, not the courts, to make policy. Some questions and issues are best left to this political process rather than the courts, although the courts do have a role to play, as lawsuits are filed by people frustrated with the slowness of the political process.

Second, how are Hawaiian issues involving preferences and remedial actions to be addressed in accordance with the equal protection principles set forth in the constitutions and subsequent case law? Although the Fourteenth Amendment was originally secured to protect the rights of Blacks and other minority groups, in past decades there has been a significant amount of United States Supreme Court case law which has
struck down affirmative action initiatives, racial preferences and other remedial actions in the name of equal protection.

Third, what are the fundamental powers and attributes inherent in governments, and should the sovereign power of the State be adjusted to accommodate a Hawaiian government entity, which might be created or recognized by the United States government to address and redress historical wrongs?

There are few legal guideposts or definitive United States or Hawai‘i Supreme Court decisions to provide easy answers to these and other questions. Smart, intelligent and committed lawyers can always find support both for and against their positions in prior court opinions. There are always general principles, but the devil is always in the details. My job was to try and evaluate the situations and apply the law as best I could.

My approach to these issues was both personal and professional. Given my personal background, I felt that it was important to support Hawaiian programs and initiatives as much as possible, as part of a broader historical and social effort to, in some way, make up for injustices of long ago. In addition to my personal preferences, I had an obligation to determine what was required under the law, to try to find the best way forward consistent with the principles set forth in the constitutions. Moreover, while I believe it is important to try to address historical wrongs, I also firmly believe that for issues of governing, we always have to deal with the practical reality of the situation that exists now. The reality to me was that Hawai‘i does not exist in a vacuum. It is one of the states of the Union, with many varied, diverse and productive citizens whose wants, needs and desires all had to be taken into account, so that issues regarding Hawaiians also had to be considered within the context of what is best for everyone.

I believed then and still believe that in dealing with these issues, care must be taken because of the history of social injustice and the realization that decisions and actions taken today will affect and shape the future relationship of the State and the Hawaiian people. My goal in dealing with Hawaiian issues was to try and make progress, try to move the ball forward, even if just a little bit, knowing that a comprehensive solution was not likely at hand, but also believing that by helping to realize some progress, a foundation could be laid for perhaps larger and more comprehensive solutions in the future. These factors made the job unique.
Legacy

In order to understand the legal matters relating to Hawaiians that I dealt with as attorney general, it is important to understand some of the history of Hawai‘i. Although I was not raised in Hawai‘i, in my years of living here I had absorbed some of that history. But I still had a lot to learn, which required research to understand the legal issues and how Hawai‘i had gotten to this juncture. The following is a brief summary of some historical points to provide context for the matters I dealt with.

For centuries before contact by Captain Cook and Europeans in the 1770s, Hawai‘i was populated by a native indigenous people of Polynesian descent. It is important to note that in Hawai‘i, the term “Hawaiian” means to refer to such people. This is different from the common usage of a word including a state name to describe people who live in the state, such as “Californian,” “Texan” or “Oregonian.” In Hawai‘i, a “Hawaiian” is not someone who simply lives in or is from the state. Instead, the terms “Hawaiian” or “Native Hawaiian” with a capital N refer to all people of indigenous Hawaiian ancestry. The term “native Hawaiian” using an uncapsulated n is a legal term from the Hawaiian Homes Commission Act (HHCA) that means people who have 50% or more Hawaiian ancestry by blood quantum.

The kingdom of Hawai‘i came into being in 1795, when Kamehameha the Great unified the Hawaiian Islands. The kingdom entered into treaties and conventions with many other nations, including the United States, recognizing its independence. There was also a long history of missionaries and settlers coming from the United States to live in Hawai‘i. The kingdom welcomed and allowed non-Hawaiians to settle and participate in the society and the government. But this welcoming attitude had consequences.

As the kingdom grew and the economy flourished, large sugar and pineapple plantations arose, and many settlers and businessmen wanted more control and wanted Hawai‘i to be part of the United States. In 1887, a group of white businessmen and lawyers forced King David Kalākaua at gunpoint to sign the Bayonet Constitution, which significantly reduced the power of the monarchy, gave most of the power to the legislature, made the king little more than a figurehead and deprived most Native Hawaiians of their voting rights.

When the United States Congress passed the Tariff Act of 1890, it ended the favored status of sugar imported from Hawai‘i and raised
import rates on foreign sugar, crippling Hawai‘i’s sugar industry. This caused many businessmen and politicians to seriously consider overthrowing the monarchy so that Hawai‘i could be annexed by the United States. Annexation would give Hawai‘i sugar growers the same rates as other United States producers and restore profitability.

In 1891, Queen Lili‘uokalani ascended to the throne upon the death of King Kalakaua and sought a new constitution to restore the power of the monarchy. In 1893, a small group of white businessmen and settlers, including citizens and agents of the United States, decided to overthrow the kingdom and obtained the complicity of the United States minister to the kingdom in this endeavor. The overthrow by military force was protested by Queen Lili‘uokalani in a moving letter to President Grover Cleveland. Her protests were to no avail, and Lili‘uokalani abdicated the throne to avoid the bloodshed of her people.

The illegal overthrow of the Hawaiian kingdom by white businessmen, with the support of the United States government, is a shameful chapter in the history of the United States. The group established a provisional government, which then became the Republic of Hawai‘i. In 1898, the United States Congress passed the Newlands Joint Resolution, which annexed Hawai‘i to the United States. Upon annexation, the Republic ceded and transferred 1.8 million acres of public, government and crown lands to the United States. These lands are known as the “ceded” lands. In 1900, Congress passed the Organic Act, which established and defined the political structure and powers of a government for the territory of Hawai‘i.

Hawaiians had not done well over the years and under the new government. In 1920, after holding hearings and determining that Hawaiians were a “dying race,” with the number of “full-blooded Hawaiians” dropping from 142,650 in 1826 to 22,600 in 1919, Congress enacted the HHCA, which mandated that approximately 200,000 acres of the ceded lands be permanently held in trust for the benefit of “native Hawaiians.” The HHCA was intended to address the decline of “the Hawaiian race” by providing “lands and the mode of living that their ancestors were accustomed to.” The lands could not be sold, but Hawaiians could obtain homesteads and occupy the land under long-term leases.

However, the goals of the program were hampered for two reasons. Although Prince Jonah Kūhiō Kalaniana‘ole of Hawai‘i spearheaded the effort and sought to make the program widely available to Hawaiians with 1/32 blood ancestry, the HHCA defined “native Hawaiians” as only
those with 50% blood ancestry, thus greatly reducing the number of eligible people. In addition, many of the lands included in this grant were rocky, marginal lands, without water, so they were not particularly valuable or useful for agriculture or economic development. Nonetheless, the HHCA was important because it acknowledged the trust responsibility of the United States to the Hawaiian people.

In 1959, Hawai‘i became the fiftieth state of the Union. Congress passed the Admission Act, which gave the State title to most of the ceded lands. As a condition of admission, the State agreed to hold the ceded lands in a public land trust, with the revenues from those lands to be used for five purposes, including the betterment of the conditions of native Hawaiians as defined in the HHCA. The State was also required to adopt the HHCA as part of its constitution. The Department of Hawaiian Home Lands (DHHL) is the formal department of the State that administers the HHCA.

When I first came to Hawai‘i in 1976, I observed many efforts and actions to foster a renaissance and resurgence of Hawaiian culture. There were many Hawaiian music groups, hula groups and a growing emphasis on recognizing and using the Hawaiian language, both in the media and officially in the government. Such efforts have been very successful over the past several decades.

In 1978, a constitutional convention was held to review Hawai‘i’s constitution and consider whether changes should be made. The new constitution established the Office of Hawaiian Affairs (OHA) as a semiautonomous, self-governing state agency, with a mandate to better the conditions of the Hawaiian community. The convention also recognized that the DHHL had historically been underfunded and included a provision requiring “sufficient” funding for DHHL.

Beginning in the 1970s, there was also a growing awareness of self-determination and political power for Hawaiian interests and causes. Protests and demonstrations occurred against the use of the island of Kaho‘olawe by the United States Navy as a bombing target. Those efforts were successful, and the Navy stopped using the island as a bombing target in 1990 and transferred it to the state in 1994. Protests and demonstrations in 1977 also stopped the development of houses and a golf course on 600 acres in the Waiāhole and Waikāne valleys on O‘ahu that had been traditional agricultural areas inhabited by Hawaiians. In 1993, the US Congress passed the Apology Resolution, which apologized for the role of the US in overthrowing the Hawaiian monarchy.
The idea of Hawaiian sovereignty, the establishment and recognition of a separate Hawaiian form of government, has been extensively discussed for many years. Senator Daniel Akaka proposed bills in Congress to provide a process for federal recognition of a Hawaiian government, similar to the recognition of Native American Indian tribal governments. However, such bills did not pass, and Hawaiian sovereignty remains an elusive concept, although the idea continues to be discussed.

How the State and the people of Hawai‘i deal with Hawaiians is a dynamic and constantly evolving issue. Hawaiians are the indigenous people of Hawai‘i, and yet are a minority in their own land. What is the obligation of the State to the Hawaiian people? How much money should be made available by the State to DHHL to develop homesteads for native Hawaiians? How much money from ceded lands revenues should be given to OHA? What are the practical realities of law enforcement and regulation if a Hawaiian government is established? These and other questions regarding Hawaiian issues have yet to be resolved.

There are many who believe that the State has not lived up to its obligations to the Hawaiian people over the years since statehood. At the same time, there have been those who for ideological reasons have actively sought to challenge and block any State action, preferences or programs to benefit Hawaiians. Lawsuits have been filed on both sides to either enhance and improve State programs for Hawaiians or to restrict and do away with such programs, claiming that these are unconstitutional preferences. This was the backdrop for my involvement in legal issues relating to Hawaiians.

Monies Claimed by the Office of Hawaiian Affairs

One of the larger issues involving Hawaiians I became involved in was dealing with and settling claims by OHA against the State that had been outstanding and a bone of contention for over thirty years. Since 1980, OHA had claimed that additional monies were owed to it for ceded lands revenues. In 2011, OHA believed that it was owed approximately $400 million, although others believed it was much larger.

In 1980, the legislature enacted a law that 20% of all “funds” from ceded lands should go to OHA. The State and OHA disagreed as to what this meant and how much money was owed, resulting in a lawsuit. The Hawai‘i Supreme Court eventually held that “funds” was not sufficiently defined, so the courts could not resolve the dispute. In response, in 1990
the legislature amended the statute to provide that 20% of all “revenue” from ceded lands should go to OHA. But this was still not sufficiently clear, since monies involving ceded lands are generated in many different ways, and the parties continued to disagree.

OHA and the State entered into a $129 million settlement in 1993 over some, but not all of the claims. The devil is always in the details. Some of the remaining claims included whether “revenue” included monies from sales at luxury “duty-free” stores at the airport and in Waikīkī (based on the lease of ceded lands at the airport, although federal regulations prohibited payment of revenues for non-airport purposes); Hilo Hospital patient receipts, because the hospital was on ceded lands; receipts from state agencies for low-cost housing projects located on ceded lands; and interest on unpaid sums.

Unsuccessful attempts to settle these claims had previously been made during the administrations of both Gov. Ben Cayetano and Gov. Linda Lingle. In 1999, Gov. Cayetano offered $251 million and 360,000 acres of ceded lands to resolve all past and future claims, but OHA refused. In 2008, OHA and the State agreed to settle the past claims for $200 million in cash or a combination of land and cash, but the legislature did not approve. The settlement had to be approved by the legislature, because state law prohibits the transfer of any state land without legislative approval by a two-thirds vote. This law prevents the State administration from improvidently giving away lands and allows the legislature to make sure that any proposed State land transfers are fully vetted and considered.

There were several factors that seemed to scuttle previous deals. Some of the proposals sought a global final settlement over all claims, both past and future, but many in the Hawaiian community were opposed to giving up future rights. Many Hawaiians came out to testify against the proposed settlement in 2008, claiming that they had not been consulted and that there was a lack of transparency in the settlement process. Some people objected to the quality of the lands that were proposed to be given to OHA, which included prime property in the heart of downtown Honolulu near the waterfront as well as hotel property in Hilo and industrial property in West O’ahu. Others simply wanted OHA to hold out for a better deal. Finally, because Gov. Lingle was a Republican in a largely Democratic state, there was a question whether the legislature was inclined to assist a Republican administration in the resolution of a major initiative involving Hawaiians. The legislature failed to approve the deal in both the 2008 and 2010 legislative sessions.
Shortly after I assumed office in 2011, I was contacted by William Meheula, a prominent attorney of Hawaiian descent whom I had known for many years and who had represented OHA in prior attempts at settlement. Did we want to try and settle the claims and get legislative approval? I worked with Charleen Aina, a senior deputy attorney general and a Native Hawaiian who had been involved in working on the OHA settlement, to see what we could do to resurrect the deal and move forward. Aina was very knowledgeable about Hawaiian issues and provided thoughtful analysis on this issue and other important litigation involving Hawaiians.

It was clear to me that following through on a settlement of these claims would be a good thing. It would resolve long-standing grievances that were thirty years old and a sore point in relations between the Hawaiian community and the State, fostering some healing which might become the basis for future agreements. It was also clear that there was no money in the State coffers to fund a settlement. Hawai‘i and the nation were still in the throes of the so-called Great Recession dating back to 2008. Tax revenues were still down, and there were large budget deficits.

Because there was no money, the only way to settle such large claims was to give OHA land, not money. It was also my view that settlements have a better chance of being agreed to when there are less, not more, moving parts. To get a settlement that would receive legislative approval, I thought we needed to simplify the terms and address the criticisms that had arisen before.

The first question was how much to settle for. The claims sought approximately $400 million. But there were a number of valid defenses that put such claims at risk and made them uncertain. OHA might prevail in court, but the State also might prevail, so there was risk for both sides. Additionally, it would take years to have the issues decided by the courts. $200 million seemed like a good approximate assessment of the risk to the State, and we knew that OHA had agreed to that number before.

Another question was whether we would try for a global final settlement and the curtailment and release of all future OHA claims. As discussions on this issue had proved contentious in the past and had engendered substantial opposition, I thought we should simply try to resolve the past claims in order to get them off the table, clear the slate and leave the resolution of future claims for another day.

The next question was what lands should we offer OHA? We already knew that there had been objections to the quality of some of the lands
previously offered. Since the legislature had already rejected the OHA settlement once, we wanted to address as many objections as we could, to improve the chances of legislative approval.

I met with Gov. Abercrombie to discuss a potential settlement. The law gives the attorney general the power to control and make decisions about all litigation involving the State, but it requires the attorney general to consult with the governor on all significant litigation. Gov. Abercrombie understood the historic nature of the issues and was in favor of getting these matters resolved. Indeed, decades before as a state senator, Gov. Abercrombie had predicted that there would be continuing recriminations and arguments over how much money should be paid to OHA.

As we discussed possible lands to give to OHA, it also became clear that there were not that many lands that could make the list. While the State has a lot of land throughout the islands, much of that land was already in use, either through one of the departments or through leases to other government entities or third parties. In downtown Honolulu, the Kaka'ako Makai (makai means on the ocean side) area was one of the last large undeveloped areas of land. While some development had occurred there, many of the parcels were still vacant and were simply being used as parking lots. The Hilo hotel property and West O'ahu industrial property previously offered to OHA did not seem to have as much development potential as Kaka'ako Makai. Together, Gov. Abercrombie and I came up with the concept of giving OHA only parcels in the Kaka'ako Makai area, as those would be the most attractive lands and possibly reduce objections by Hawaiians.

Because these lands were in the heart of downtown Honolulu, they were already quite valuable, so they had a high value per square foot. Less acreage of such high-value parcels would need to be given to OHA to reach an approximate $200 million valuation. Also, prime real estate in the heart of Honolulu would likely appreciate, become more valuable and provide an income stream to assist OHA in furthering its mission. In my view, the State had time on its side. On a long-term basis, eventually the State’s other lands would become valuable. But in the short run, giving up valuable land in downtown Honolulu would get the job accomplished without a big sacrifice to the State.

Through my prior experience with the Aloha Tower Development Corporation (ATDC), the state agency charged with developing the area around Aloha Tower, I had learned that for the State to do any
significant development requires substantial political capital and will. I did not think that the State would have the political will or capital to put together any major developments in the Kaka‘ako Makai area any time soon. Because of existing restrictions against residential development in Kaka‘ako Makai resulting from prior community protests, there was even a question whether successful development in the area could be achieved. The development consultants for ATDC had repeatedly stressed that successful developments require a mixed-use combination of residential, business and government infrastructure.

Gov. Abercrombie was already using his political capital and skills to move forward with plans to allow significant residential development in the nearby former light industrial area of Kaka‘ako Mauka (mauka means on the mountain side) to address the large unmet need for housing in Honolulu. Even desperately needed housing projects in the area had opposition, mostly from people who already lived in some of the few residential developments in the Kaka‘ako Mauka area but did not want further development.

Kaka‘ako Makai had been under state jurisdiction ever since statehood but had only partially been developed. Many projects, such as a community center, had been talked about but had never been brought to fruition. Putting up a large government project would cost substantial money and without accompanying mixed-use development would likely mean that it would just be an expensive white elephant, only occasionally used. I did not think a government project in Kaka‘ako Makai would be likely if the State had to push it forward.

However, I was hopeful that OHA might be able to develop some properties in the area that would be beneficial both to itself and the larger community. OHA could seek to develop projects that would enhance Hawaiian culture and community, as well as provide tourism offerings. Perhaps OHA, with its mission to benefit Hawaiians, could overcome public opposition and restrictions on residential development in Kaka‘ako Makai. This would make those parcels much more valuable and enhance prospects for a successful mixed-use development. The idea was that OHA might be more nimble than the State in creating the elements for successful development. Both Kaka‘ako Makai and Kaka‘ako Mauka came under the jurisdiction of the Hawai‘i Community Development Authority (HCDA), which regulated development, so the State would still have some control over OHA’s use of the lands.
Another question was whether to settle for a specific number and have a cash payment (either by the State or OHA) to make up any difference between the tax-assessed property values and the settlement number. Neither the State nor OHA had any money to account for the difference. We decided to offer OHA specific parcels of land only in Kaka‘ako Makai that were valued at close to $200 million, but without any cash component. The properties would be offered as-is, where-is, without any promises as to value, apart from the existing tax assessments. By offering only high value, prime properties in Kaka‘ako Makai, I thought that this could make up for any concerns about not having an exact $200 million settlement.

OHA agreed to the deal we proposed. Of course, we both then had to sell the settlement to the Hawaiian community and the legislature. Getting support for any settlement from Hawaiian community organizations was critical, but we left this piece of the puzzle to OHA. OHA undertook to hold public meetings with the Hawaiian community, since it would appear self-serving for the State to appear and argue the reasonableness of the settlement in such forums. OHA held many such meetings and was successful in getting community support.

Both the State and OHA then had to sell the deal to the legislature. As described in the chapter on marriage equality, we had to make some compromises in how we handled a lawsuit about same-sex marriage in order to move the OHA settlement forward. In addition, we tried to address any concerns the legislature had about the settlement. Working with Meheula and OHA, we were successful in getting legislative approval.

After all of the hard work of documenting the deal, a ceremony to mark the settlement was held at Washington Place, the governor’s ceremonial mansion. OHA chairperson Colette Machado gave a moving speech about how we had been able to put our differences behind us and come together to resolve long-standing differences. She specifically recognized the achievements of Charleen Aina in helping to push this forward. Gov. Abercrombie spoke about the historic nature of the settlement and praised the cooperation that had led us to this moment.

I was pleased to have been a part of the endeavor and to have helped push this settlement over the goal line. Because there was so much history involved with the OHA claims, which were only a small part of larger issues of social justice and reconciliation, I thought it important to resolve these claims without protracted court proceedings. Litigating
in court would take years, or even decades, a process that would not be satisfying to anyone and could exacerbate tensions and resentments. These claims have cried out for a political, rather than legal solution, but the legislature did not appear likely to provide a comprehensive solution at any time soon to the many Hawaiian issues that exist. Other political leaders in the past had tried and failed to achieve such a solution. Consequently, it fell to us to craft a settlement that could be approved by the legislature and resolve some, but not all, of the many existing claims.

Yet even as we celebrated this legal and political achievement, we knew that this was only a small piece of a complicated jigsaw puzzle, and that there were still other unresolved issues affecting Hawaiians that would require continuous attention and care. ♻️
Reflections on the Journey

My experience as attorney general was the opportunity of a lifetime. Reflecting on the experience, there were some lessons I learned along the way that I would like to share, in the hope that others can take from my experience and use it for their own goals and, I hope, the public interest.

What I Learned about Government

I have always believed that government can and should be an institution to improve the lives of people and allow them to live in harmony and should strive to do the greatest good for the greatest number. Government, with all of its resources and all of its power, can be a tremendous force for good, achievement and positive action. Of course, the devil is always in the details, and putting those ideals into practice and action is no small matter.

In my brief time serving as attorney general, I learned that our democratic system of government works. It’s certainly not perfect, but it allowed us to address some major problems and accomplish significant achievements in dealing with the national mortgage foreclosure crisis, Native Hawaiian claims and environmental protections. We were able to make things better and improve the lives of people. Many people take our system of government for granted and love to blame government and political leaders, without thinking about how hard collective organization and action are, especially when there are large differences of opinion in what and how things should be done.

In my view, the reason we have such a tremendous system is because of the ideals of the Constitution and the fact that we have established a fair process for balancing and sharing power among different actors,
branches of government and factions, while respecting peaceful dissent and opposing points of view. Our system allows for disagreement so that good ideas can come forward and attempt to win support in the marketplace of ideas. Most importantly, we have institutionalized a process for a peaceful periodic transfer of power, based on free and fair elections, to allow people to make their voices heard and affect the balance of power.

I learned that government is the best vehicle for solving big problems to ensure our collective future. In today’s world, the size of the problems that confront us are so large that joint concerted action is the only way to address them. Solving large-scale interconnected problems such as economic recessions, disaster recovery, health pandemics, social justice issues and environmental issues requires significant thought, commitment and resources. Only government has the capacity, resources and authority to marshal and deploy the necessary measures to address such difficult and massive problems.

There truly are no viable alternatives to government action when our communities are confronted with huge problems. The Ronald Reagan idea of trying to downsize to “small” government is simply wrong, since it ignores the interconnectedness of our communities and the size of the problems we face. We will not solve massive problems by trying to put blinders on to harken back to a mythical vision of small-town government from a different age. Big problems demand big solutions.

The private sector and business community cannot solve major societal problems. They can help and they can support, but they cannot lead. Business interests have too narrow a focus on their own interests to focus on what is best for communities. One of the most pernicious developments in the last several decades has been the emergence of a dominant philosophy that businesses are supposed to be laser focused only upon making profits for their shareholders. The result has been a “me first” attitude that emphasizes what is good for narrow special interests, not our communities as a whole. This philosophy ignores the reality that businesses do not exist in a vacuum, that they can only succeed within the context of the communities they serve and are dependent upon a host of others, such as vendors, suppliers, employees and customers, for their success.

The big problems that our communities face, such as economic recession, health pandemics, climate change and social inequality, are simply too large, and businesses are too fractured and small to effectively
deal with such problems. Few businesses have the resources, leadership, organization or desire to provide comprehensive solutions to large problems. For example, it was the big banks and mortgage companies that caused the mortgage foreclosure crisis and resulting Great Recession, precisely because of their narrow focus on what was best for each of them. Only government could act to solve that crisis in a timely fashion, forcing banks and mortgage companies to support solutions with the threat of litigation and liability.

Similar to economic problems, large-scale social justice problems require government leadership, since the private sector is reluctant to lead, as many of the issues are too political, too uncertain, too emotional and could have a negative impact on their businesses. Even enlightened business leaders cannot ignore their own business needs and imperatives to undertake the necessary missions that governments can.

The lessons I learned in my time in government have been reinforced and underscored by the events of the last four years. Our system of government and our capacity to address and solve large-scale societal and community problems have been under a relentless and systemic attack by President Donald Trump during this time. Trump actively attempted to dismantle the system and the process, and to create disrespect for the institutions of government and society. He lied repeatedly and had no respect for facts, simply making up “alternative facts” to serve his own interests. He had no respect for others with opposing viewpoints and celebrated those with discredited conspiracy theories and racist attitudes as being “very fine people.” In perhaps his worst moment, on January 6, 2021, he made baseless, untrue claims that the 2020 presidential election had been stolen and fomented insurrection by inciting a mob of his followers to make a violent attack on Congress at the US Capitol to stop the election results from being confirmed.

Fortunately, Trump lost the 2020 presidential election to Joseph R. Biden, and his insurrection attempt and lies have been unsuccessful. There were many conservative Republicans who disavowed Trump and supported President Biden in the election. However, the fact that Trump received as many votes as he did and has continued to garner support from his right-wing base shows how fragile the institution of democracy in America is. When leaders such as Trump veer away from the institutional processes of a fair system of government and into hate, authoritarianism, lying and the encouragement of violence, our system of government and our society suffer.
I believe that the United States and the American people are better than that, better than the vision that Trump tried to sell to the nation. Based on my experiences, I believe that the American people, like the people of Hawai‘i, are kind, decent and responsible, with great heart and compassion. We are people who share the same values of community, respect for others, fairness and equity. We are people who have more in common than the differences that may exist among us. We are better than the old hatreds, prejudices and fears that have been Trump’s stock in trade.

In my experience, most people just want the same things—housing, education, prosperity for them and their children, acceptance, understanding, community, and the opportunity to work hard and succeed and not be limited by the color of their skin, or gender, or sexual orientation. Many people also want to make a difference, to be part of a solution and bigger mission, to be a positive force in the world.

When we look to our better angels, when we uphold and put into practice the ideals of the United States Constitution, of equality and opportunity, we enhance our collective future together. Hawai‘i is an example of how races can live together in harmony, with a shared future, with cooperation, communication and life together, even on a few islands where there is nowhere else to go. The world is a global village, so we all have to succeed or fail together. It cannot be a zero-sum game of winners and losers. We are better than those who would seek to divide us and drive us apart.

In this regard, civic engagement and civic education are critically important for our communities and our young people. Democracy is fragile. It takes work to make sure that the people who vote understand what is at stake and how our government operates. Modern technology and communication on the Internet have accelerated the trends that fracture our shared consciousness, making it easy for us to retreat to silos and bubbles where we only hear what we want to hear. Without civic engagement and education, those trends will continue with alarming and negative effect, and the people in our communities will lose sight of the larger picture of living and working together for a better future.

I suppose that this may sound corny, but it is what I learned from my time in government. It is sometimes fashionable to be a skeptic, to question and denigrate civic virtues, somehow thinking that those are unso-phisticated concepts not suited for today’s world. I believe that is flat-out wrong. The basic principles we have always taught our children about
our system of government are tried and true. The Gettysburg Address, the Pledge of Allegiance and the Declaration of Independence have not lost their meaning or vitality.

What I Learned about Accomplishing Goals in Government

Governing is hard. It is not for the faint of heart, as it requires courage, leadership and willpower to try and accomplish things for the common good. Because there is so much money and power associated with many government processes, there are many interests that seek to bend the arc of government action to their benefit. People are people, and there are always those who seek to use government for their own ends, not necessarily those of the common good. There are a number of factors unique to government that influence the ability of governmental leaders to achieve goals.

First, politics and election cycles are overriding factors that confront public sector leaders. Government institutions are ultimately subject to politics and democracy, a process that requires the consent of the governed in regular elections. Sometimes, important but controversial issues cannot be pushed forward when there are upcoming elections, because politicians are concerned about being reelected. Providing the political will to solve long-standing problems is neither easy nor simple, and the problems that remain are thorny and difficult. One structural issue is that the four-year political cycle is sometimes not long enough for difficult problems to be properly addressed and solved. Even eight years for a governor’s administration is barely enough to address difficult problems.

Second, the importance and influence of the media and social media cannot be overstated. The free flow of information through media and social media avenues clearly impacts decision-making by government institutions and leaders. Media coverage can influence public perception on various issues. Social media coverage can be more unfiltered and wilder than media coverage, but just as effective, and sometimes more effective. Sometimes, because of space or time limitations or the intent of reporters, complex issues can be reduced to slogans and simplistic formulations that confuse or distort the issue and hamper reasoned decision-making. Media and social media coverage can certainly bring attention to issues. At the same time, clear and honest communication through both is critical to making sure the electorate is aware of and understands what is happening in government.
Third, the processes of public sector decision-making in the executive, legislative and regulatory environments are critical, but sometimes unknown or misunderstood. Many people who are not familiar with government think that government processes are a black box, which cannot be deciphered without knowing the secret handshake. Actually, government processes are usually governed by statutes, rules, tradition and inertia. Such processes have their own internal logic and gatekeepers. Timing can be everything. Because the process of legislation or administrative regulation is complicated, knowing the rules can be the critical difference between successfully accomplishing policy objectives and having initiatives derailed by adversaries.

Fourth, special interests are often involved in trying to shape and direct what government does. Government is supposed to be concerned with the public interest, rather than special interests. Special interests are not necessarily bad if they also serve the public interest. Thus, special interests will try to show that their interests align with the public interest. Public sector leaders must be clear-eyed about the effects of special interests and money, how the public interest may be affected, and wary that public initiatives are not hijacked or subverted by special interests. Special interests bring money to the table for political actors. The reality is that it can cost millions of dollars to run even a modest political campaign in our modern world. Disclosures of special interest money are critical. Where the money comes from and how it affects decisions are important issues that government and the electorate must always be prepared to deal with.

All of these factors can affect and constrain the exercise of power and authority to accomplish goals. In his recent book, The End of Power, Moises Naim writes that, “in the 21st century, power is easier to get, harder to use—and easier to lose.” Naim describes how governments are increasingly restricted from the exercise of power through traditional leaders and institutions, as recent developments in the flow of information, social media and protests have made political and corporate leadership vulnerable to challenges from smaller, more nimble adversaries. Naim puts forth the provocative argument that societies are becoming both increasingly constrained and more anarchic, since smaller actors now have the power to veto but not dictate, i.e., destroy but not create, thus creating gridlock, anarchy, or both. Naim’s thesis is a cautionary warning to all who want to achieve goals in the public sector.
What I Learned about Leadership

I have been asked what advice I would give to young people, or to a younger me, about leadership, in light of my experience. For those who might be interested, I offer the following thoughts.

First, consider stepping up to serve and be a leader. Leadership is the single most important factor for the world and our communities. As our global village continues to become more and more interdependent, the leaders that our communities have will determine our futures, whether good or bad. They will determine whether we will solve critical problems, create a better world, succeed or fail. The caliber of leaders in our institutions will affect whether we can adapt to change, make progress and achieve positive outcomes.

Leadership provides direction, meaning and purpose to people. Leaders provide critical analysis and decision-making to accomplish goals and solve problems. In a world of uncertainty and indecision, they hopefully will provide integrity, focus and responsibility for groups of people. Our communities need leaders to help guide them along. Consider serving in government or for nonprofits. These are noble pursuits, as both seek to improve all of our lives for the common good.

Second, apply yourself and learn the many different and varied skills of leadership. You will not go wrong. In today’s world, the more skills you have, the better. There are many books and courses about the characteristics and skills of leaders. Read them. Learn about character, trust, communication, people skills, emotional intelligence, management skills, writing skills and executive decision-making. Practice such skills by serving in nonprofit organizations. Nonprofits can provide valuable experience in participation and decision-making that might not otherwise be available to a young person.

There are two skills that I consider of paramount importance. One of those is communication. Learn to express yourself clearly, both verbally and in writing. Learn to communicate your thoughts to create passion and excitement. Communication is also a two-way street. The best communicators are also great listeners. Learn to put yourself in the other person’s shoes and actively listen to others to understand their concerns, anxieties and motivations, so that you can speak to their concerns. Learn negotiation skills—the ability to understand the positions and interests of others in order to find shared interests and values that can lead to common solutions. Since people do things for their reasons, not yours,
a leader must be able to understand and communicate both his or her own reasons and the reasons of others to find common ground for accomplishment.

The other skill of a leader I consider important is understanding the perspective of the group. General Omar Bradley, the first chairman of the Joint Chiefs of Staff, said, “The greatness of a leader is measured by the achievements of the led. This is the ultimate test of his effectiveness.” The role of the leader is to get the team, the organization, the community to achieve a goal, not to achieve personal glory. It is the difference between being a mountain climber and a mountain climbing guide. The mountain climber is focused on her individual achievement in reaching the summit of the mountain. The mountain climbing guide, on the other hand, is focused on having the entire team reach the summit together. An effective leader will emphasize the achievements of the group, as opposed to his individual achievements. The role of the leader is to work for those who work for him.

Third, put yourself out there and volunteer. Don’t wait to be asked. Good things will come of it. If you have an interest in something, let others who have similar interests know, and ask how you can help. My friend John Radcliffe, a veteran union leader, educator and political lobbyist, told me once about how he ran for state office. He did not win, but people appreciated that he was willing to put himself on the line and step up, and good opportunities came to him as a result. My experience has been the same. I have succeeded through the kindness of friends and strangers who have assisted me and have let me know they appreciated that I stepped up to take on a particular role. One role led to another and another and together they got me to where I am today. Of course, you should not expect to reap rewards from your volunteer service. They may or may not come. But the intrinsic value to yourself and to those around you of serving and learning from such service is priceless.

Fourth, when someone asks for your help and you decide to give it, do something as quickly as you can. Senior US district judge Charles R. Breyer, the brother of US Supreme Court justice Stephen G. Breyer, once told me a story about a legendary lawyer in California, who was an old-school confidant of highly placed political and business figures. Part of this lawyer’s success was that he kept in his shirt pocket a small notebook of requests for favors and would act as quickly as he could whenever he got a request, then cross it off in his notebook. His reasoning was that if he was able to get a result quickly, the person for whom he got that
result would be extremely grateful and would hold him in high regard for being a magician. Even if no positive result was forthcoming, the person would be very grateful when he learned that the lawyer had acted so promptly, even just to try. But if nothing was done for a while, or if the person had to ask again, then the curve of gratitude would drop off rapidly, and he or she wouldn’t be as grateful, even if a positive result were to occur later. It was the speed of action that showed that the person was held in high regard, and that high regard would usually be reciprocated and paid back in spades. I have found the same result in my experience. People are very appreciative that you have tried to assist them and have not delayed or waited to do so.

Fifth, remember that time is a very fleeting commodity. You may think you have a lot of time to accomplish your goals, but time slips away a lot faster than we think. It certainly did for me. Four years may seem like a long time, but my term in office went by really fast. To accomplish meaningful and lasting goals is hard work that requires substantial time, time to work with and convince others to agree, time to comply with existing procedures, time to deal with all of the details and unforeseen complications attendant to doing something important. Apply yourself diligently, because the time will never be enough.

Finally, always remember the human dimensions and the people aspects of whatever you are involved in. One of the key things I’ve learned from my time as a lawyer and attorney general is that it is important for us to always focus on the human consequences of the problems at hand. The issues that came to us, the policies and procedures we opined on, the agency decisions that were made, were not just some ethereal hypothetical constructs, but instead dealt with real people, their lives, fortunes, hopes and dreams, and had real consequences to them.

As attorney general it was critical for me to take into account the human consequences of any decisions or actions and always think about the larger picture—whether we were doing the right thing for the most people. Even when we had to say no or enforce a policy that adversely affected others, we needed to be able to consider the consequences to people’s lives. Without such empathy, you will not be able to fully appreciate the concerns of all involved to try and fashion the right solution. I have found that after all is said and done, it is the people who make important things worth doing.
At the End of the Day

Serving as attorney general really was immensely meaningful and satisfying. I used the time, tools and resources available to address and try to solve problems, to make things better. What I remember most was the overall sense of purpose, that each day I was contributing to a larger goal and helping people. I tried to get as much done as I could, knowing that whether I was involved in big or small matters, my efforts would contribute to the tapestry of government action that was being woven daily, that my story would be part of the fabric of history and society, building on the accomplishments of those who came before me and providing a foundation for those who would come later. I am forever grateful that I was allowed to serve. ☹