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### Response, Class Actions, Civil Rights, and the National Injunction

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CLASS ACTIONS, CIVIL RIGHTS,  
AND THE NATIONAL INJUNCTION<sup>†</sup>

Suzette M. Malveaux\*

Professor Samuel Bray, in *Multiple Chancellors: Reforming the National Injunction*,<sup>1</sup> tackles one of the most salient issues of our modern legal system: the propriety of the national injunction. Over the last few decades, federal district court judges have increasingly issued injunctions that halt important policies and executive orders promulgated under both Republican and Democrat administrations. Bray's Article concludes that, under Article III of the Constitution and traditional principles of equity, federal district court judges may apply their rulings to the parties before them but not to nonparties.

Consequently, Bray proposes a course correction, a rule that prohibits federal judges from issuing injunctions that enjoin defendant's conduct with respect to nonparties. He concludes "[n]o matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction."<sup>2</sup> Period.

Bray's Article makes the important contribution of identifying the national injunction as a recent phenomenon in equity history and proposes a rule that will provoke an important conversation about the power of the courts vis-à-vis the executive branch. However, as attractive as a bright-line rule against national injunctions might be, I can't agree with this solution. It is too blunt an instrument to address the complexity of our tripartite system of government, our pluralistic society, and our democracy. Moreover, Article III and traditional equitable principles give judges considerable discretion that enables them to craft remedies that touch nonparties. Although national injunctions are imperfect and crude forms of justice, they are better than no justice at all — which for some actions, may be the alternative.

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<sup>†</sup> Responding to Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

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<sup>1</sup> Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017). This Response analyzes the potential consequences of Bray's blanket prohibition on national injunctions and argues normatively why his prohibition should be rejected. A full analysis of the federal judiciary's power under Article III and traditional equity to order national injunctions is beyond the scope of this shorter work.

<sup>2</sup> *Id.* at 420.

## I. THE CONSEQUENCES OF THE NATIONAL INJUNCTION

The meat of Bray's Article is, of course, his exploration of the drawbacks of the modern national injunction and the alleged failure of courts to impose proper limits when determining remedial relief. To Bray, the national injunction should be avoided because it leads to forum shopping,<sup>3</sup> poor judicial decisionmaking,<sup>4</sup> and doctrinal inconsistencies.<sup>5</sup> All are valid concerns, but not grounds for the complete elimination of the national injunction.

### A. Forum Shopping

First, Bray's illustration of how the national injunction leads litigants to forum shop is indisputable. As Bray aptly notes, litigants can "[s]hop 'til the statute drops"<sup>6</sup> and have done so deftly. Forum shopping is hardly new and, in fact, the American legal system tacitly encourages it<sup>7</sup> with its charge that lawyers zealously represent their clients within the bounds of the law. While some may have a visceral distaste for the practice, in a conflict resolution system that requires a certain degree of adversity,<sup>8</sup> it should come as no surprise that litigants take advantage of fora that lean one way or another. Forum shopping is just one example of how the plaintiff is the master of his own claim.<sup>9</sup> But to the extent that forum shopping is the vice, it is not solved by an anti-injunction rule.<sup>10</sup> Bray puts forth the class action as an alternative to the national injunction,<sup>11</sup> but forum shopping for courts hospitable to class actions is also common.<sup>12</sup> Thus, Bray's rule leaves this problem intact.

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<sup>3</sup> *Id.* at 457–61.

<sup>4</sup> *Id.* at 461–62.

<sup>5</sup> *Id.* at 464–65. He also identifies conflicting injunctions, but concedes that this is less common. *Id.* at 462–64.

<sup>6</sup> *Id.* at 460.

<sup>7</sup> See J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (positing that forum shopping is "a national legal pastime"); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (arguing that many activities involved in forum shopping are "integral to the legal system").

<sup>8</sup> See U.S. CONST. art. III, § 2 (requiring "[c]ases" or "[c]ontroversies"); *Flast v. Cohen*, 392 U.S. 83, 94–97 (1968).

<sup>9</sup> See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987) (master-of-complaint doctrine); see also *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

<sup>10</sup> Bray, *supra* note 1, at 460 n.252 (noting that forum shopping would still take place in individual cases via the venue statute); see 28 U.S.C. § 1391 (2012).

<sup>11</sup> Bray, *supra* note 1, at 475–76.

<sup>12</sup> See, e.g., Shrey Sharma, Note, *Do the Second Circuit's Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit's Class Certification Jurisprudence*, 85 FORDHAM L. REV. 877 (2016) (comparing class certification standards across circuits).

### B. Judicial Decisionmaking

Second, Bray makes the important point that national injunctions undermine good decisionmaking by cutting short the ability of courts to have competing rulings percolate up to the Supreme Court for resolution.<sup>13</sup> Instead, a complex legal issue reaches the Court “accelerated and relatively fact-free.”<sup>14</sup> I agree that this is not ideal. However, there are occasions when an issue is sufficiently ripe and particularly pressing such that it should be ruled on sooner rather than later.

Bray minimizes the fact that reducing delay and uncertainty and creating stability are significant countervailing interests to the “value in percolation,”<sup>15</sup> especially where individuals’ lives and fundamental rights hang in the balance. Deportation of immigrants, travel bans implicating national security, and keeping families intact and protected under the law<sup>16</sup> are instances where the courts may justifiably feel greater urgency and a reluctance to hold an executive order in limbo. Indeed, many of the recent national injunctions have stemmed from such crisis moments.<sup>17</sup> In these instances where so many risk irreparable harm, it behooves the Court to ask: How much time and how many decisions are reasonable for percolation? How important are factual records when the Court is ruling on the validity of a government’s uniform conduct or policy? And how justified is delay in the face of instability, uncertainty, and harm that may result? Incrementalism has its costs too.

### C. Rule 23(b)(2)

Finally, Bray criticizes the national injunction for its potential to undermine Rule 23(b)(2) of the Federal Rules of Civil Procedure.<sup>18</sup> This provision allows injunctive relief while requiring certain due process safeguards. Bray goes further than necessary in concluding that “the implication is that the remedy is available *only* if those conditions are met.”<sup>19</sup> Although the point is overstated, Bray appropriately recognizes the utility of the modern class action rule. However, his suggestion that Rule 23(b)(2) provides a ready alternative to the national injunction is flawed.

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<sup>13</sup> Bray, *supra* note 1, at 461–62.

<sup>14</sup> *Id.* at 461.

<sup>15</sup> *Id.* (quoting Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975)).

<sup>16</sup> *See id.* at 418–19, 457–60 (describing such injunctions).

<sup>17</sup> *Id.* at 418–19.

<sup>18</sup> FED. R. CIV. P. 23(b)(2).

<sup>19</sup> Bray, *supra* note 1, at 464.

In 1966, the rulemakers crafted Rule 23(b)(2) with the express goal of empowering litigants challenging systemic discrimination — particularly segregation — to force courts to order widespread injunctive relief that would protect the class as a whole.<sup>20</sup> Over a half century later, this civil rights class action provision remains as salient to the enforcement of federal civil rights statutes and constitutional claims as at its inception.<sup>21</sup>

But despite Rule 23(b)(2)'s important function of enabling broad injunctive relief for a class while safeguarding due process, the Court's contemporary jurisprudence has made it more difficult for litigants challenging discrimination to act collectively.<sup>22</sup> Further, at the same time the Advisory Committee is eschewing large scale Rule 23 reform, Congress has proposed numerous amendments that would radically change the aggregation device and curb its availability and utility.<sup>23</sup> To the extent that the Rule 23(b)(2) injunctive class action has been and continues to be compromised, the national injunction fills a void that is worth protecting.

Thus, it cannot be as Bray argues, that the “obvious answer” for when to permit an injunction that goes beyond the plaintiffs is the “class action.”<sup>24</sup> Bray's concession that “the requirements for a class action will not always be easy to meet”<sup>25</sup> understates the significant hurdles erected over the last fifty years. They include the Court's heightened commonality requirement for class certification,<sup>26</sup> hostility toward monetary relief for (b)(2) classes,<sup>27</sup> and deference to the enforceability of class action bans, within litigation and arbitration.<sup>28</sup> The lower courts, along with Congress, have challenged all manner of aggregate litigation,

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<sup>20</sup> See John P. Frank, Response to 1996 Circulation of Proposed Rule 23 on Class Actions, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 260, 266 (Admin. Office of the U.S. Courts ed., 1997), <http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf> (The “single, undoubted goal of the [Advisory] [C]ommittee, the energizing force which motivated the whole rule, . . . was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.”).

<sup>21</sup> Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325 (2017).

<sup>22</sup> *Id.*

<sup>23</sup> See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

<sup>24</sup> Bray, *supra* note 1, at 475.

<sup>25</sup> *Id.* at 476.

<sup>26</sup> A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013).

<sup>27</sup> See John C. Coffee, Jr. & Alexandra D. Lahav, *Battered but Unbowed: A 2016 Update on Class Actions*, 20 ANN. NAT'L INST. ON CLASS ACTIONS D-1, D-21 (2016).

<sup>28</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–10 (2013).

including issues such as the ascertainability of the class,<sup>29</sup> standing of noninjured class members,<sup>30</sup> validity of issue certification,<sup>31</sup> and interlocutory appellate review of certification determinations.<sup>32</sup>

Aggregate litigation is being undermined at the very same time Bray is suggesting greater dependence on it. But the government cannot have it both ways. As the availability of the class action device goes down, the need for the national injunction goes up. Nor is Bray's response to this dilemma satisfying. He states: "Yet the difficulty of fitting a case into the classic form of a class action is a reason to favor *individual* suits, not a reason to circumvent class requirements and jump straight to giving what is in effect class-wide relief."<sup>33</sup> But the whole point of many class actions is that it is difficult, if not impossible, for an individual to bring the case. With the class action device under siege, on the one hand, and the national injunction under attack, on the other, litigants are caught in a Catch-22. Bray may be correct to criticize the national injunction, but without significant change to doctrine, the solution cannot be to rely on the shrinking class action as a substitute.

## II. WHERE SHOULD WE GO FROM HERE?

Although the Supreme Court has yet to rule directly on the propriety of the national injunction, there are numerous justifications recognized for its existence. Bray finds these unsatisfactory because of their indeterminacy and inconsistency. Weaving throughout these justifications, Bray describes, is the thread that federal judges have significant discretion when determining the propriety of a national injunction. This leaves litigants, according to Bray, with the unenviable task of exhorting judges to do the right thing (whatever that might be).

For example, a common justification for issuing a national injunction is that it is necessary to provide "complete relief" to the plaintiffs. This requires a judge to identify the extent of the violation, which for unlawful executive orders and regulations or unconstitutional federal statutes

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<sup>29</sup> Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 928–39 (2017).

<sup>30</sup> See Perry Cooper, *Both Sides Claim Victory in Statutory Injury SCOTUS Case*, BLOOMBERG BNA (May 17, 2016), <https://www.bna.com/sides-claim-victory-n57982072511/> [<https://perma.cc/DW55-CEMY>] (discussing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in which the Court held that injuries may be intangible but must be concrete and particularized).

<sup>31</sup> See Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DEPAUL L. REV. 733 (2013) (describing how appellate courts are divided over issue certification post-*Wal-Mart*).

<sup>32</sup> See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103(a) (2017).

<sup>33</sup> Bray, *supra* note 1, at 476 (emphasis added).

will be national. Bray contends the “complete relief” principle ends up so malleable as to not be a limiting principle at all.<sup>34</sup>

### A. *Bray’s Proposal*

Bray’s discomfort with leaving the solution in the hands of judges and existing doctrine leads him to craft a hard and fast rule: prohibiting national injunctions altogether.<sup>35</sup> His rule’s clarity and universal applicability make it a tempting proposal.<sup>36</sup> Yet, when subjected to further scrutiny, the rule falters.<sup>37</sup>

As Bray notes, a major concern with his proposal is that without a national injunction, individuals throughout the country will be treated differently: courts will exempt successful plaintiffs from an unconstitutional federal law or executive order, while others will continue under its yoke.<sup>38</sup> He calls this “disuniformity in the law.”<sup>39</sup> This “disuniformity” could just as easily be called “unfairness” or lack of law enforcement, characterizations I believe are far more apt here. That someone’s not bringing a lawsuit justifies his being subjected to an unconstitutional federal law or unlawful executive order seems a troublesome elevation of form over substance.<sup>40</sup> Moreover, a court’s partial enforcement of an illegitimate law undermines the rule of law.<sup>41</sup> That some people are left unprotected may have less to do with their sitting on their rights<sup>42</sup> and more to do with their lacking the resources and privilege necessary to bring litigation. It is cold comfort to those unprotected individuals that the legal system already permits some measure of disuniformity because of our federal and state court system and federal appellate structure.

Bray identifies the rub as a timing issue: legal issues for nonparties are best left for precedent to resolve.<sup>43</sup> But the risk of irreparable harm that an injunction would address makes more immediate legal resolution appropriate at times.

<sup>34</sup> *Id.* at 466–68.

<sup>35</sup> *See id.* at 469.

<sup>36</sup> *Id.* at 469–73.

<sup>37</sup> Bray himself addresses a number of anticipated objections. *See id.* at 473–81. I expand only on some.

<sup>38</sup> *Id.* at 473–74.

<sup>39</sup> *Id.* at 474.

<sup>40</sup> *See, e.g.,* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 490 (2016) (referencing “unfairness”).

<sup>41</sup> *See* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2033 (2015).

<sup>42</sup> *But see* Bray, *supra* note 1, at 474 (justifying plaintiff’s protection because of his “initiative”).

<sup>43</sup> *See id.*; *see also* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 250 (2016) (comparing injunctions and precedent).

Bray concedes that his rule is “second best” to a standard.<sup>44</sup> I agree. Despite the clarity, predictability and uniformity of a bright-line rule, a one-size-fits all approach sweeps too broadly. Such a rule strips federal judges of their discretionary authority under Article III and is not required by traditional equity, which is fact-driven and contextual. A standard provides the appropriate flexibility and balance of competing interests, while discouraging the wide-scale use of the national injunction.

### B. Reasons for the National Injunction

It may be naïve to continue to believe in judicial self-restraint and adherence to the “complete relief” limiting principle. And it may be subject to the beholder’s eye whether an injunction must be universal to provide such complete relief. However, I am not ready to say that national injunctions that apply to nonparties are *never* appropriate.

This important conversation about the propriety of national injunctions is not taking place in a vacuum. With Congress in almost perpetual gridlock and an Administration embroiled in frequent turmoil and controversy,<sup>45</sup> Americans are justified in looking to the federal courts to safeguard our democratic principles and fundamental values. Context matters.

A rule banning all national injunctions that apply to nonparties would remove an important check on the executive branch of government. The American political system’s tripartite balance of power requires a robust and effective checks-and-balances system.

Article III judges are empowered to curb executive branch abuse of power. When values counter to what many Americans aspire characterize the executive branch,<sup>46</sup> it is comforting that the federal courts have a method for intervening sooner rather than later.

<sup>44</sup> Bray, *supra* note 1, at 480.

<sup>45</sup> Greg Giroux, *In Congress, the Center Hasn’t Held*, BLOOMBERG GOV’T (Oct. 18, 2017), <https://about.bgov.com/blog/congress-center-hasnt-held/> [https://perma.cc/CJG4-SRV2] (describing Congressional gridlock); Aimee Ortiz, *A Look at the Trump Administration’s Revolving Door*, BOS. GLOBE (Aug. 1, 2017), <https://www.bostonglobe.com/news/politics/2017/07/31/look-trump-administration-revolving-door/fvLG5ibUdf8fGJIiJDeqP/story.html> (describing sixteen appointees’ resignations or firing).

<sup>46</sup> See, e.g., Juliet Eilperin, Emma Brown & Darryl Fears, *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017), [https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-ddbb23c75d82\\_story.html](https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-ddbb23c75d82_story.html) [https://perma.cc/R92E-8KJK] (describing policy reversals in areas of environmental justice, sexual harassment standards in education, policing reform, voter identification laws, and LGBT issues); Donna Owens, *100 Days of Civil Rights in the Trump Administration*, NBC NEWS (Apr. 29, 2017, 9:17 AM), <https://www.nbcnews.com/storyline/president-trumps-first-100-days/100-days-civil-rights-trump-administration-n752536> [https://perma.cc/8AX9-4EPX] (describing concerns about unconstitutional policing, a “discriminatory Muslim Ban,” “immigration roundups, a proposed Mexican border wall, [a] rollback

## CONCLUSION

Bray contends that the “national injunction has a distortive effect on the decisionmaking of the federal courts and on the enactment and enforcement of law in the United States.”<sup>47</sup> His Article provides a rich analysis of the historical context of the national injunction and offers one way of translating traditional equity to the current legal framework. He grants that that translation requires choosing between two competing ways to resolve legal questions: “quickly, comprehensively, and with immediate finality” or “slowly, piecemeal, and with a resolution that was only eventually final.”<sup>48</sup> Acknowledging the “vices” of each, he chooses the latter.

Bray grounds his choice in history. Federal judges in the United States today make equitable rulings that would have been made by the Chancellor of England in medieval times.<sup>49</sup> He contends that the current American political system’s diffusion of power<sup>50</sup> means that legal issues must be resolved through the “patience and the consideration of many minds,” thereby leaving “no room for the national injunction.”<sup>51</sup>

But like the pervasive division of the American political system, the current American population is wildly diverse and pluralistic in ways that Bray does not fully grapple with. This complexity makes the resolution of legal claims in the United States today inherently messy. And while the transsubstantive nature of federal civil process means that patience and percolation is required of all types of legal claims, there are varying degrees of propriety. Patience has its place. As Reverend Martin Luther King, Jr., eloquently explained in his Letter from Birmingham Jail in 1963:

There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope . . . you can understand our legitimate and unavoidable impatience.<sup>52</sup>

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of] transgender protections and voting rights”); Graham Vyse, *Donald Trump’s War on Civil Rights Is Intensifying*, NEW REPUBLIC (May 30, 2017), <https://newrepublic.com/minutes/142951/donald-trumps-war-civil-rights-intensifying> [<https://perma.cc/5BGD-DMTA>] (Leadership Conference on Civil and Human Rights Head Vanita Gupta describing Trump Administration’s cost-cutting measures as “a rollback of civil rights across the board”).

<sup>47</sup> Bray, *supra* note 1, at 481.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 426–27.

<sup>50</sup> *Id.* at 482.

<sup>51</sup> *Id.*

<sup>52</sup> MARTIN LUTHER KING, JR., Letter from Birmingham Jail (Apr. 16, 1963), in *WHY WE CAN’T WAIT* 77 (1964).

Dr. King's letter (to which Bray seems to allude<sup>53</sup>), reminds us that justice delayed can often be justice denied when it comes to claims of systemic discrimination.

Admittedly, all legal claims — including those alleging widespread discrimination and violations of fundamental constitutional rights — must traverse the well-trodden path of a resolution system that highly values incrementalism. Indeed, the seminal *Brown v. Board of Education*<sup>54</sup> was the result of a deliberate and brilliant campaign to slowly chip away at the separate but equal doctrine through decades of precedents. But my guess is that for the beneficiaries of *Brown* overturning de jure segregation couldn't come fast enough.<sup>55</sup>

What Bray's Article overlooks, then, is that the current legal landscape is fraught with danger to the rule of law and to the very members of society that that law was meant to protect.<sup>56</sup> As tempting as a bright-line rule against national injunctions may be, it raises a number of concerns. Such a rule is not required by traditional equity in a system no longer governed by a single Chancellor. And Bray's proposal would ultimately undermine Article III judges' discretion to act more urgently and craft remedies more broadly when appropriate.

It is true that a national injunction — which lacks decades of precedent and the benefit of a full-blown record from which to gauge the merits — is hardly the ideal way to establish law and bind nonparties. But one should not let perfect be the enemy of the good. Traditional equity can be translated to our modern legal system in a way that makes room for a judicial course correction, not only for the few plaintiffs fortunate enough to be able to bring suit, but for everyone who may be suffering under the current regime. Many of the current administration's executive orders target the most vulnerable populations in our society — including various minorities, immigrants, and children. The nature of many of the rights at issue is precisely what traditional equity was designed to protect — justice. I believe the Chancellor would be proud.

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<sup>53</sup> See Bray, *supra* note 1, at 482.

<sup>54</sup> 349 U.S. 294 (1955); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>55</sup> See *Brown*, 349 U.S. at 301 (noting that resistance to *Brown*, 347 U.S. 483, necessitated the Court's directing district courts to enter orders consistent with *Brown* "with all deliberate speed").

<sup>56</sup> See, e.g., *Hate Crime Statistics, 2015*, FBI, <https://ucr.fbi.gov/hate-crime/2015> (last visited Dec. 7, 2017).