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Genealogy of the Concept of "Hate Crime": The Cultural Implications of Legal Innovation and Social Change

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A GENEALOGY OF THE CONCEPT OF "HATE CRIME" IN AMERICA:
THE CULTURAL IMPLICATIONS OF LEGAL INNOVATION AND SOCIAL CHANGE

by

ROSLYN MYERS

A dissertation submitted to the Graduate Faculty in Criminal Justice in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2017
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The Cultural Implications Of Legal Innovation And Social Change

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Roslyn Myers

This manuscript has been read and accepted for the Graduate Faculty in Criminal Justice in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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THE CITY UNIVERSITY OF NEW YORK
ABSTRACT

A Genealogy Of The Concept Of "Hate Crime" In America:
The Cultural Implications Of Legal Innovation And Social Change

by

Roslyn Myers

Advisor: Jayne Mooney

The term "hate crime" is new to legislative and public discourse, as well as legal and social science scholarship. A decade after the concept of a "hate crime" was introduced in Congress, the 2009 Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA), to punish criminal actors who target victims because of their characteristics (race, color ethnicity, sexual orientation, religion, gender, gender identity, or disability). Using relevant archival sources, this project uses genealogical qualitative methods to examine the interplay of cultural elements manifested in this provocative term, which reflect dominance and subjugation among social groups (In- and Out-Groups) going back to the earliest settlements on American soil—and long before the term "hate crime" had emerged. The lens through which this historical progression is interpreted emphasizes "hate crime" as a signifier—a conceptual red flag—that alerts us to the way that seemingly disparate themes in American cultural development have coalesced in new conceptualizations of Others, Self, and the social process of Othering. The historical, cultural, and legislative antecedents that preceded the HCPA suggest a modern crisis in the way that certain cultural touchstones related to "identity" are conceptualized, experienced, and deployed. This project seeks to illuminate subtle changes in the meanings attributed to relevant historical events and certain social dynamics to explain their contemporary ramifications for individuals and society, using the concept of "hate crime" as an organizing principle. Broadly speaking, the
project asks: What does the emergence of the concept of "hate crimes" tell us about larger cultural trends, and what does it suggest about future trends? The question to be answered is how the concept of "hate crime" emerged over time in order to explain the cultural significance of why it emerged at all. The main theses of this dissertation is that a hypermodern understanding of "agency" is necessary to reconcile the "inversions" of meaning in cultural knowledges, without which the concept of "hate crime" would not have emerged. Thus, this dissertation concludes that the concept of "hate crime" tracks with the changes in conceptualizations of "identity" over time. A close examination and analysis of the term reveals an archaeology of social constructions, false logic, flawed (but commercially convenient) assumptions, and compromises on humanity that go to the very core of the American identity.
ACKNOWLEDGMENTS:
THREE DEATHS AND A DISSERTATION

I would like to thank my committee, Jayne Mooney, David Green, and Val West. Jayne's scholarship on spectacles and punishment, and David's methods, wrapped in the fascinating package of comparative cases in the UK and Norway, are now coffee-stained and dog-eared on my desk from continual use. Were it held together in bookbinding, Val's brain, which she generously opened to me throughout the process, might be similarly tattered. Sociologists know that proximity accounts for a great deal of the way the world is organized, and it is therefore no surprise that Val, who lived not too far from my former residence, shouldered the brunt of the Q&A as I worked out how to proceed. For her unshakable pragmatism and her ability to patiently remind me multiple times of exactly the same thing I asked only a month before as if it were a brand new conversation, like a cheerful goldfish, I offer a special thank you.

I am grateful to my outside readers, Samuel Freedman, whose ability to frame historic events as indicators of broad social change with punctilious attention to sources and verification, was as motivating as it was informative, and Justice Aharon Barak, who has given a lifetime of deliberate thought to matters of justice and the mechanisms by which it is (or ideally should be) achieved and whose work I drew from repeatedly to test my own perspectives on "hate crime" law within these systems.

As this project has taken shape, I have mourned the loss of several very important people. Notably, our absent team member, Jock Young, who served as my wise and amusing Chairperson at the outset of the project and whose work so definitively set its foundations. I am grateful for his magnificent mind.
The path that led me to Jock's office door at the Grad Center to ask if he would be my committee Chair originated with another absent party. Doug Koski, an editor and a discursive thinker with whom I worked before he passed away over a decade ago, is credited with honing my early exposure to Jock's work and deepening that interest in our lengthy meandering conversations.

Because of Doug, by the time I came to John Jay as an adjunct, years before I applied to the PhD program, I had formed an idea of Jock as something cast in marble, an elder statesman of criminology with Zeus-like abilities to cast lightning bolts at the academic Establishment while articulating the "keys" to the social world in artfully drawn observations that were so accessible, they hardly needed explaining. So, when I heard that Jock was joining the college faculty, I had two reactions: first giddiness, and then wonderment at how John Jay managed it. In this roundabout way, Doug had a hand in the scholarly curiosity that led me to transform a larger-than-life hero into a mentor.

The last casualty during this project and the most significant to me was my father, Miles Myers, who died suddenly in December 2015. My father was an educator and a polymath, a hungry one—constantly reading, thinking, writing, and conversing with his wide array of friends and colleagues—which my mother will admit good humoredly can sometimes be tiresome to live with. In addition to being the only two PhDs in our family, my dad and I shared an intellectual simpatico. It is not an overstatement to say that he was the spark for everything I ever thought was interesting or worth doing. The morning of the day he died, we agreed to speak later, to review his comments on an early draft of my dissertation. We never had that conversation. It is almost inconceivable to me that he is not alive as I complete this process. I guess that the daughterly thing to say is, Thanks, Dad! But I'm actually still peeved that he's not here. I'm one-hundred percent certain that he is too.
Of course, I want to acknowledge Thane, whose inventiveness and agility with ideas, and whose sheer intellectual endurance has literally made this possible. Thane could not have served as sounding board, reader, cheerleader, invigorating provocateur, and a mine of innovative ideas were his areas of interest not overlapped with my own—and my dad's. He can be forgiven for agreeing with my mom that a dissertating partner can be very tiresome to live with. Thank you.
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I. PROJECT OVERVIEW: MAKING MEANING OF THE EMERGENCE OF THE CONCEPT OF "HATE CRIME"

Hate Crime Prevention Act of 2009

In 2009, Congress passed and the first U.S. President to identify as African-American signed into law the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA), to punish criminal actors who cause "bodily injury" to their targets "because of" their perception that the victims embody certain characteristics—race, color ethnicity, sexual orientation, religion, gender, gender identity, or disability. The cultural brew from which the HCPA bubbled up reflects other significant changes across society that can be understood by examining the emergence of the concept of "hate crime." The words "hate" and "crime" can be understood in linguistic terms, but the meaning of "hate crime" draws from a broader, richer sources. The term "hate crime" hints at an interplay of cultural elements across American history, manifesting in this provocative label for violent acts that the dominant social group (In-Group) has been inflicting on members of minority groups (Others or Out-Groups) since the earliest settlements on American soil. Using relevant archival sources, this project examines the relevant legislative foundations of the HCPA, coupled with an analysis of related social developments to trace the cultural "knowledges" that fed the emergence of the concept. These three trajectories—legislation, major social and political change, and cultural knowledges—are discussed within an historical framework, to highlight the progression over time of the relevant conceptual cornerstones of "hate crime." The lens through which this progression is interpreted emphasizes "hate crime" as a signifier—a conceptual red flag—that alerts us to the way that seemingly disparate themes in American cultural development have coalesced in new conceptualizations of Others, Self, and the social process of Othering.

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1 See Sections II.A, V.D.7.
2 See Section IV.
To articulate these undercurrents of American social life, this dissertation is styled as a genealogy, which sets forth the historical, cultural, and legislative antecedents that brought us to the HCPA. Genealogy, as a method of social inquiry, provides an organizing structure for the rise and decline of social phenomena over time. Unlike legislative history, this inquiry expands beyond the realm of law. Unlike historical analytic traditions, which infer the causes for given phenomena in antecedent events, genealogical research focuses on relationships and meanings (rather than causes), and their reinforcing nature. Genealogical methods are suitable to uncover the origins of meanings, which may illuminate obscured social dynamics to explain their ramifications for individuals and society. Broadly speaking, the project asks: What does the emergence of the concept of "hate crimes" tell us about larger cultural trends, and what does it suggest about future trends? The question to be answered is how the concept of "hate crimes" emerged over time in order to explain the cultural significance of why it emerged at all.

Why should we assume that the concept of "hate crime" signifies anything? The first answer is that we should pay attention precisely because the concept and the law appear at first glance to have no significance. The term appears to be a provocative misdirection, and the law, the HCPA, appears to be legally superfluous. Based on the same grounds—that federal criminal civil rights law already prohibited the acts criminalized under the HCPA—scholars in law and the social sciences as well as politicians have argued for and against "hate crime" legislation.

On one hand, critics who position themselves as defending liberal ideals suggest that the HCPA is not only redundant, it is indeed an intrusion on First Amendment free speech that has the added negative effect of unfairly increasing punishments for criminals in violation of the Equal Protection Clause. In a strange twist, the logic of these objections may lead progressive thinkers to prioritize free speech over other values, without noticing that the endpoint is

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3 See Section III.A.
4 See Section III.A.3-8.
5 See Section V.D.1.
6 See Section II.B.
regressive in that it undermines the explicit core goal of the HCPA to once and for all elevate *racist* violence as a distinctly punishable offense. Because, historically, racist brutality has been disproportionately directed against African-Americans and other minorities, the liberal perspective on the HCPA, as I have described it here, places these voices in an illiberal position in relation to the very population that liberal policies are typically geared to defend.

On the other hand, the apparent appeal of harsher sentences for a tough-on-crime agenda has not produced a unified stance on the HCPA among conservative voices. In another inversion of logic, some conservative supporters deployed the HCPA's emphasis on protecting *victims*—a familiar liberal perspective—to promote greater federal police power generally, thereby increasing social control over *offenders*. In this sense, the HCPA, which was proposed and tirelessly championed by democratic politicians, was hijacked by conservatives to pass a range of substantive federal laws that they declared needed to be addressed "once and for all"—such pernicious social problems as drugs and gang violence.

Thus, even if one believes that the HCPA is essentially redundant as a law, it is demonstrably shortsighted to argue that the HCPA is insignificant as a cultural phenomenon. Its key significance for the analysis in this dissertation is that the HCPA serves as a highly peculiar and slippery nexus between purportedly opposing narratives.

The second answer is that these strange narrative "bedfellows" reflect a larger crisis in the way that certain cultural touchstones are conceptualized, experienced, and deployed. The unintended helix of liberal and conservative voices described above is only one glimpse of a much wider trend—referred to in this dissertation as "inversions"—the focus of which, presented in this dissertation, are conceptualizations of "identity." Popular discourse is littered with examples of modern usages of terms related to "identity," and the multitudinous facets that

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7 See Sections V.A, V.D.  
8 See Section V.D.  
9 See Sections V.B-C, VI.  
10 See Section V.B.-C.  
11 See Sections V.B.-C, VI.
"identity" as a lived experience attempts to convey. Using familiar examples that demonstrate hypermodern shifts in "identity," this dissertation places these shifts within the context of "hate crime."

Throughout the genealogy, I spotlight the way that "identity" informs the way we understand Self and Other at given points in history. How can such complex ideas as Self and Other be reduced to manageable nuggets that serve rather than overwhelm the dissertation? What circumscribed understanding of Self and Other can be utilized that transcends time and cultural change, and also relates to "hate crime"? The HCPA itself tells us. The core of the HCPA, and one of its main points of contention, are the categories of persons the law specifically protects. By following the legislative antecedents of the HCPA that rely on person-categories and related laws, this dissertation brushes off the "stepping stones" from the earliest settlements in America to contemporary modern life, to reveal one path by which conceptualizations of Self and Other have evolved and shaped the ancestral concepts of "hate crime."

Building on answers one and two above, the third reply to the question of why we should care about the concept of "hate crime" and its related laws is that a close examination and analysis of the term reveals an archaeology of social constructions, false logic, flawed (but commercially convenient) assumptions, and compromises on humanity that go to the very core of the American identity. While the discussion addresses a limited slice of that nuanced idea, this dissertation makes visible the process of American identity formulation over time through an examination of the relationship between "agency" and "hate crime."

This dissertation proceeds in the following sections: The next section, Section II, examines the usages of the term "hate crime" and the wide variety of literature that has been generated

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12 See Sections II.A., V.A, V.D.
13 See Section V.
14 See Sections IV, V.
about "hate crime." Also in Section II, a summary of the innovations presented in the HCPA leads to several questions to be explored through the research.

Section III sets forth the details of the qualitative analysis. Section III articulates the benefits and limitations of using genealogical methods, seeking meaning narratives to illuminate cultural knowledges, among other matters of protocol, and it examines the role of the researcher in a qualitative analytic process. Section III describes the utility of archival documentation to examine the interactions between two general tiers of social life: events (e.g., criminal cases, legislative acts, social movements, inventions or technological advances, etc.) and the cultural significance of those events. Section III focuses chiefly on the importance of narrative and meaning-making to the concept of "hate crime," because a central premise of this project is that evolving narratives about Others form a complex partnership with concepts of Self to inform the way actors engage in social life. Specifically, narratives about Self and Other may prompt criminal acts and legal punishments for those acts, and within these dynamics, the designation of Self and Other shift among the parties involved. Also, Section III elaborates on the terminology used in the research and summarizes the variety of digressions and snags that arose during the process of conducting research.

Section IV presents theories of Othering as a backdrop to the research. Othering processes are placed in the context of late modernity—the distinctive features of which in turn support identity-expression in new and provocative ways. Merging integrated identity theory with Young's inclusionary-exclusionary processes of Othering, this project uses historical context to illustrate the way that the conceptualization of "hate crimes"—the criminal act, the law, and the phrase in public usage—"[fit] into a larger historical pattern of events and may serve as a harbinger of future 'states of affairs'." What "state of affairs"? Section IV answers this question by telescoping our attention on the most salient feature of "identity"—agency—to sketch the connection between modern conceptualizations of "identity" and the concept of "hate crime."

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Using the peculiar structure of "hate crime" legislation within criminal law traditions to demonstrate that "agency" is in a process of transformation, Section IV introduces one of the main theses of this dissertation: that a hypermodern understanding of "agency" is as necessary to reconcile the HCPA to criminal law traditions as it is to the emergence of the concept of "hate crime."

Section V presents the genealogy of the concept of "hate crime." The skeletal framework of the genealogy is the legislative history of relevant laws and cases, which are analyzed and summarized in four chronological groupings from approximately 1620 to 2009. The connective tissue of the genealogy is the significance of these "precursors" to "hate crime" to larger cultural developments. The liminal question for each historical and legislative event was: Does this event reflect an element of cultural knowledge without which the concept of "hate crime" could not have emerged? If the term "hate crime" could not have been conceptualized without the event and the ideas that it prompted, then that artifact of history was included in the genealogy. Within the chronological groupings, the discussions deploy the various conceptualization of "identity" to spotlight relevant narratives. Additionally, to the extent that they shaped the meaning of the concept of "hate crime," historical figures, speeches, technological advances, and other notable features of a given cultural era were also included in the genealogy to increase its explanatory power.

In Section V, the legislative history begins with the most recent "hate crime" legislation, the HCPA, and uses its text and annotations—which include amendments, rules of construction, findings of Congress, among other discursive work to trace its foundations. This legislative history establishes a framework leading back most directly to the civil rights acts of the mid-20th century, whose legislative references and historical context in turn lead back to authoritative documents going back to the earliest settlements in the "New World." The genealogy extends back to the American "Charter Generation"—the original settlers whose:

16 See Appendix APL.
17 See Section V; see also Section III.A.1.
charters brought them to the New World to establish the colonies—when early discourses about In-Groups and Out-Groups laid the groundwork for the concept of "hate crime" to emerge in its uniquely American form and as a singular feature of U.S. criminal law.\(^{18}\) Placing the historical events and documentation in context, the research links legal developments to broader social developments and examines specific processes of concept formation and meaning-making to reveal latent shifts in the cultural understanding of such fundamental principles of American identity as equality, freedom, personhood, and harm.\(^{19}\)

Section VI returns to the question of "identity." Building upon the discussions presented throughout Section V and elsewhere in this dissertation, Section VI highlights the way that modern narratives that reinforce the concept of "hate crime" draw upon the particular conceptualizations of "identity" and its core feature, "agency." Certain narratives related to "agency" influence "hate crime" discourse and the way the concept is understood. Section VI explores the context of modernity in which these narratives gained currency and the "agency" that enacts or embodies them.

This dissertation concludes that the emergence of the concept of "hate crime" tracks with the changes in conceptualizations of "identity" over time. In concert with other features of late modernity, the boundaries of individual "identity" have blurred and refracted in such relatively new developments as "virtual" reality and genomics, as well as less recent developments like the shift of political power from land ownership to voting rights.\(^{20}\) Since the term "hate crime" entered public and policymaker discourse, the core feature of identity that typically is associated with Self—"agency"—has undergone at least an important change. "Agency" is conceptualized as linked with and activated by Others. The key shift in "identity" in modern culture is found in the migration of human agency—identity-as-agency—from an \textit{interior} process enacted in social life

\(^{18}\) See Section V; see also Section II.
\(^{19}\) See Sections IV, VI; see also Sections II, III.
\(^{20}\) See Section V.
by one individual to an *exterior* process embodied in social life by another individual.\(^{21}\) Without these changes in the central meaning of "agency," the concept of "hate crime" would not have been utilized to describe the kind of distinct criminal actions the HCPA is intended to encompass. Among other things, this dissertation explains that, in late modernity, it is possible to imagine that personal agency arises not from inside the individual, the agent, but from inside another person, the Other.\(^{22}\) In sum, by conceptualizing the Other as the agent of, *first*, the external events affecting him or her (e.g., in the form of victim-blame, negative stereotyping) and, *later*, as an agent of reactions to or attitudes toward him or her (i.e., by virtue of his or her Otherness), it is possible to conceptualize a crime with the distinct characteristics of "hate crime."

\(^{21}\) See Sections V, VI.
\(^{22}\) See Section VI.
II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT "HATE"

II.A. Formal Usages of the Concept

Federal "Hate Crime"\textsuperscript{23}

In developing the genealogy of a term with numerous official and unofficial definitions, the liminal concern is determining which usage of "hate crime" will be the point of departure. In other words, where does this project begin?

The most basic understanding of "hate crime" is a crime of violence motivated by prejudice.\textsuperscript{24} The term has been used by advocacy groups, in federal and state law, by the Federal Bureau in Investigation, among others, and it has been operationalized at the local level by police departments. Because the legal variations are labyrinthine and raise questions of law not encompassed in this research, this project focuses on the federal law.

Among the numerous legal formulations of "hate crimes" prohibitions, the sanctions take three forms: a distinct crime, as crafted in the HCPA, a sentencing enhancement, as legislated in the HCSEA, or an aggravating circumstance. The first requires evidence at trial (or in a plea) of the criminal elements enumerated in the statute to determine whether the defendant is guilty, consistent with criminal law on its face.\textsuperscript{25} The second type of sanction is one of several considerations of the court during the sentencing phase, after the defendant's guilt has been established. The third requires proof at trial of the element sanctioned in the enhancement, but

\textsuperscript{23} The section title's phrase is borrowed from Raymond Carver, What We Talk About When We Talk About Love (1981).

\textsuperscript{24} Federal Bureau of Investigation, Training Guide for Hate Crime Data Collection 1 (2000).

\textsuperscript{25} The distinct crime is the subject of interest in this project for three reasons: First, these crimes require an underlying crime, or they cannot be charged. Such a parasitic crime is distinctive in many ways from previous legal formulations of crimes that "merge" or require predicate offenses. Second, these parasitic crimes reflect broader innovations than simply those in law, whereas sentencing enhancements do not. The use of aggravating and mitigating circumstances to add grayscale to the determination of a defendant's sentence is a commonlaw tradition, and even the addition of "hate crime" enhancements to the sentencing considerations does not represent concept formation. Third, to the extent that the conceptualization of "hate crimes" is a socially and legally relevant cultural phenomenon, the attributes of the parasitic formulation subsume the attributes of the sentencing enhancement formulation. It is hoped that filtering out most if not all the sentencing enhancement debates will reduce some analytical noise without losing discoveries or conclusions.
they are not viewed as distinct crimes.\textsuperscript{26} Sentencing enhancements,\textsuperscript{27} similar to aggravating circumstances,\textsuperscript{28} have long been a part of American criminal law. The addition of "hate crimes" to state and federal sentencing frameworks—either as enhancements or aggravating factors—is itself not a legal innovation, but the evidence used to substantiate the enhancement raises

\textsuperscript{26} These "hate crimes" are understood as a pragmatic decision for prosecutors, who view ABL as simply offering them another sentencing option. For women, for example, who have been victimized in sex crimes, prosecutors may proceed under "hate crime" or sex crime statutes, depending on the range of sanctions they determine to be reasonable for the facts of the case. (See Michael Shively, Study of Literature and Legislation on Hate Crime in America, Final Report, submitted to the Nat'l Inst. of Justice NCJ 210300 (Jun. 2005), \textit{available at} www.NCJRS.gov/pdffiles1/nij/grants/210300.pdf.)

\textsuperscript{27} The difference between sentencing enhancements and aggravating circumstances rests in the level of proof required and point at which the factor must be raised. Sentencing enhancements (as distinguished from aggravators) must be charged in the indictment and proved to a jury beyond a reasonable doubt. Aggravating circumstances are facts found by a judge and need only be established by a preponderance of the evidence. (Blakely v. Washington, 542 U.S. 296 (2004); U.S. v. Booker, 543 U.S. 220 (2004).)

\textsuperscript{28} The question of whether "hate" or another circumstance may constitute an aggravating circumstance is complicated by the structure of laws in which aggravation is contemplated. In some states, the crime itself is already "aggravated," and the evidence supporting an aggravating circumstance at sentencing is viewed as proven upon conviction. In other states, a felony that is "aggravated" does not necessarily fulfill the aggravating circumstances at sentencing, and further evidence is required. When it comes to "hate," a similar overlap occurs in practice. If "hate" is proved as one of the elements of the criminal act at trial, the sentence is already enhanced, and it makes no difference whether the basis for it is a separate criminal charge or an enhancement. However, if "hate" is not proven at trial or the jurisdiction does not contemplate "hate" as an element to be proven in proving a crime, then evidence of "hate" at sentencing may be offered to enhance the sentence for the underlying criminal conviction.

For example, the Alabama Penal Code implies aggravating circumstances when the defendant is guilty of a crime under §13-11-2(a) for a jury finding that the defendant is guilty of charges that include certain enumerated offenses, even though the provision calls for a separate charge of aggravation and later lists "aggravating circumstances" under §13-11-6. Thus, in Magwood v. Patterson, 555 F.3d 968 (2010), the court found that the serious nature of the murder of a sheriff while carrying out his official duties charged under § 13-11-2(a) was sufficient to meet the separate charge of "aggravation," even though no other aggravating charges under § 13-11-6 applied to the case.

Similarly, in a capital case, Ex Parte Kyzer, 399 So. 2d 330 (Ala. 1981), the court explicitly permitted an aggravation proved at trial under § 13-11-2(a) (10) to double as an aggravating circumstance at sentencing. This ruling overturned a prior Alabama holding that precluded an aggravating element of a charge against a defendant for a capital felony from being used as one of the aggravating factors that would support a capital sentence. Under the old rule, factors could not be used both to support a conviction for an aggravated felony and as an aggravating circumstance to support a death penalty conviction at sentencing. Under the new rule, "the jury and the trial judge at the sentencing hearing [may] find the aggravation averred in the indictment as the aggravating circumstance, even though the aggravation is not listed in § 13-11-6 as an aggravating circumstance." (Ex Parte Kyzer, 399 So. 2d 330, 339 (Ala. 1981).)
important questions of law that reflect broader cultural trends.\footnote{29} The primary focus of this research is the legal innovations because they have cultural importance.

Both popular, institutionalized, and legal usages have emerged symbiotically, and the research is designed to examine not simply the legislative trajectory, but also "all the fuzzy stuff that lies around the edges—context, background, history, common knowledge, social resources"\footnote{30} for the valuable information and perspective that these influences may bring. Only by viewing the concept of "hate crime" against the background of "these wider forms of life and their history [can we] understand the informal logic that underpins its emergence and importance in modern social life."\footnote{31} The project uses these intertwining narrative threads may reveal something about the deeper trends in American culture. Nevertheless, the project is built upon the statutory language of federal "hate crime" laws, with occasional reference to state laws.

\footnote{29} The consequences of a "hate crime" enhancement are significant, often adding large fines and as many as ten years to the defendant's prison time. The court's determination of the defendant's prejudice is not subject to the same rules of evidence or burdens of proof as the guilt phase of a trial. For this reason, the right for victims to present impact statements is not a violation of the rights of the defendant.

Sentencing enhancements generally, which are akin to aggravating factors, have long been an uncontested part of sentencing considerations. The criteria the courts use to make determinations about the length of the convict's sentence include the heinousness of the crime and the vulnerability of the victim. Criteria that allow the court to consider the defendant's remorse and potential for rehabilitation are among the last vestiges of early 20th century reforms in the penal system built on the romantic aspirations of religion as salvation for criminals. The gradual marginalization in the justice system, particularly in corrections, of the defendant's rehabilitative potential has occurred inversely with the shift toward greater punitiveness in law and in popular culture. (P. Hahn, Emerging Criminal Justice: Three Pillars for a Proactive Justice System (1998).) "Modernist optimism" about the effectiveness of compassion and penitence has given way to late-modern cynicism that "nothing works" to control criminal behavior. (David A. Green, When Children Kill Children: Penal Populism and Political Culture 217 (2008).) Considerations of offender behavior are no longer about the potential for rehabilitation; they are about the propensity of the offender to reoffend and the public safety threat that his or her recidivism would pose. (See generally Douglas D. Koski, The Jury Trial in Criminal Justice (2003).) Laws that take a "no more excuses" stance, such as Three Strikes laws, have replaced the more complex and more ideologically and emotionally taxing perspectives on punishments that are aligned with rehabilitation. (David A. Green, When Children Kill Children: Penal Populism and Political Culture 216-18 (2008).)

Ideas about human potentialities have withered in the face of criminal "professionals" who, combined with obstacles to reentry, are unable to "rejoin" society free of risk to public safety. This shift is one of the present social conditions that buoys the harsh sentences of "hate crime" enhancements, and, of all the various punitive legal developments that emerged in late modernity, it is one of only a few that have received such heated attention from the law academy. Why? One possible explanation is that the increasing secularism in the populace (setting aside political rhetoric) has contributed to a scaling back of romanticism about the human potential has been scaled back.

Therefore, some decisions about which specific laws, cases, and other research material to explore may be fine-tuned to the legal concepts presented in the material, so that the multitude of digressions that may stem from an attempt to explore all the varieties of "hate crime" legislation will not weigh down the goals of the research. Although this dissertation is not a dissection of legal traditions *vis a vis* "hate crime" legislation, telescoping in on the legal points is necessary to the genealogical investigation. Using law, and indeed plain language, as the foundation of the project is not intended to cut off "the peripheral visual field" of popular usages, but to magnify them as equally important expressions within "the communities, organizations, and institutions that frame human activities." In a broad sense, this dissertation asks, *What does the emergence of the concept of "hate crimes" tell us about larger cultural trends, and what does it suggest about future trends?* The question to be answered is how the concept of "hate crimes" emerged over time in order to explain the cultural significance of why it emerged at all.

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32 Under state ABL, the elements that constitute "hate crime" are the following:
- The range of predicate crimes (or, the range of conventional crimes that may potentially be regarded as "hate crimes," if the second criterion is fulfilled);
- An indication in the language of the law that the crime must have been motivated by bias or prejudice; and
- A group of traits identifying the protected groups.
The core feature of ABL—the necessary condition that the crime was motivated by bias—may be stated in the statutes in many ways.
There is also variation among state statutes in the degree of specification about the predicate crimes to which the charge of "hate crime" can be attached. When the language does specify the crimes, there is variation in the range of offenses listed.
There is also variation in state law about the categories and number of protected groups.

II.B. Literature Review of "Hate Crime" and Federal ABL

Interdisciplinary Examination of Anti-bias Legislation

Thousands of articles have wrestled with the meaning and ramifications of "hate crime" as something that has criminal and social implications, and their numbers demonstrate the challenge that the concept presents to current sensibilities across disciplines\(^34\) and even across borders.\(^35\) The array of "descriptive studies, debates, typologies, thought-pieces, and overviews of hate crime research"\(^36\) cover every narrow crevice of either the motivation to commit a hate crime or the motivation to legislate against such crimes.\(^37\) "The deeper research digs into the problem [of hate crimes], the more questions it throws up...[A]s knowledge of some aspects of hate crime becomes enriched and more certain, further nuances and ambiguities are inevitably revealed."\(^38\)

The scholarship ranges from criminal law and procedure,\(^39\) to sociology,\(^40\) to psychology,\(^41\) social psychology,\(^42\) cognitive neuroscience,\(^43\) history,\(^44\) economics,\(^45\) political science,\(^46\) and


more. Theoretical analyses, although well summarized and reviewed in previous literature, on the whole offer unsatisfying structural and interpersonal explanations for "hate crime" acts.
Literature reviews that draw from this vast trough of information tend to recycle the same voices in the field, all of which are discussed in this dissertation, along with others.49

The most comprehensive examination of the literature for the Department of Justice ("DOJ Report") presents a broad restatement of the key conclusions of the research of others, while acknowledging that even a thorough review cannot efficiently mention more than a fraction of the total body of "hate crime" research.50 Along with additional important literature, the major findings of this exhaustive DOJ Report are included in the following review of the hate crime literature, which details these overarching areas of the current research:

- Offender ideation, causes, and explanations of "hate crimes";
- Consequences for victims, experiential harm, and community effects, including the uses of crime-mapping of "hate" incidents to explore people's sense of place and individual safety;

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50 The DOJ report states that it "presents the result of a systematic review of well over 100 documents and web sites, including sources describing federal and state hate crime data collection efforts, government sponsored and independent research, and prevention and response efforts by criminal justice agencies and independent organizations. While the volume of research and breadth of this review means we cannot fully describe and adequately convey the contributions of every significant source, we describe dominant themes and trends. Given our goal of informing future empirical research, we have focused on gaps in data and research and point to lines of inquiry that could help to close these gaps. To this end, we: (1) examine the strengths and weakness of major data sources; (2) describe the current scope of the hate crime problem as gleaned from the best available data; (3) describe select prevention and response efforts, and (4) summarize the research examining hate crime and evaluations of programs designed to prevent and respond to it." (Michael Shively, National Institute of Justice, Study of Literature and Legislation on Hate Crime in America (June 2005, updated 2007), available at www.NCJRS.gov/pdffiles1/nij/grants/210300.pdf.)
• Inconsistencies in data collection, policymaking, and criminal justice analyses, and the related difficulties stemming from the lack of clarity in defining what the term actually refers to;
• Implications of ABL in criminal and constitutional law, its human rights overtones, and the complexities of the concept's democratic tenor;
• Categories of people protected by the law, their increasingly contingent definitions, and the related pressures of identity politics; and
• The symbolic value of "hate crime" laws to victims and society.

(1) "Hate crimes" can be differentiated according to the actor's ideation—thrill-seeking ideation (66%); defensive ideation, to protect turf or threatened resource (25%); violent reactivity to a perceived personal insult (8%); or missionary zeal (1%), in which the attacker believes he or she is ridding the world of evil.\textsuperscript{51} Related to these motivations are the typologies of the emotion of hate as "rational" or "character-conditioned."\textsuperscript{52} The former is a response to violations to an individual's "fundamental natural rights" or "freedoms, [way of life], and values."\textsuperscript{53} The latter is prompted by a vague sense of being wronged that requires a polarity embodied in an Other on whom resentment can be projected. These formulations of hate are expressed in "extropunitive" crimes against the perceived persecutor.\textsuperscript{54}

These analytical categories fit well with Young's description of exclusionary Othering processes and the formations of subcultures that gravitate to counter-identities within groups that demand affiliation, such as fraternities, gangs, far right extremists, cults, and other outcast

\textsuperscript{52} Erich Fromm, \textit{Humanistic Ethics} (1947).
(and borderline-outcast) communities to "counter the forces of denigration."\(^{55}\) When carried out by organized groups, hate crimes may be used to "conjure up dread"\(^{56}\) or to give energy to "moral indignation with self-righteous enthusiasm."\(^{57}\) The variations in the actor's impulses may affect the success of legal attempts to deter or punish actors.

(2) Despite the useful offender categories, "basic research on the etiology of bias-motivated offenses remains relatively underdeveloped."\(^{58}\) No theories yet have shown an ability to adequately explain or predict hate crime On the causes of "hate crime," the DOJ report states:

Theories from all branches of social sciences have been posited as explanations of hate crime, including those from psychology (e.g., personality theories, usually focusing on authoritarianism among aggressors), sociology (e.g., modernization and classical Durkheimian theories involving anomie as a causal factor), and economics (e.g., competition for scarce economic resources driving aggression against "other" groups such as new immigrants of different races and nationalities). However, there has been little formal or rigorous hypothesis testing and thus there is little in the way of a theoretical foundation for explaining or predicting hate crime.\(^{59}\)

One consistent thread in the literature discussing the reasons offenders commit "hate crimes" is linked to several assumptions about "hate" impulses: (a) The offender's bias is


personal, based on his or her own hateful attitudes toward the targeted social group\textsuperscript{60} (which
overlooks the fact that offenders do not specialize in the victimization, as explained below); (b) The
offender's actions are motivated by strong—even overpowering—negative feelings, not external
structural forces or the desire to attain a tangible goal;\textsuperscript{61} (c) The offender's hateful bias
is deviant and irrational,\textsuperscript{62} making him or her an extremist, a radical who does not represent
the mainstream cultural view of the targeted group; and (d) The offender's bias is an emotional urge
fueled by hatred that must be satisfied by demonstrating his or her hatred by inflicting harm on
a member of the target group. All of these formulations stem from the basic proposition that
domains, like hate, stem from those aspects of humanity predominantly located in the sphere of
nature (i.e., a realm unchanged and untamed, by definition, throughout history).\textsuperscript{63} These
assumptions may limit the possibilities for more creative insights into the forces that propel the
actor's bias crime.

(3) However, the etiology of "hate crime" victimization, which focuses on the dual effects on
the specific victim and the community personified in the victim,\textsuperscript{64} has crystallized the distinctive
nature of the harm that stems from such crimes without entirely proving its consistency.
Compared to analogous conventional offenses, "hate crimes" have been shown to have more

\textsuperscript{60} Lu-in Wang, The Complexities of "Hate," 60 Ohio St. L.J. 817-21 (1999).
\textsuperscript{63} Alessandro Arcangeli, Cultural History: A Concise Introduction 59 (2012).
\textsuperscript{64} The hierarchy of victims according to 2012 data show African Americans as the most victimized,
followed by gay men, and finally Jews. In 37% of reported "hate crime" cases, the offender knew the
victim, whereas in violent non-hate crimes, half of all victims knew the offender.
serious negative consequences for victims and for communities. Evidence indicates that hate crimes are usually more serious than their conventional counterparts, involving more violence, physical injury, and more negative psychological and emotional consequences for victim. The negation of the victim as an individual deepens the harm by making the victim "fungible" and moves the concept of hate crime victimization into the penumbra of human rights traditions.

(4) Researchers who apply crime-mapping techniques have taken special interest in the way that "hate crime" expresses the victimization of prejudice in stark geographical relief. Flint articulates "hate crime" victimization as a statement of who does and does not belong in a certain place. By leveraging the geographical information of hotspots to serve criminological theory, criminologists can accomplish several important goals: (a) explore spatial variation in "hate crime" data collection, law enforcement practices, and the effect of legislation; (b) track the relationship between symbolic sites (e.g., temples, ethnically homogeneous neighborhoods) and types of "hate crime" (e.g., arson versus vandalism); c) compare patterns of "hate crime" in urban and rural areas; (d) depict regional patterns of "hate crimes"; (e) identify clusters of "hate

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67 Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 9, 39 (1999).


crime" hotspots; (f) show processes of diffusion; and (g) illuminate the rise and fall of "the crime" rates with widespread economic or other stressors.\(^71\)

(5) Reporting of "hate crimes" does not accurately reflect their rates of occurrence. The DOJ has identified four points of entry to the criminal justice reporting systems, at which failures in identifying "hate crimes" can occur: (a) when victims seek help from local law enforcement agencies; (b) when officers assess whether the incident is a "hate crime"; c) when an official determination is later made about whether the crime was indeed bias-motivated; and (d) when the incident, along with other crimes, is transmitted from local law enforcement agencies to the FBI's UCR program.\(^72\) Researchers believe that "hate crimes" are more prevalent than is suggested by reported crime data, in part, because victims often fail to report incidents to law enforcement.\(^73\) Also, reports begin with subjective assessments of reported incidents\(^74\) and the difficulties operationalizing the definition uniformly affect the criminal justice path of a report.\(^75\)

(6) The difficulty in theoretical propositions, and incidentally in data collection, stem in large part from the multiple ways that the term is used, understood, and operationalized.\(^76\) Although this disconnection between definitions at various stages of the criminal justice system is noted in the literature, few studies identify with precision how these gaps affect the knowledge


\(^{72}\) Fed. Reg. (62)222 at 61549 (Nov. 18, 1997).


about "hate crime" in the respective disciplines. The variety of definitions in turn makes it difficult to determine what responses are effective.\textsuperscript{77}

With regard to the descriptive terms "hate" and "bias," the literature seems to make no distinction. (See Table 1: Search Engine Results, "Bias Crime" v. "Hate Crime".) The federal laws use the term "hate" in their titles, and it appears that the terms "hate" is often used in statutes to ensure that the laws are directed at the most egregious expressions of prejudice in criminal acts. The wave of "hate crime" laws were prompted by heinous crimes, such as the lynching of James Byrd, Jr., and Matthew Shepard, and policymakers may have used the term "hate" to ensure that the laws were rarely applied. Yet, the term "bias" would have cast the widest net of motivation and, in the 1968 Civil Rights laws on which ABL is based, the language emphasizes bias not "hate."

Table 1: Search Engine Results, "Bias Crime" v. "Hate Crime"

<table>
<thead>
<tr>
<th>Search Engine</th>
<th>&quot;Bias Crime&quot;</th>
<th>&quot;Hate Crime&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCJRS Abstracts (concept)</td>
<td>60</td>
<td>247</td>
</tr>
<tr>
<td>NCJRS Full Text (concept)</td>
<td>316</td>
<td>500</td>
</tr>
<tr>
<td>Ingenta</td>
<td>10</td>
<td>71</td>
</tr>
<tr>
<td>Amazon</td>
<td>163</td>
<td>2,241</td>
</tr>
<tr>
<td>Google</td>
<td>8,420</td>
<td>337,000</td>
</tr>
</tbody>
</table>


(7) In particular, these definitional issues affect the legal analyses of the concept. Many simplistically view ABL as redundant. These scholars assert that "[t]he predicate crimes are already punishable by criminal codes, so there is no need to create laws for a certain subset

\textsuperscript{77} Aside from variations "in levels of thoroughness and timeliness, and real or perceived objectivity," the chief problems include the following:
- Uneven definitions of what the crime actually is;
- "Fragmentation of information across locales and across data sets" making useful meta-analyses difficult, even when statistical reports required under federal law; and
- Few evaluations of current law enforcement and other program initiatives. (Michael Shively, NIJ, \textit{Study of Literature and Legislation on Hate Crime in America} 85 (June 2005).)
based upon the characteristics of the victim or motivation of the offender.” This claim is based on the interpretation of ABL as establishing a new "motivation type"—hate or extreme prejudice—that opens the door to more parallel laws based on motivation types. The morass of laws on "hate crimes" has been partially untangled by scholars who delineate several types of ABL that, they assert, punish motives: (a) statutes that impose criminal punishments on any interference with individual civil rights; (b) statutes that create new criminal categories; (c) statutes that build upon other criminal code sections; and (d) statutes that "enhance" or reclassify crimes against certain victim groups. These are distinguished from a very different categorization of ABL by Lawrence, who posits two competing legal frames for hate crimes: the "discriminatory selection model" and the "racial animus model." Many supporters defend the HCPA because of its stance against racial animus, but Lawrence, one of the key voices favoring ABL, interprets the statute's language to create a discriminatory selection model. These divisions in interpreting the meaning of the statutory framework highlight the legal subtleties associated with hate crime legislation. In the former model, offender culpability is determined according to the offender's prejudice when selecting a victim. "It is irrelevant why an offender selected his victim on the basis of race or group; it is sufficient that the offender did so...to [enhance] the maximum penalty for conduct motivated by a discriminatory point of view more


80 Lawrence recommends gradations of punishment in accordance with the animus shown. (Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 50 (1999).)

81 Lawrence has opined that the "because of" language signals an adoption of the "discriminatory selection" model of hate crime statutes. (Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* (1999). See also Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 Mich. L. Rev. 320, 376 (1994) (contending that bias crime laws should not apply to a perpetrator who selects victims from a particular social group only because "he believes that he will better achieve his criminal goals" by targeting that group, and not because he feels hostility toward the group) See also S. 19, 107th Cong. 107(a) (2001); H.R. 74, 107th Cong. 4 (2001).)

severely than the same conduct engaged in for some other reason or for no reason at all."\textsuperscript{83} In other words, the necessity of hatred toward the groups is eliminated; the selection itself is what matters.

In contrast, the "racial animus model" asks whether an offender "acted out of hatred for the victim's racial group or the victim for being a member of that group."\textsuperscript{84} The nomenclature notwithstanding, the second model refers to crimes motivated by animus toward any protected attribute of the victim. Whereas the model emphasizing animus requires that the offender express hatred for the victim's Out-Group, the model emphasizing selection presumes negative attitudes, based on the offender's behavior, toward the victim or the Out-Group.\textsuperscript{85} In theory, under the "selection" model, an offender who harbors no generalized hatred toward the selected group might still be guilty of a hate crime. Alternatively, the animus model might imply that the offender is correct in his identification of the victim as part of the hated group, and it therefore raises some legal hurdles if the offender is mistaken about the victim's categorization.

In another formulation of animus model, the victim is understood to be targeted because of the offender's racist agenda. Lawrence connects this to ethnocentrism.\textsuperscript{86} The distinction is that a racist or ethnocentric agenda suggests the offender carries a framework about social life that links to a collective of like-minded people and determines his or her behavior in various settings, including the attack against the victim. This "animus agenda model" implies an attachment to an ideology. In contrast, an "animus selection model" absent an overarching agenda—such as

\begin{itemize}
\item \textsuperscript{84} Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 29 (1999).
\item \textsuperscript{85} Lawrence provides the helpful example of an offender, with no particular animus toward African-Americans, who steals from a Black person in a location where the offender knows that prejudice among law enforcement will mean that the crime will go unpunished. The selection of a protected (racial) group affords this offender "cover" from the law, which, Lawrence explains, should qualify as a bias crime under the current statutes. (See Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 30-31 (1999).)
\item \textsuperscript{86} Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 29-39, 41-44, 58-63, 64-73, 79, 106-09 (1999).
\end{itemize}
membership in a White supremacist group or a practice of refusing to serve minorities in one's private business—may indicate context-driven prejudices.

But another advocate of these laws suggests that the racial animus model is too limiting. Wang argues that limiting the laws to only those that are hate-driven fails to capture the greater societal truth that members of Out-Groups are victimized more often than dominant groups for opportunistic reasons, not "hate." Thus, the "racial animus requirement would exclude from enhanced punishment [the numerous] criminals who have some reason other than group-based animus for targeting certain social groups"—such as greed or bravado.87 Wang does not open the door to the debate about whether "hate crime" can be said to arise from identifiable reasons at all, but this is an important of exploration. As discussed throughout this dissertation, the offender's purported reasons for committing a "hate crime" are less relevant to understanding the concept of "hate crime" than is an examination of the historical and cultural framework in which such crimes have taken shape.

Under criminological analysis, both models reflect the complications of capturing undesirable behavior in legal frameworks. The former hints at a rational calculus leading to irrational (transgressive) behavior88 described by Merton89 that erupts from structural stressors (the unfulfilled American Dream) projected onto a pre-identified Other whose attributes can be linked in the mind of the actor to the actor's own ontological challenges.90 The latter is more akin to the extreme, violent prejudice that most people associate with "hate crimes," and this impassioned animus fits well with theories about genocide91 and Katz's "righteous slaughter".92

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The energy given to the act of "hate" suggests a malevolent version the "collective effervescence" described by Durkheim, in which incitement pulls people out of their ordinary modes of behavior and "become susceptible of acts and sentiments" to which people are typically incapable.93 Under any analytic frame, the concept of "hate crimes" exceeds the breadth of what criminal laws typically are designed to address. As Garland notes with regard to punishment, ABL is "only imperfectly adapted to its current situation," and the ABL's dubious ability to prevent or control undesirable prejudicial behavior stems in part from the failure of "purely instrumental logic of a technical means adapted to a given end."94

(8) The term attempts to capture a range of harms identified in concurrently forming neologisms, such as "ethnoviolence,"95 "racially motivated crime,"96 "anti-foreigner violence,"97 and "heterosexist violence."98 Objections to ABL in many instances are directed not at its content but its sprawling reach:

[ABL] encompasses unlawful conduct directed at a wide array of different target groups. Moreover, the term refers not simply to acts of violence but also to crimes involving destruction of property, harassment, or trespassing. Thus, such disparate phenomena as cross-burnings in front of homes owned by blacks, vandalism directed against Jewish cemeteries, and assaults against men leaving putatively gay bars are brought together under

a common heading. Existing definitions specify various (a) applicable target groups, (b) forms of illegal conduct and (c) types of motivations as characteristic of hate crimes.99

(9) No legal analysis of ABL would be complete without questioning the law’s constitutionality—Free Speech, Equal Protection, Federal jurisdiction, State interests, etc.—all of which have their own subcategories of argumentation.100 Opponents argue that ABL contradicts basic constitutional principles.101 They assert that ABL punishes beliefs and thoughts, not simply actions,102 which contradicts First Amendment protections.103 And, like mid-century scholars who resisted attempts to use the U.S. Constitution’s Equal Protection Clause as a lever for protecting extra-constitutional "rights," including and especially human rights,104 the opponents of ABL are reluctant to expand legal protections to specific social groups against specific types of "speech,"105 to permit government intervention in instances of individual-on-individual violence


Some have argued that, under a liberal reading of the statute’s language "because of," prosecutors could capture all interracial crime, a large majority of which is committed by minority groups. (See Hearing on S. 1529, at 52 (testimony of William J. Stuntz) (questioning whether "because of" has any determinate legal meaning); see also Gerard E. Lynch, RICO: The Crime of Being A Criminal (pts. 1-2), 87 Colum. L. Rev. 661, 716 (1987) (noting language of RICO is similarly vague in its limitations).)


101 The constitutionality of Wisconsin's ADL-based language was unanimously upheld by the U.S. Supreme Court in 1993, implicitly supporting all similar formulations. (See Wisconsin v. Mitchell, 508 U.S. 476 (1993).)

102 E.g., U.S. Senate Committee on the Judiciary, The Hate Crimes Prevention Act of 1999, testimony of T. Lynch, May 11, 1999


beyond the meat-and-potatoes sanctions against murder and assault\textsuperscript{106} or to shape law around basic "human" freedoms from threats and intimidation\textsuperscript{107}. In the U.S., the right to free expression (even of hateful emotions) is the American analog of "human rights." To freely express is to be human, and one of the most pressing roles of law is to protect that essential freedom. But, even under U.S. law, free speech is limited; it is readily separated from the violent or other actions that may accompany the speech, and it is limited by such mundane matters as the time, place, and manner of the "speech."\textsuperscript{108}

(10) The constitutional concerns with ABL are linked to the harsh punishments that attach when "hate" is proven as an element of the crime. Although equal protection arguments do not require long sentences to be valid, the multiplication of sentences—depending on the jurisdiction, two or three times the prescribed term of imprisonment—for a motivation or state of mind that many assume is routine in criminal acts has added "célèbre" to what was already an important cause.

Garland offers a Durkheimian perspective on the "punitive passions" that motivate society's vengeful responses to actors who offend society's morality and offenses that threaten the social order.\textsuperscript{109} Constitutional protections are supposed to prevent the government from "[laying] an unequal hand on those who have committed intrinsically the same quality of offense."\textsuperscript{110} But these limitations apply only to government actions—a government that is also obliged to protect citizens from the intimidation and violence by others. The diffuse threat presented by "hate" and


\textsuperscript{108} C.T. Coker, Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act With the First Amendment, Vanderbilt L. Rev. 64, 1, 271-300 (Jan. 1, 2011).


the crime that enacts the extreme prejudice contained in the concept has spurred public support for the "tough on crime" stance of ABL. Like its punitive cousins three-strikes laws and zero tolerance policies, "hate crime" sentencing provisions may reflect more about the cultural mindset than the danger of the crime itself. According to Garland, impassioned public sentiment spurs social construction around particular criminal justice issues, and the nature of what is socially constructed evolves across history.

Modern sentencing schemes have only one serious tool in their kit: imprisonment. Therefore, an act—like a "hate crime"—that ignites the "hostile reaction on the part of the public, which demands the offender be punished," can be answered with little other than an increased prison sentence.111 Given the current turnabout on mass incarceration and long-term imprisonment—or imprisonment at all for low-level crimes—those who critique ABL's retributive extremes may gain traction, but alternative consequences to "hate" and prejudice when coupled with crime must also gain traction if ABL is to be changed.112

(11) Broader questions of the democratic nature of ABL have been largely ignored in the literature. To the extent that such discussions arise, most arguments come down on the side of freedom as an overriding value—specifically, freedom of speech—without adequately analyzing the meaning of "freedom" or "speech," the limited nature of individual constitutional rights, the particularities of U.S. history that give rise to sensitivities about bias and hatred against minority populations, or questions of balance among democratic values. Proportionality applies both to judgments about crime and punishment and to the relative weights of individual rights


in situ in the case at bar and in historical context.\(^{113}\) In other areas of sociolegal discourse, the dual democratic impulses promoting individual rights and collective will have been framed as a matter of self-conscious balance\(^{114}\) and interdependence.\(^{115}\) The idea that "[d]emocracy is based upon a delicate balance between collective security and individual liberty"\(^{116}\) is one expression of the democratic dilemma presented in ABL.

(12) Legal analyses also debate the law's fit with criminal law traditions (motive versus intent, evidentiary standards, emotion and states of mind versus selectivity, etc.). Those that decry ABL's ill-fit question the law's ability to accomplish even its sanguine goals (deterrence, punishment for actions versus beliefs, protection of vulnerable categories of people, etc.).\(^{117}\) "For those opposed to hate crime law, all of the statutory provisions would be considered misguided and inherently flawed, built on faulty assumptions and yielding unintended negative consequences."

\(^{118}\) This is largely because, according to opponents, the law wrongly focuses on the actor(s) and not the act, by examining perceptions of the victim and the traits of the offender.\(^{119}\) That ABL examines thoughts and character (of both parties) is inconsistent with criminal law's traditional parameters.


\(^{115}\) See, e.g., G. Gunther, The Supreme Court, 1971 Term, 86 Harvard L. Rev. 1, 1-306 (Nov. 1, 1972) quoting J. Marshall ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."); Aharon Barak, International Humanitarian Law and the Israeli Supreme Court, 47(2) Israel L. Rev. 181, 185 (Jul. 6, 2014) (noting that "security and human rights go hand in hand").

\(^{116}\) Aharon Barak, International Humanitarian Law and the Israeli Supreme Court, 47(2) Israel L. Rev. 181, 185 (Jul. 6, 2014).


But other scholars note that the thoughts of offenders are no more or less unknowable than the intentions that criminal law already examines. Acts of vandalism, bombings or shootings, offenses at places of worship, the use of swastikas or racial epithets all form part of the legal inquiry into the defendant's culpability, and this was true long before "hate" became part of the legal landscape. If the common critique is true that it is exceedingly difficult to determine beyond a reasonable doubt that "hate" or bias motivated a particular offense, this operates as an appropriate restriction on the application of the long sentences for which ABL is critiqued. Furthermore, proponents posit that it is precisely the merging of the severity of the harm with the traits (perceived or actual) of the victim that makes these crimes uniquely damaging—not just to the individual but also to their co-members in the "hated" group.

(13) Proponents of the laws argue that crimes motivated by hate or bias require separate and more severe criminal justice responses and civil consequences for offenders, because these crimes are inherently different and more severe than their conventional counterparts. Research has shown that, "unlike other victims, the responses experienced by victims of hate-motivated crimes when they do in fact report the incident to the police may result in an increased feeling of stigmatization or an increased feeling of future vulnerability." Also, contrary to popular expectations, law enforcement officials have observed that hate crime offenders do not target one particular group, as if specializing in particular expressions of hate, and this furthers the sense of vulnerability of all groups.

Mooney has summarized the law's problem with unique harms in the following way:
[S]ocial harm will be proportional to the substantive degree of vulnerability of the person so afflicted. The legal notion of judging objectively similar offenses, as if they were equal in harm and inflicted on equal victims, ignores the substantive differences, of an economic, emotional and psychological nature, between victims.123

(14) "Hate crimes" are said to affect communities in unique ways, because members of the victim's group may experience fear and intimidation for their own safety, and victims themselves have a more pronounced and long-term generalized fear,124 which sometimes stems from the haphazard selection of individuals who represent the "hated" group and from the fact that hate crimes often involve multiple offenders.125 Thus, the deterrent effect of increased penalties may promote public safety for society in general and for the historically victimized groups who have not been effectively protected under criminal law. "For example, one of the major arguments for including sexual orientation in hate crime statutes is that assaults against gays and lesbians have been 'notoriously under-investigated by the police and under-prosecuted by local district attorneys'."126 Penalties are said to "reinforce the message to current and

In Congressional Testimony in 2007, McDevitt, one of the leading scholars on "hate crimes," stated: ||In a study I led in 2001, we found differences in victims' psychological reactions to being assaulted, depending on whether the attack was hate motivated or not. The study examined data on hate motivated assault victims and a comparison group of non-hate motivated assault victims. Results of the survey demonstrate that victims of hate crimes experienced increased fear and indicated a greater likelihood of experiencing intrusive thoughts, even controlling for the type and severity of crime. Effects experienced by victims of hate crime were more intense and lasted longer than those of the non-hate victims in the sample.||
(Cong. Q. April 17, 2007, Hate Crimes, Congressional Testimony of Jack McDevitt, at 12-13.)
125 Jack Levin and Jack McDevitt, Hate Crimes Revisited (2002).
potential offenders that the criminal justice system (and society) considers them to be more serious.”\textsuperscript{127}

(15) "Hate crime" advocacy has drawn attention to groups who have historically been subject to discrimination and the need to protect members of these groups.\textsuperscript{128} Jenness and Grattet, who "have conducted perhaps the most thorough analysis of the evolution of state hate crime statutes over time," found that the law has expanded its reach by "expanding the number of 'protected groups,' in particular adding groups defined by gender, sexual orientation, and disability as targets of bias and hate motivated crime" and the severity of punishment when penalty enhancements apply to hate- or bias-motivated crime; but critics perceive the "special attention given to certain groups of individuals...as political correctness rather than a legitimate extension of established legal principles."\textsuperscript{129} As Duff and Garland have claimed, "penal policy is determined by political forces and the struggle of contending interests, rather than by normative argument or relevant empirical evidence,"\textsuperscript{130} and advocates have attempted to harness the existing political forces that hate crime cases set in motion.

If ABL is an unjustified and ill-advised exercise in identity politics,\textsuperscript{131} such laws may result in unintended consequences.\textsuperscript{132} Several articles have noted the potential for a backlash in the form of reverse discrimination. Moreover, principles of equity raise questions the fairness of identifying certain groups to be protected under ABL while omitting other groups. "Basing

\textsuperscript{129} Michael Shively, National Institute of Justice, Study of Literature and Legislation on Hate Crime in America 33-37 (June 2005), available at www.NCJRS.gov/pdfiles1/nij/grants/210300.pdf (depicting rapid increase in number of states with hate crime statutes over time)
\textsuperscript{130} A. Duff and David Garland, A Reader on Punishment 32 (1994).
\textsuperscript{132} F. Schauer, Commensurability and Its Constitutional Consequences, 45 The Hastings L.J. 785 (Jan. 1, 1994).
punishment on the traits of specified groups of victims can be divisive, pitting groups against one another as legitimate victims deserving of legal protection."\textsuperscript{133}

\textbf{(16)} Although "gender" as a protected category gives state prosecutors a choice of pursuing either a conventional criminal code violation or a "hate crime," the category in law and social discourse is typically associated not with the binaries of male-female, but solely with women. Thus, an offender who has attacked a woman may be charged "with either the predicate crime alone or with its hate crime analogue to enhance penalties, the relationship between gender motivated hate crime and sex crimes creates special challenges for prosecutors."\textsuperscript{134}

Gender presents particular problems for ABL legislation, and the tepid and complicated reception of gender as a protected class reflects the historical unevenness in gender relations as compared to other minority groups.\textsuperscript{135} There is a dialectic of submission and resistance in women's roles and lack of conformity with the role expectations that has not been viewed as subversive in the same way that it has been in race relations. "[T]he social structuring of ethnicity, sexuality and economic status is intimately and systematically related to the social structuring of gender and power. These various social structures are constructed concurrently and are intertwined."\textsuperscript{136} Feminist literature describes the support in religious institutions for decent treatment of women (wives), and in some religions (e.g., Quakers) women were treated with relative respect and equality, and even wives were even viewed as dominant in certain

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spheres of domestic life.\textsuperscript{137} This was not analogous to the relationship between Black and White people as understood in religion or in other spheres of social life.\textsuperscript{138} The consequences of the differences between these two protected groups, and the path by which they came to be among the protected categories in ABL, has not been the subject of direct comparison.

(17) Notwithstanding questions of incompatibility with past traditions and the uncertainty about their deterrent effects, the DOJ study found support for the symbolic effectiveness of ABL. Laws are often "tied to the idea of educating perpetrators, law enforcement officers, and the public about hate in society (e.g., Religious Action Center of Reform Judaism [RAC], 2002)," and the understanding of hate crimes may be "crucial to effectively combating them."\textsuperscript{139} The view that "hate crimes are 'message' crimes intended to provoke fear, marginalize members of society, and disrupt the social order" is pervasive in the Congressional literature.\textsuperscript{140}

Ironically, the success of ABL as a symbolic statement of intolerance for intolerance is one of the chief criticisms by scholars who view the laws as the offspring of weak politicians and strong special interest groups. They downplay the material significance of the law while emphasizing its responsiveness to groups with special interests linked to their identity. The phrase "identity politics" as applied to ABL is less descriptive than reductive, inviting negative inferences from the concerted, decade-long process of publicity and advocacy that preceded the federal HCPA.\textsuperscript{141} Symbolic uses of law have been contrasted with instrumental uses, recognizing that the former

\begin{footnotesize}
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\item \textsuperscript{137} Jerold S. Auerbach, Justice Without Law? (1983).
\item \textsuperscript{138} J. Bufkin, Bias Crime as Gendered Behavior, 26 Soc. Justice San Francisco 155 (Jan. 1, 1999) (examining differences in social constructions of categories).
\item \textsuperscript{140} 65 Fed. Reg. 122 (June 23, 2000).
\item \textsuperscript{141} Sara Sun Beale, Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?, 80 B. U. L. Rev. 1227 (2000); J. Bell, Policing Hatred (2002).
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provides important lessons about right and wrong, civil society, the social contract, and other matters that guide social relationships.\textsuperscript{142}

Also, the uncertainty about whether the "animus" or "selection" models are the activating force translates into uncertainty about the point of the punishments. If one cornerstone of ABL is the strong and public message that society will not tolerate hate-based actions against minority groups—groups which the laws themselves recognize are more likely to be victimized than other groups—does the legal punishment of "hate" rather than opportunity or "selection" undermine the law's own goals?

(18) The codification of "hate" has been used somewhat interchangeably with "bias," which is more in line with the original ADL model law.\textsuperscript{143} One question raised in the legal literature is whether any difference between these terms is legally significant?\textsuperscript{144} If the law is intended to prohibit discrimination (selectivity) in criminal victimization against protected groups, then the more moderate term "bias" fits that objective. But a law intended to demonstrate social repugnance of criminality coupled with the extreme emotion of "hate" for individuals in protected groups, then "bias" might not be narrow enough. The applicable standard of proof may support one interpretation over another: For example, a criminal act (the underlying crime) coupled with reputation evidence may be sufficient to prove an offender's "bias."\textsuperscript{145} To prove "hate," a criminal act against a victim in (or believed to be in) a protected group would have to be coupled with some (non-hearsay) expression of the offender's internal feelings of hatred. That a criminal act prompted by extreme emotion, if "hate crimes" are defined as such, is difficult under criminal law and due process standards might be desirable, since ABL was never intended to be applied routinely.

\textsuperscript{142} See, e.g., Lynn S. Chancer, High-Profile Crimes: When Legal Cases Become Social Causes (2005).
\textsuperscript{143} See Appendix ADL.
\textsuperscript{144} Lu-in Wang, The Complexities of "Hate," 60 Ohio St. L.J. 817-21 (1999); Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 80-109 (1999).
\textsuperscript{145} Federal Bureau of Investigation, Training Guide for Hate Crime Data Collection (2000).
If "hate" is not charged as a crime, but is raised to argue for a more severe sentence based on "hate," does this make improper use of the defendant's belief system? This is a question for the sentencing enhancement laws. As a sentencing enhancement (for example, under the HCSEA), is "hate" essentially the same as an aggravating circumstance? Aggravating circumstances typically focus on the way that the crime was carried out by the offender or the vulnerability of the victim, not the way the offender felt or the belief system he or she brought to the criminal act. But this too may be a legal fiction; determinations of just how aggravating the circumstances are is a subjective process. Malicious crimes (desecrating the bodies or involving cruelty) or heinous crimes (cannibalism or torture) are circumstances that increase the sentence, largely because, it is said, they caused more than necessary physical harm to the victim, and they offend the society that stands in judgment of the offender. But it is widely acknowledged that demonstrating the existence of aggravating circumstances often touches upon the defendant's character or delves into the defendant's belief systems. An extremely violent "hate crime" or one done with depravity or cruel indifference aligns easily with well-established sentencing traditions. Even if the crime did not involve cruelty or depravity, "hate" as a basis on which to enhance the defendant's sentence places an emphasis on society's extreme repugnance for the defendant's prejudice. Whether enhanced sentences for proven "hate crimes" are excessive is a separate matter—an important question of constitutionality, collective standards, and proportionality.

146 See Appendix HCSEA.
From this review of the literature, it is clear that the term "hate crime" has touched a live-wire in legal and sociological thought. One measure of the importance of the concept of "hate crimes" is the variety of analyses of ABL. The pro-con tug-of-war on the appropriateness of such a concept in criminal law reflects the colorful array of contemporary cultural concerns with equality, identity, and freedom, among other things. This may explain why the resistance to the concept in public discourse has equaled that in legal discourse. The very notion of a thing called a "hate crime" suggests the kind of "moral disturbance [with] an intensity of emotion" that affects microlevel dynamics as readily as the structural processes that are deemed to be, by some scholars, the causes of hate crimes, and by others, the result of hate, which should therefore be criminalized.\(^{150}\) The debates—pro and con—on its meaning form a Rubik's cube of interdependent sociolegal principles, which demonstrate the lack of resolution in societal struggles about freedom of expression, affiliation, and religion (First Amendment freedoms), nondiscrimination (civil rights) and equality, equal protection and appropriate penalties, identity (individual and group) and privacy (the right to have one's identity unknown or to be left alone), the uses of politics to shape discourse, and more.

Yet, few if any voices in the literature explore the influences of modern society on the emergence of the concept, its connection to the dilemmas in social relationships, or the deeper (non-legal) cultural messages the term contains. Also remarkable is the relatively muted attention given to the misalignment between the way that "hate crimes" is generally understood and its implementation in ABL.

As a point of departure, a list of considerations used to determine whether a criminal act amounted to a hate crime may be useful. The offender's intention must be related to the selection of the victim, whose membership in a particular group motivates the crime. The federal government requires "sufficient objective facts [to] be present to lead a reasonable and

prudent person to conclude that the offender's actions were motivated, in whole or in part, by bias."151 The FBI guidelines enumerate the following considerations, which may be combined or applied in the alternative to support a legally significant finding of bias:

1. The offender and the victim were of different race, religion, disability, sexual orientation, and/or ethnicity/national origin.
2. The offender made bias-related statements or gestures.
3. The offender left bias-related drawings, markings, symbols, or graffiti at the crime scene.
4. Certain objects which indicated bias were used during the crime.
5. The victim is a member of a protected group that is overwhelmingly outnumbered by other residents in the neighborhood where the victim recently moved and where the incident occurred.
6. The victim was visiting a neighborhood where previous hate crimes were committed against other members of his or her group and where tensions remained high.
7. Several incidents occurred in the same locality, at or about the same time, and the victims shared the same motivating characteristic.
8. A substantial portion of the community where the crime occurred perceived that the incident was motivated by bias.
9. The victim was engaged in activities promoting his/her race, religion, disability, sexual orientation, or ethnicity/national origin.
10. The incident coincided with a holiday or a date of particular significance relating to a race, religion, disability, sexual orientation, or ethnicity/national origin, e.g., Martin Luther King Day, Rosh Hashanah.
11. The offender was previously involved in a similar hate crime or is a hate group member.

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151 FBI, Hate Crime Data Collection Guidelines, Uniform Crime Reporting, Revised October 1999, at 4-5.
12. There were indications that a Ku Klux Klan-style hate group was involved.

13. A historically established animosity existed between the victim's and the offender's groups.

14. The victim was an advocate for the targeted group.\textsuperscript{152}

The list reflects many of the lessons of the civil rights era as well as experience of law enforcement confronted with "hate crime." But concerns about the subjectivity of these considerations remain. Is a subjective assessment of a defendant's mental state a violation of legal traditions, or simply an invitation for the tier-of-fact to test the credibility of the assessment, which aligns well with entrenched traditions? This legal dilemma is beyond the scope of this project.

The implications of this legal dilemma are relevant, however. In a Foucaultian\textsuperscript{153} sense, the emergence of the concept, with its uncertain meanings and ill-fit with prior traditions, reflects a crisis of identity, a fracturing of criminal justice binaries (deviant-conformist; victim-offender; agent-subject of social control). The concept reflects an adaptation within law to that crisis. Both the act of a "hate crime" and the legal prohibition against it can be seen as emerging within "a culture in which actors have become alienated from those processes and activities by which they recognize themselves and through which they actively form their identities."\textsuperscript{154}

Given its complex and layered history, both the legal and the social science literature on "hate crime" have left a gap in the analyses on the concept. This project attempts to close that gap by bringing the necessary historical and conceptual resources to the analysis of "hate crime" as a signal of tectonic shifts across the culture that affects social relationships, the nature of identity and privacy, the role of law as a social institution, assessments of harm and

\textsuperscript{152} FBI, \textit{Hate Crime Data Collection Guidelines, Uniform Crime Reporting}, Revised October 1999.

\textsuperscript{153} The alternative spelling, "Foucauldian," which adopts a phonetic spelling of the linguistic "tap" (treating the "t" in "Foucaultian" as a sound approaching a "d" sound) (also known as a "flap"), is not used in this dissertation.

\textsuperscript{154} Michel Foucault, \textit{Madness: The Invention of an Idea} 138 (1954).
victimization, among other things. Placing these laws in a larger cultural and historical context may explain the value of "hate crime" innovations to criminal justice.
II.C. Research Questions

As demonstrated in the literature review, the challenges presented by "hate crimes" and related ABL legislation stem from the morass of meanings attributed to and usages of a concept that is inadequately understood. The basic elements of the idea of "hate crime" legislation can be broken down into the following areas of interest:

1. *Categorizing persons according to traits*, some of which are inherent and some of which can be chosen by the individual;

2. *Organizing personal traits into categories* that comprise In-Groups and Out-Groups;

3. *Protecting particular categories* based on their status as Out-Groups (also commonly referred to as minorities, underserved, underprivileged, etc.);

4. *Using general labels for protected Out-Groups*, such that everyone could claim to belong to at least one category (i.e., everyone has a "sexual orientation"; at least one "gender"; a "religion" because the law treats atheism and agnosticism the same way it treats Catholicism or Judaism);

5. *Defining "harms" as endemic*, to encompass the targeting itself, as well as the broader effects of targeting and violence on the Out-Group to which the victim belongs;

6. *Extending the meaning of "harm" to encompass prejudicial violence* as an "ism" (i.e., racism, sexism, anti-LGBTQ+, etc.)—that is, a social attitude that dehumanizes, terrorizes, and silences the victim and the victim's community;

7. *Expanding the meaning of "harm"—and the related legal protections*—to include a generalized feeling of apprehension in normal daily life (e.g., Nazi symbols spray-painted in Jewish neighborhoods), a feeling of being specifically singled out (e.g., driving while Black), a reluctance to engage in civic life (e.g., police presence at voting stations to discourage African American turnout), or a diminishment of one's freedom to fully participate in social and civic life;
8. *Expanding the conceptualization of "violence"* to encompass acts that do not involve solely physical attacks, but which may involve acts so consequential, they alter the victim’s life in three-dimensional ways (e.g., stalking "violence"; online "violence"; "violence" to one's reputation), and acts that occur in virtual spaces (e.g., trolling, gaslighting, revenge porn);

9. *Attaching special (harsher) punishments* to criminal activity that is specifically directed against members of the Out-Groups with the intention of causing expansive harms noted in paragraphs above;

10. Using prohibitive legislation, in the form of *police powers*, to mold social behavior and protect targeted groups, with the long-term objective of changing the practices that support the attitudes that promote prejudicial violence;

11. *Implying limits to speech* when it is enacted through violence against victims, regardless of whether the "violence," if merely spoken, would not have amounted to a criminal act; and

12. *In concert with the above, expanding objectives of criminal law* without articulating the nature, extent, and justification of that expansion.

The practice of categorizing persons of every stripe is not new. Sorting people according to traits for In- and Out-Group status and, in turn, providing special protections for persons who are more vulnerable to harm and silencing because of their minority status was one of the primary goals of the first settlers in the New World. The desirability of such protections was recognized even before the development of formalized police powers and punishments that are currently used to deter violations of the protections. And the battles over their advisability and legality are also not new. But some of the specifics of these embattled elements of "hate crime" legislation signal developments so distinct to late modernity, they are worthy of careful study to understand their implications.
Before turning to these implications, we examine the building blocks of "hate crime" legislation. First, the categorization of persons, going back to the earliest settlements on American soil, reflects historical changes over time. As shown in Table 2: Categories of Persons in Archival Documentation, the categories of persons recognized at a given point in history demonstrate the concerns of the era. For example, the earliest settlers, fleeing mortal threats to the free practice of their religious beliefs divided persons into "Saints" and "Strangers." Certainly there were members of the religious community who were not saintly, and there were nonmembers who were not "strangers" to any religion or "strangers" in a personal sense to their neighbor-Saints. But the concerns of the era informed the identities that they designated with specific labels. Moving forward in history, the early focus on shaping the rights and privileges of citizenship in the young nation prompted labels related to national belonging, such as "aliens," and this continued into late 19th and 20th century with labels related to national origin, such as "immigrant." Recent claims for equality in all areas of social life by members of the LGBTQ+ community have prompted new labels, such as "gender identity."

Table 2 sketches the array of persons designated in archival documents going back to 1620. The general trend is toward greater granularity in ways of identifying one's Self.
Table 2: Categories of Persons in Archival Documentation

<table>
<thead>
<tr>
<th>Source</th>
<th>Categories of Persons</th>
<th>Historical Catalyst for Categories</th>
<th>Immediate Goal of Categorization</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009 Hate Crime Prevention Act</td>
<td>Religion, Nationality, Skin Color, Race, Sexual Orientation, Gender Identity, Gender, Disability</td>
<td>James Byrd, Jr., and Matthew Shepard murders</td>
<td>To prevent and punish violent discrimination</td>
<td>Appendix HCPA</td>
</tr>
<tr>
<td>1968 Federally Protected Activities, Section 245</td>
<td>&quot;Any class of persons&quot; Race, Color, Religion or National Origin</td>
<td>Civil Rights protests, related Civil Rights Acts, and such landmark cases as Brown v Board of Ed.</td>
<td>To protect minority citizens attempting to enjoy benefits of citizenship, e.g., to vote, go to school, run for elected office, etc.</td>
<td>Appendix FPA</td>
</tr>
<tr>
<td>1870 Fifteenth Amendment, U.S. Constitution</td>
<td>Race, Color, or &quot;Previous condition of servitude&quot;</td>
<td>Reconstruction and related Civil Rights Acts</td>
<td>To enfranchise recently emancipated African-Americans</td>
<td>Appendix 15th Amt</td>
</tr>
<tr>
<td>1870 Deprivation of Rights, Section 242</td>
<td>Alienage, Race, or Color</td>
<td>Reconstruction, lynching, and other mob violence</td>
<td>To punish lynch mobs, especially the KKK, for violence against African-Americans and &quot;Aliens&quot;</td>
<td>Appendix FABL-R</td>
</tr>
<tr>
<td>1787 Three-Fifths Clause, U.S. Constitution</td>
<td>Slaves Freedmen</td>
<td>Negotiations to diminish representative power of South in Congress</td>
<td>To prevent Southern states from gaining sufficient governmental power to perpetuate or expand slavery</td>
<td>Appendix 3/5ths Clause</td>
</tr>
<tr>
<td>1688 Germantown Protest</td>
<td>Friends and Foreigners</td>
<td>Unilateral decision by colonists to legally mandate lifetime slavery for African slaves</td>
<td>To demand equal treatment for people of color according to Quaker tenets</td>
<td>Appendix Quaker Petitions</td>
</tr>
<tr>
<td>1620 Mayflower Compact</td>
<td>Saints and Strangers</td>
<td>Failure to reach shore at the settlement where the leaders on the Mayflower had authority</td>
<td>To establish authority of the leaders even in the absence of language in the Royal Charter</td>
<td>Appendix The Compact</td>
</tr>
</tbody>
</table>
Table 2 provides a snapshot of the changes in labeling Out-Groups as Others over time, but it does not illuminate the overarching question about the way "identity" itself has been understood. If identity is generally co-extensive with one's freedom to be or express one's Self, then the table demonstrates that, in 2009, there were many more possible "Selves" by which to be identified than in 1620. Increasing granularity in expressions of identity is compatible with other examples of deconstruction in modern life, such as sexuality: The homo/hetero binary of human sexuality has become so granular, there are websites devoted to tracking the labels used to describe an extensive list of recognized forms of sexuality. Thus, the increasing granularity of identity traits is one thrust of the genealogy in this dissertation. The question might be framed as follows: How does the increasing granularity of recognized identity traits support or coincide with the emergence of the concept of "hate crime"?

Additionally, each identity label and trait in ABL reflects something about the meaning of "personhood." To have a label at all implies some basic recognition as a personhood; for example, the term "gender identity" gives the imprimatur of governmental recognition (in addition to specific legal protection) to transgender persons and others whose sexual identity is contested in contemporary social life. "Race," however, has been defined in American history to denote a lack of "personhood." In general, demands by specific social groups for sociolegal recognition have resulted in greater freedom for the members of the groups, as well as nonmembers. Turning points in the legal and social recognition of non-White "races" reflect changes in the way that "identity" is understood.

Table 3: Changes in Terminology for Concepts Related to Personhood sketches a progression in concepts like "identity" and "personhood" over time, as exemplified in several key archival documents that support the genealogy. While the terms used to categorize persons are drawn directly from the documentation, the trends indicated by the changes in terminology for the concept of "identity" or "personhood" are summations presented here to give a general sense of the direction of changes over time.
Table 3: Changes in Terminology for Concepts Related to Personhood

<table>
<thead>
<tr>
<th>Source</th>
<th>Categories of Persons</th>
<th>Historical Era</th>
<th>Trends in Concept of &quot;Identity&quot;</th>
<th>Correlated to &quot;personhood&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009 Hate Crime Prevention Act</td>
<td>Religion, Nationality, Skin Color, Race, Sexual Orientation, Gender Identity, Gender, Disability</td>
<td>Late Modernity</td>
<td>- Autonomous (within democratic structures)</td>
<td>&quot;Personhood&quot; correlated to being accepted in one's <em>being</em> or <em>doing</em></td>
</tr>
<tr>
<td>1968 Federally Protected Activities, Section 245</td>
<td>&quot;Any class of persons&quot; Race, Color, Religion or National Origin</td>
<td>Civil Rights Era</td>
<td>- Equal to others (within democracy)</td>
<td>&quot;Personhood&quot; correlated to equal treatment socially, societally, and legally</td>
</tr>
<tr>
<td>1870 Fifteenth Amendment, U.S. Constitution</td>
<td>Race, Color, or &quot;Previous condition of servitude&quot;</td>
<td>Reconstruction Era, New Birth of Freedom</td>
<td>- Enfranchised as citizen (but not necessarily in other realms of democratic structures and not necessarily for all identities, e.g., women)</td>
<td>&quot;Personhood&quot; correlated to not being enslaved, being enfranchised</td>
</tr>
<tr>
<td>1688 Germantown Protest</td>
<td>Friends and Foreigners</td>
<td>Colonial Era</td>
<td>- Predetermined (by religious affiliation, sex, etc.) or grounded (literally, by national origin, place of residence, etc.)</td>
<td>&quot;Personhood&quot; correlated to enjoying freedom of religious belief and practice</td>
</tr>
<tr>
<td>1620 Mayflower Compact</td>
<td>Saints and Strangers</td>
<td>Charter Era</td>
<td>- Derived from authoritative source (e.g., monarch or land-ownership)</td>
<td>&quot;Personhood&quot; correlated to lack of religious subjugation or limitations on wealth via land or inheritance</td>
</tr>
</tbody>
</table>
Going back in time, this dissertation examines the historical limitations on "personhood" in American history to better understand the relationship between "identity" and the concept of "hate crime." This question can be framed as follows: *How did the limitations on "personhood" and personal identity in law and social life inform the origins and emergence of the concept of "hate crime"?*

Finally, changes in "identity" have resulted in changes in "harms." The trend is not merely that demands for greater recognition spark violence or that the increasing complexity of modern social life has increased tensions among members of different groups, or even that new technologies have provided new ways to harm one another. This dissertation explores the way that the changing concept of "identity" has altered the way that "harm" is understood.

Table 4 summarizes some aspects of the trends in conceptualizing "harm," specifically harms to "identity."
Table 4: Trends in Conceptualizing "Harm" to "Identity"

<table>
<thead>
<tr>
<th>Source</th>
<th>Categories of Persons</th>
<th>Historical Era</th>
<th>Trends in Understanding &quot;Harm&quot;</th>
<th>Correlate of Engaging in Harm</th>
</tr>
</thead>
</table>
| 2009 Hate Crime Prevention Act | Religion, Nationality, Skin Color, Race, Sexual Orientation, Gender Identity, Gender, Disability | Late modernity | - Threats to one’s freedoms to be or do, i.e., to express one’s identity  
- Force or coercion to conform to traditional societal norms to avoid discrimination or violence | - Using one’s identity (especially in virtual environments) to defraud others (i.e., "performing" or impersonating to gain trust) |
| 1968 Federally Protected Activities, Section 245 | "Any class of persons" Race, Color, Religion or National Origin | Civil Rights Era | - Unequal treatment or access  
- Force, coercion, threats, or manipulation to obstruct the exercise of one’s rights | - Using freedom to protest to incite others to violence |
| 1870 Fifteenth Amendment, U.S. Constitution | Race, Color, or "Previous condition of servitude" | Reconstruction Era | - Disenfranchisement through coercion  
- Silencing communities through mob violence, arson, lynchings, etc. | - Using State sovereignty to enact poll taxes, voter ID laws, literacy tests, etc. |
| 1620 Mayflower Compact | Saints and Strangers | Charter Era | - Denying one’s valid link to monarchy or land  
- Shunning from religious community | - Falsely accusing community member of witchcraft |

To define an action as harmful, there must have been value that was taken away. As certain features of identity have gained recognition, violent acts against the person embodying the trait has been recognized as having been harmed. This question can be stated as follows: How does the emergence of the concept of "hate crime" mirror the emergence of contemporary understandings of "harm"?

The dissertation uses genealogical methods to examine these topics to articulate the historical, sociolegal, and cultural relevance of the concept of "hate crime."
III. QUALITATIVE METHODOLOGY

III.A. Genealogical Methods

So far as hypotheses are concerned, let no one expect anything certain from astronomy, which cannot furnish it, lest he accept as the truth ideas conceived for another purpose, and depart from this study a greater fool than when he entered it.

—Nicolaus Copernicus (c. 1514)

Emerging Social Phenomena

Genealogy attempts to trace the emergence and decline of social phenomena, to make visible what has been previously unseen. The tool of genealogical research can expose the reinforcing relationships among historical events, social life, and the evolution of culture expressed in the discourses that arise from the events. When the lens is focused on a particular subject, genealogy is appropriate to reveal the growth or emergence of a subject in relationship to broader social conditions. Because genealogy examines relationships, this method is sensitive to nuances within the procession of events and ideas that form the reinforcing influences of the subject of study. Genealogy does not attempt to reveal an underlying philosophy. Rather, it attempts to illuminate the cultural contributions to the emergence of a given subject over time by seeking linkages among meanings and usages within an existing context.

Beginning with the HCPA, this project moves backward in time through American history to locate and "account for" the social phenomena that preceded the concept. The project is not an attempt to explain "hate crimes," to predict the types of offenders who engage in bias crime, or to analyze the federal law, although these analyses may become useful in the research. Rather, it identifies the "causes"—that is, the social phenomena and contemporary "Knowledges"—in which this legally activated concept formed and what it communicates about the cultural

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mindset. An excerpt of the historical timeline related to major civil rights legislation as ABL emerged is depicted in Figure 1: Sample Antecedents to HCPA.

Figure 1: Sample Antecedents to HCPA

<table>
<thead>
<tr>
<th>Sample of Antecedents to HCPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1866 Reconstruction Civil Rights Laws, gave ex-slaves rights to sue, own property, and protections from violence</td>
</tr>
<tr>
<td>1883 Supreme Court invalidated 1875 and 1871 Civil Rights Acts as unconstitutional</td>
</tr>
<tr>
<td>1957 Civil Rights Act re voting</td>
</tr>
<tr>
<td>1964 Civil Rights Act permitting private lawsuits</td>
</tr>
<tr>
<td>1968 Civil Rights Act protecting activities of citizenship</td>
</tr>
<tr>
<td>1981 Model Ethnic Intimidation Statute by ADL</td>
</tr>
<tr>
<td>1988 Damage to religious property; obstruction of free exercise of religious beliefs</td>
</tr>
<tr>
<td>1990 Hate Crimes Statistics Act</td>
</tr>
<tr>
<td>1994 Hate Crimes Sentencing Enhancement Act</td>
</tr>
<tr>
<td>2009 Hate Crimes Prevention Act</td>
</tr>
</tbody>
</table>

"Snapshots" of a Concept

Genealogies articulate not genesis, but bloodlines. Inherent to genealogy is "a suspicion of the concept of a genuinely originating act—on the grounds that what makes of an act an event of origin is what happens later, so that its originating character did not belong to it as it happened—there is always in genealogy reference to some act or series of acts, both originating and continuing."\footnote{Alastaire MacIntyre, Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition 201, 213 (1990).} In the tradition of cultural historians, genealogy highlights snapshots of a concept as it takes shape within the triadic influences of history, society, and culture; while, in the traditions of criminology, the researcher maintains an awareness that the concept emerged long after the actions and attitudes to which the term applies were already in existence.

Where and how to look. Adapting Morse's basic steps of qualitative investigation, the research process can be summarized as (1) deconstructing the concept; (2) developing a
taxonomy of related terms, ideas, or functions using "sensitizing concepts";\(^\text{157}\) (3) establishing basic analytic criteria to establish a "tentative understanding of where to look" across the historical arc (Glaser's "tableau-rose"\(^\text{158}\) which requires the researcher's "energetic efforts at discovery" to become meaningful); and (4) tracing the concept's relationship to larger social trends through illustrative techniques using inductive and deductive interpretation.\(^\text{159}\)

When an event that fits the initial analytic criteria, the meanings associated with it are deconstructed into related ideas, which are part of the analytical feedback loop which builds thematic associations with other events, which are then analyzed, and so on. Based on this initial sketch of related ideas, I expect to find in other archival sources an array of historical events—such as one-on-one violent crimes, bombings of religious sites, acts or attempted acts of terrorism, civil protests, and the like—that are motivated by religion and which may be framed as expressions of religious belief (e.g., attempted murder of abortion doctors and related cases);\(^\text{160}\) actions justified by political ideology (e.g., incitement to violence based on political-religious opposition to government);\(^\text{161}\) and, in contrast, anti-government protest by religious communities (e.g., Ferguson, MO).

To this spare sketch, the genealogy adds historical background that illuminates the links among these terms and to anchor the terms in social life. For relevant issues, the genealogical analysis will examine relationships among these terms. For example: *By what historical contingencies did religion become connected in common public discourse to terrorism?* Despite its pervasive Christian influences, the U.S. is a secular society, and terrorism prior to 9/11 was typically linked not with religious ideology and practice but with political rebellion. These shifts in meaning and connotation raise other questions about the changes in religious identity in the


\(^{159}\) Janice M. Morse, *Theory Innocent or Theory Smart?,* 12(3) Qualitative Health Res. 295-96 (2002). *See also* Janice M. Morse et al., *Verification Strategies for Establishing Reliability and Validity in Qualitative Research,* 1(2) Int'l J. of Qualitative Methods 1-19 (2002).


U.S. While some of the answers may be beyond the scope of this project, the genealogical method invites these questions and, figuratively speaking, holds them in suspension throughout the analysis in case they later become relevant to the network of events, issues, and ideas in the genealogical structure.

As events are formally mapped out across history, certain understandings of the concept may fall away and others may be elevated as they are reinterpreted and refined.\textsuperscript{162} This raises several distinctive points about genealogical inquiry: contextualization, discovery, and the use of genealogical revelations to critique the phenomena that are the subject of study.

**Contextualization.** The historical arc of the events, ideas, and issues is one frame on their interpretation, and the use of archival sources anchors this project in traditions associated with historicism. But history, as an encyclopedic series of steps toward an abstract goal of "progress," is further deconstructed in genealogy. While examining the subject matter within the flow of events, genealogy calls attention to important influences on the "plot" (the emergence of the term)\textsuperscript{163} Thus, historians' concern with the determinism of chronology and sequence are de-emphasized in favor of contextualization. Context, among other things, refers to the specific conditions in which the concept of "hate crimes" emerged, including social-structural elements, socio-legal developments, and, when appropriate, the material world. These include "the semantics, the technologies, the conventions— in brief, the logics—that characterize the world in which action takes place."\textsuperscript{164}

In sociology, context is determinative; thus, history serves to illuminate context, which may help to explain phenomena. Like criminology, genealogy is both retrospective and prospective: It looks back to make projections into the future. Whereas criminology attempts to explain past behavior in order to predict future behavior, genealogy links past events to the present to

\textsuperscript{162} A useful chapter in clarifying analogous mechanics is H. Miller and Jiawei Han, title Geographic Data Mining and Knowledge Discovery: An Overview, available online at http://123seminarsonly.com/Seminar-Reports/034/Geographic-Data-Mining-Knowledge-Discovery.pdf.


"explain" how we arrived at a given idea or event. Whereas criminology may use predictions to craft preventative measures, to achieve one any number of goals—to punish wrongdoing, to deter wrongdoing, to appease victims, to appease communities, to rehabilitate offenders, to improve public safety, among others—genealogy uses lineage to demonstrate what may come next based on current "Knowledges" (which also restrict the possibilities). Whereas criminology may pursue sources of causation, genealogy pursues the historical contingencies in human social life that shape meaning and concept formation.

**Discovery, or seeing anew.** The genealogical approach does not invite researchers to "look harder or more closely," as thick description or highly focused qualitative interviews may attempt to do, but to render visible those aspects (cultural moments) of the social web (stretched across history) that frame and construct what is understood (the concept of "hate crimes"). But the process is not stepwise or static; meaning does unfold neatly, nor does it flow evenly from a single source of intentionality of the individual, community, institution, or culture in which it developed. To trace a concept over time is to follow its zig-zagging development through "wider webs of belief that constitute the social practices within which...intentions are embedded." Genealogy is a process of revelation, which calls attention to affiliations that might otherwise appear discrete and logical progressions that might otherwise seem inevitable. In that sense, genealogy has poststructuralist aims to call into question what is taken for granted (for example, that all crimes express hatred or that there are crimes that express hate and those that do not; that all crime should be regulated similarly or that such crimes should be regulated differently based on similar legal principles; and so on).

**Revelations support critique.** Foucaultian genealogy takes a "J'Accuse" approach to its subject matter: The research should not simply observe, analyze, and report, but should extend the conversation on the subject matter by way of critique. "Rather than developing and

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contributing to established discourse, genealogy develops/disCOVERs its own discourse by stating what others fail to see or choose to ignore” and thereby expose the latent assumptions on which social value is constructed. Exposure itself forms a normative critique. Foucault used genealogy to expose the reinforcing nature of power and knowledge, placing his work in a poststructuralist mold, with all its political and iconoclastic aims.

Because, in genealogy, the only elemental progress is that of chronology, events are not analyzed in a stepwise fashion, but within overlapping cycles oriented around concepts and meanings. The distorting or repressive functions of these cycles, and the realignments of meanings, form the building blocks of the genealogy. Revealing the genealogical structure of the concept ultimately will enable the project to shape a critical analysis of how the concept of "hate crime" has affected and been affected by cultural changes.

Thus, although the techniques are qualitative in the way they evolve through iteration, this project parts ways with grounded theory and other "strong-form" qualitative methodologies.

Illustrative Techniques

Illustrative techniques are used to demonstrate the relevance of certain events to a pre-established framework and to test and improve upon its propositions. The framework used in this project is Othering theory, described more fully below, which explains the way changes in Othering lead to the emergence of the concept. Relevant events are used to illustrate the changes over time in the way that Othering has been used and understood, and in the responses to it. If "hate crime" concept formation is described as a plotline organized around shifts in the changing nature of Othering, illustration is used to identify, interpret, and analyze relevant

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168 Michel Foucault, Nietzsche, Genealogy, History, in The Foucault Reader 139-64 (1971).
events and ideas along the historical arc. The strength of the framework stems from the coherence of its constituent parts, each of which is evaluated as new data are "discovered" and integrated into the framework. Thus, it is both an inductive and deductive process. Constituent parts are "tested" for their fit and function within the overall framework, not necessarily their strength individually. To demonstrate change over time, comparisons are drawn among the events, ideas, and issues, and the conceptualizations they represent.

Although illustrative comparisons are often distinguished from analytical comparisons, this project employs both to highlight the interplay between history and theory. Illustrative operations make comparisons between a theoretical framework and individual events that are roughly equivalent, according to the selection criteria (outlined below). Analytical operations employ inter-event comparisons to reveal common, but evolving, patterns, whose regularity supports certain generalizations about the theory. Using analytical approaches within illustrative techniques allows the genealogy to show correspondence between events and the theory, while allowing it to account for the modifications in repeated patterns.

Below, Figure 2: Legislative Events and Othering Categories outlines the relationship between certain legislative events and Othering categories and depicts the within-between analytical framework. This figure extracts language from a handful of laws to sketch one simple progression: The change of Othered categories of protected people under the HCPA and its related prior laws.

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As shown in the figure, the categories of individuals protected under the 2009 HCPA stem from previous legislation going at least as far back as 1968, which in turn stem from historical changes that animate the targets of Othering taking place at different points along the historical arc. An initial understanding of the processes of Othering can be understood in this figure simply through the stated changes in legislative prohibitions drawn from the archival material (detailed below): *The prohibitions expand from "willful injury" in "federally protected activities," such as voting, serving on a jury, and going to public school—each of which reflect a specific set of events during the Civil Rights era and each of which can be connected to a specific set of Supreme Court decisions and/or congressional Acts—to the any activity a person might engage in as a citizen entitled to the basic freedom to go about one's daily life without being subject to "injury or intimidation" (1968), "intimidation" (1981), "bias" (2004), or "bodily injury" (2009).*
A similar progression is demonstrated in the addition of gender-related categories. In 1968, sexual orientation was not contemplated as a protected category; indeed, to the extent that the predecessors of the term "sexual orientation" were contemplated in law, it was to criminalize sexual behavior between gays. By 2009, not only was "sexual orientation" protected under the HCPA, but the language of the HCPA also offered its protections to categories of "gender" and the seemingly redundant "gender identity," which appeared in 2014 (during the early stages of this research) in only four other provisions of the U.S. Code, two of which were definitions, and now has been integrated into numerous provisions, particularly related to labor law, educational institutions, and civil rights protections, either directly or by cross-reference. Among other things, the highly abstract term "gender identity" blurs the conventional masculine-feminine binary and ties the protection to self-conceptualization as opposed to biology or appearance. The neologism places Othering in feminist theories that view gender, in terms of identity, as "more fragile, more tenuous, less salient as both an explanatory and an evaluative category."\(^{174}\)

The rapid change in language use and the expansion of concepts associated with this term presents one example of the interaction between legislation and social life. Figure 2, depicting Othering categories, provides a snapshot of these phenomena, suggesting the way that an analysis of the concept of "hate crime" can be tied to numerous historical and cultural changes.

Figure 2 reflects new "species" of protected categories emerging in the present time, as political affiliation becomes more deeply intertwined with other aspects of one's identity, especially religion and national origin, and such categories as "homelessness" become surrogates for society's "cast-offs" who are subject to selective violence because they are disenfranchised and presumed to be vulnerable. After an analysis, for example, the research may show support for political affiliation is the new "national origin," resulting from global influences or increased insecurity in public safety, and homelessness is the new "race," given the strong undercurrent of poverty in prior understandings of racial categories.

\(^{174}\) K.E. Ferguson, *Interpretation and Genealogy in Feminism*, 16(2) Signs 322 (Wint. 1991).
In connecting the concepts with legislative action, constitutional protections, and major cases, even a relatively small slice of archival material suggests that cultural concerns with "race" and related categories of Others reach a far back as the origins of the country. Figure 3: HCPA Concepts, Cases, Laws, and Constitutional Provisions, drawn from the annotations in the pre-codified language of the HCPA, Public Law 111-84, illustrates an abbreviated depiction of the interrelationships among Othering categories, concepts in the HCPA, historical events stemming from criminal cases, and governing provisions of the Constitution. (See Appendix APL.) This figure depicts the links between categories and the other jurisprudential issues specified in the text of the legislation, such as cases and constitutional provisions. Each of the boxed items, which relate to a lexicon of personal categories, is explicitly recognized in the HCPA (See Figure 3: HCPA Concepts, Cases, Laws, and Constitutional Provisions).
The framework employed in this dissertation is the relationship between patterns of Othering and the emergence of the concept, mediated by cultural changes, crystallized for the purposes of analysis in "cultural moments" that are significant enough to have led to a legal ruling. The genealogy provides "empty theoretical boxes,"¹⁷⁵ which are filled with "evidence," in the form of historical facts and the discourse that arise from them, that confirm the role of Othering as the engine of the formation of the concept, which confirmation itself makes intelligible certain features of cultural evolution. These "moments" form the "structure of the conjunctures"¹⁷⁶ that make up the genealogy. Thus, theories about Othering patterns supports the utility of the genealogy to explain the importance of the concept of "hate crime" to American cultural identity.

III.A.1. Archival Sources

This project uses archival sources, which, although varied, share a high level of authenticity and credibility as both descriptions of events and testimonies to the cultural mindset existing at the time they were written. The documentation to be examined includes statutory language and amendments,¹⁷⁷ judicial decisions, congressional reports, legislation, newspapers and other

¹⁷⁷ The U.S. Government Printing Office online service states:

"The United States Code is the codification by subject matter of the general and permanent laws of the United States. It is divided by broad subjects into 51 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives. The U.S. Code was first published in 1926. The next main edition was published in 1934, and subsequent main editions have been published every six years since 1934. In between editions, annual cumulative supplements are published in order to present the most current information."

"FDsys contains virtual main editions of the U.S. Code. The information contained in the U.S. Code on FDsys has been provided to GPO by the Office of the Law Revision Counsel of the U.S. House of Representatives. While every effort has been made to ensure that the U.S. Code on FDsys is accurate, those using it for legal research should verify their results against the printed version of the U.S. Code available through the Government Printing Office."
media, documentaries, and firsthand accounts. The primary judicial source is the U.S. Supreme Court, which is the most authoritative voice on constitutional matters and which produces longer, more considered opinions than other courts. Nearly all opinions from higher courts explicitly enumerate the claims and legal arguments in sequence, elaborating the reasons for accepting or rejecting each claim, with references to applicable precedent. Indeed, each of these archival sources tends to follow a formulaic approach, which supports a methodical examination of the subject matter.

This range of archival material is chosen for its ability to represent a variety of perspectives on relevant matters and will serve to strengthen the interpretation of the information through triangulation. Each form of documentation offers its own distinct benefit to the validity of the research: Judicial opinions tend toward objectivity. Even though these opinions cannot be sanitized of subjective influences, the law is designed to minimize subjectivity through matrices (e.g., for sentencing), transparency (public access and media coverage), internal systems of checks and balances (objections at trial, formal procedures to request recusal, appeals processes, etc.). Higher courts explain their reasoning, and dissenting opinions are published in legal reporters. Publication opens the opinions to public scrutiny and collective response, which may influence future decisions. At the national level, U.S. Supreme Court decisions both reflect and guide the collective toward a social order consistent with constitutional principles. Constitutional principles, as applied to ABL as well as other legislation, crystallize over time in response to cases that test the boundaries of legal concepts.

| Of the 51 titles, the following titles have been enacted into positive (statutory) law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, and 51. When a title of the Code was enacted into positive law, the text of the title became legal evidence of the law. Titles that have not been enacted into positive law are only prima facie evidence of the law. In that case, the Statutes at Large still govern.

| The U.S. Code does not include regulations issued by executive branch agencies, decisions of the Federal courts, treaties, or laws enacted by State or local governments. Regulations issued by executive branch agencies are available in the Code of Federal Regulations. Proposed and recently adopted regulations may be found in the Federal Register. About the United States Code.||

The stability of judicial opinions is determined by the doctrine of \textit{stare decisis}\textemdash Latin for \textit{stand by things decided}. The guiding principle in legal rulings is the commitment to precedent, which ensures that those who are subject to the laws and those for whom the law is their profession will be able to ascertain its meaning and likely application. Although the effect of \textit{stare decisis} may be inexact, "gradual, [and] contingent upon the circulation and communication of rhetorical justifications,"\textsuperscript{179} judicial decision-making is infused with the doctrine. When there are no previous decisions applicable to a dispute, courts develop their rulings through analogy, attempting to align "like" rules to "like" fact patterns. They may also look beyond the boundaries of their own jurisdiction to borrow the precedent set in another jurisdiction. All of these procedures are guided by customary judicial hierarchies that influence the weight of \textit{stare decisis} (e.g., Second Circuit precedent is more influential than Sixth Circuit opinion; the appellate courts are more influential than local courts; etc.). A failure to adhere to these customs, although not unheard of, would generate considerable debate in legal communities and in the public discourse. More importantly, a break with precedent\textemdash as happens when the U.S. Supreme Court overturns its previous ruling\textemdash signals a measurable shift in the law that is tied to major realignments in culture. Although genealogy seeks associations, these ruptures paradoxically may spotlight more about the significant features of the genealogical structure than the gradual developments that are consistent with \textit{stare decisis}.

Congressional reports set forth the debate on a particular topic of public interest. These reports typically contain the sworn testimony of experts and laypeople, representatives of different spheres of social life, and the statements of publicly elected officials. When a policy issue is not immediately passed into law, it may be revisited year after year in Congress\textemdash as was the case with the HCPA\textemdash and the variety of voices speaking on the issue at different points in history presents a microcosm on wider public debate about the issue. This material not only outlines matters of public concern, whether or not they become policy, they also air the

intentions of the policies that do eventually become laws. The records may explain and echo the elements of a later statute, or they may debate a statute that currently exists. The language of statutes and the precedent outlined in caselaw also set forth the criteria for State intervention on individual behavior. With exceptions fully explored by Green, media reports and documentaries provide descriptive accounts of newsworthy events, guided by ethical rules of accuracy and nonpartisan objectivity. Unlike legal opinions, which are primarily written for members of the Bar, and political hearings and reports, which are primarily written for policymakers, media outlets report to the general public. In addition to the content relating the details of an event, the "spin" placed on the description can provide insights about the social conditions in which the events took place. Firsthand accounts connect us with an individual's experience of a particular moment in time, and it is their very subjectivity that may convey important experiential features of the event that cannot be obtained through alternative sources.

**Subjectivity of documentation.** While this project is not engaging in discourse analysis, there are similar concerns with the influence of discourse on social and legislative decision-making, and the research is not blind to the possibility that a given source may represent the authors' or speakers' subjective agenda. The literature related to "hate crimes" suggests that there is a greater likelihood that judges' subjective concerns border on activism. Even stare decisis does not completely filter out the "judge's socially constructed interests and ideological values, and the limitations, perceived or actual, on the exercise of those interests. 'Past constructions of law,' interpretive canons,' expectations of the judge's 'role', and policy commitments all form part of a cultural 'tool kit' from which judges construct

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interpretations and opinions." 186 Phillips and Grattet caution that "it makes sense to think about law as structuring judicial outputs, but not in the deterministic way the legal model presumes." 187 To the extent necessary to this project, the agenda of the author will be explored, with due recognition for the fact that even subjective views can provide insight into the cultural debate and the relevant concerns of the era in which they were generated.

For the purposes of this project, individual subjectivity becomes important retrospectively, when the compounding of subjective views demonstrates patterns across culture. Thus, this "weakness" in a document's credibility may thus strengthen the validity of its interpretation in the genealogical inquiry. Furthermore, because judicial opinions tend to reflect the perspectives of the community in which they were issued, they can be seen as a consolidation of contemporary social standards—even biased social standards.

**Limitations to the choice of sources.** The choice to rely on documentation anchored in legislative action presents certain limitations. Aside from consciously narrowing the scope of what might be learned if a wider net were cast, there are burdens that stem from a reliance on discourse contained legal and quasi-legal documentation. While it can be viewed as a report or digest of information, it cannot be viewed as solely reportage—that is, as constitutive of information, not constitutive of a posture.

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Figure 4: Material Available at the Government Printing Office Website

Source: www.gpo.gov/help/index.html#about_fdsys2.htm

Aside from relaying content, authors and narrators of the texts used in this research are themselves stakeholders in the action whose manner of reporting information may guide the narrative. (For a list of archival documentation available from governmental sources, see Figure 4: Material Available at the Government Printing Office Website, nearly all of which were mined for supporting material in the dissertation.) For example, when one considers that law and policymaking are infamously partisan—in fact, designed to produce results through processes
that are to varying degrees combative and adversarial—the presumption that these sources represent anything other than claims and agendas borders on the absurd. Politicians and lawyers (and, more recently, the high-art form of contemporary opinion news, which somehow passes for journalism) define themselves professionally by what camp they are in—Democrat/Republican; defense/prosecution—and judicial decisions are made up of the "stuff" of these debates. As in partisan politics, compelling legal challenges exploit the soft points of ambiguity in a precedent or in statutory language to undermine its validity. Courts accept the arguments of one side or the other, or, more rarely, they assert their own position. To be successful, the opinion typically must rely on analogies that link their decision to established jurisprudential principles. This happens regardless of whether the statute or precedent is rejected or upheld. These realities of legal and political "sausage-making" increase the researcher's burden to maintain an awareness of the posturing taking place in the discourse—not in an attempt to filter it out but to interpret it appropriately as part of the tenor of the times, which may reveal something about the culture beyond the plain meaning of the words.

III.A.2. Criteria for Initial Fit

From the historically open-ended mass of archival information, what criteria will guide the selection of historical events to be analyzed for their relevance to the genealogy? The basic requirements that the events relate to acts of Othering and that the event spur discourse on the event itself, issues it raises, and/or the ideas it engenders are only the "price of admission." The helpful heuristic devices of etymology and stare decisis in law have already been discussed. And, the requirement of significance, demonstrated by the deliberate articulation of a legal posture—newly proposed, debated and/or passed legislation, emergent precedent, a lawsuit challenging constitutional standards, etc.—establishes the "explanatory value" of an event to the genealogy.

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Outlined below are the basic criteria used to establish the possible relevance of an event, issue, or idea to the genealogy. The rationale for these gatekeeping mechanisms is also detailed below.

To establish the groundwork of potential relevance of an event, issue or idea to the concept, this project uses three primary criteria:

(1) The event must have led to a legal precedent or legislative change. The fact that an event led to or was itself a legal precedent of some kind demonstrates the magnitude of the event, issue, or idea. The legal change need not be permanent; as noted above, rulings that are later overturned may represent the most "explanatory" of the events in the genealogy. The important factor is that the event, issue, or idea was of such magnitude that the law responded in some deliberate, public way.

This criterion exploits the utility of legislative and commonlaw precedents to explore the cultural values and orientations that give shape to issues in the broader social discourse. Law, like religion, encapsulates a system of "ethos (a people's 'moral and aesthetic style and mood') and a worldview ('their picture of the way things in sheer actuality are' [or should be])"—perhaps even more than religion in a secular democracy, not withstanding the valid question of America’s current secularity.

In this project, the law is viewed as the scaffolding by which historical events gain efficacy, and it serves as a proxy for significance. In other words, major legal decisions and legislative acts identify the events, ideas, or issues that were significant enough at a given point in cultural development to invite a crystallizing legal statement about it. Without pressure from other institutions to synthesize social issues that are more diffusely woven into public discourse and make them actionable, the arduous process of law-making would not occur.

189 Clifford Geertz, The Interpretation of Cultures: Selected Essays 127 (1973). See also Patrik Aspers, Nietzsche’s Sociology, 22(4) Sociological Forum 474-99 (Dec. 1, 2007). Nietzsche argued that religion and science themselves have developed over time and so should be regarded as only two possible ways of understanding the world among many others, some of which have not yet been named. (Id.)
(2) The event must have been associated with violence. Not every act of prejudice can be said to have contributed to the emergence of the concept of "hate crimes." To make the measure of the elements of the genealogy overbroad would render the genealogy meaningless. Violence is therefore used to distinguish potentially relevant events from "ordinary" acts of prejudice that pepper American history.

Being "associated" with violence does not mean the event itself must be violent. An action, event, or issue that employs imagery might fit the criteria, if the graphical representations are so historically entwined with violence as to recall the acts of violence through the image. Obvious examples of symbols that have become shorthand for violence against specific social groups include swastikas and burning crosses. The fact that a swastika is associated with the attempted extermination of the Jewish population in WWII does not necessarily mean that WWII then becomes part of the genealogy of the concept of "hate crimes." Rather, the events in which the symbol is used to convey the threat of violence in the U.S. may become part of the genealogy after further analysis.

(3) The event must have stemmed from repeated acts of Othering. This criteria filters events that were one-offs, and those that emerged from social processes unrelated to Othering. The repetition of the acts supports the working assumption that patterns of Othering reflect important social problems. Repetition of similar acts of Othering communicates information message about the way that Othering is understood and the failure to find appropriate responses to it. Examples that fit this criterion are the lynchings of African Americans, which reached a peak in the early part of the 20th century, and related acts of intimidation, such as cross-burning.

Patterns of Othering may communicate information about structural matters, such as actual or threatened disruptions in the social order or a rebellion against the social order. In the context of "hate crimes," structural (macrolevel) pressures that precipitate repeated acts of
Othering may be seen in interpersonal (microlevel) crime. For example, when new legislation is contemplated or passed, as in the lynching example above or in the more recent advocacy for same-sex marriage rights, hostilities toward the groups involved (African-Americans, LGBTQ+ persons) are manifested in repeated acts of Othering against members of the group or their supporters. Alternatively, Othering at the interpersonal level, if repeated at different places or points in time, may manifest structural phenomena. For example, the repeated bullying to which Dylan Kliebold and Eric Harris attributed their shooting and suicide at Columbine High School, CO (1999), was viewed as part of a nationwide problem of Othering that lead to antibullying policies. Therefore, this project attempts to leverage the repetition of interpersonal acts to understand what those patterns may communicate about broader cultural pressures.

(4) The event must have important implications for all *four actors in the "square of crime."*¹⁹⁰ The event must generate discourse that debates the legitimacy of the position of the State, offenders, communities, and victims. For example, the discourse on "hate crimes" debates the legitimacy of the State in regulating internal emotional states of people. It debates whether the laws infringe on the fundamental freedoms of offenders. It argues about the effects on communities when social groups are harmed or intimidated. And it discusses the dual effects on victims of criminal violations coupled with extreme prejudice. An example of an event that would not spark these types of debates is car-jacking: Few would argue against the State's legitimate role in preventing and punishing these crimes; few would suggest that offenders had a legitimate claim to steal a car; and so on. An event that engenders debate about these four constituents passes another hurdle of relevance in that it reflects wide-reaching social effects that may change culture or reflect a change in the culture.

These four criteria narrow the focus of the research while expanding the possibility for unexpected discoveries in the analysis. Unlike the other studies of "hate crimes," this project does not treat the concept as one whose primary importance rests in the sphere of law. Many scholars have traced the legal-historical roots of the term back to Reconstruction or, in some instances, even hundreds of years earlier. But these scholars place the concept wholly within legal frameworks. The social context that gave rise to the concept and its antecedents is examined as a continuous system, with law as the maypole to which social occurrences are tethered. In this project, social occurrences are not used in the service of understanding the law; the law is used in the service of understanding social conditions and cultural change. In this project, law is one of several discursive threads used to examine the emergence of the concept.

The frame of law allows the research to examine the retroactive labeling of and punishment for actions that were initially permissible. This necessarily explores the transition from *de jure* punishment (criminal prohibitions on the books) to *de facto* punishment (actual punishment in court cases), which, among other things, reflects the interaction of public sentiment with judicial sentiment. The history of lynching in the American South is a good example of illegal violent Othering that increased with formal pressures toward racial equality, which gave rise to other forms of social resistance and which required repeated bouts of new formal legislation and court cases, in tandem with changes in public attitudes, to eventually end the practice.

Additional discursive threads incorporated by these criteria include the media and the public. The feedback loops involving events that lead to cycled of public reaction, media reports, reactive public sentiment, and so on, are an important force in the emergence of the concept. If ABL is an artifact of the pressures of penal populism that promote harsh punishments,\(^{191}\) like those in hate crime sentences, these criteria establish a threshold for the type of media-fueled popular rhetoric that may be relevant to the term "hate crime." But these criteria would also encompass the very different media-public discourse at other points in history about hate-

crime-type activities that were not punished, were punished as simple crimes, and/or were viewed as beyond the reach of law.

These criteria also allow for the possibilities attendant to the changing nature of Othering and the make up of Othered groups, some of which involve "deviants" who have, over time, occupied both sides of the cultural divide between tolerable and punishable (e.g., homosexuals, once punished by law as deviants, are now protected by anti-bias legislation as a vulnerable population, while ideologically-based groups, like the KKK, once tolerated by their communities and the law, are now considered deviant and punishable under antiterrorism statutes). In fact, ABL represents a turnabout in these phenomena: Groups that were and are subject to Othering are formally protected under a law that turns offenders into Others. In other words, for ABL to work, the person prosecuted under the law is subject to prejudicial treatment: By virtue of the legal sanctions, the victim may not be viewed as less of an Other, but the offender him- or herself is proven to be and publicly exposed as an Other. And the offender's Otherness is not simply that he (or she) is a felon, no longer a member of law-abiding citizenry. He is given special status as an Other because of his habit of bigoted Othering. These criteria call attention to the complex and changing patterns of Othering. Whereas other research methods may tend toward binary categories, genealogical studies are suitable to examine simultaneously held contradictory views. Genealogy and illustrative techniques are useful tools for analyzing such contradictory dynamics in their historical milieux.

Finally, in these criteria, the terms are understood flexibly. "Activities" are treated as expressions—verbal, symbolic, or performative—that communicate information about broader social concerns. Similarly, "events" may include or be associated with issues, ideas, material innovations, and the like. In that way, these criteria are both expansive and specific enough to encompass the relevant social conditions in Young's inclusion-exclusion dialectic that sharpen the impulse to Other, which may bring into relief certain attitudes within American culture
about such fundamental principles as freedom, equality, tolerance, privacy, identity, and public safety.192

III.A.3. History and Cultural Systems

All definitions of civilization belong to a conjugation, which goes: "I am civilized, you belong to a culture, he is a barbarian."

—Felipe Fernández-Armesto (2000)

Culture is understood simply as what is cultivated by the aggregate of individuals living together in society and social institutions.193 Culture is an abstraction used to express a bundle of social patterns, collective behavior, and shared systems of beliefs that permeate (or nearly so) all aspects of a given social group that are vaguely expressive of a shared identity.194 One cultural historian, borrowing from others, has described it this way:

The repetitive routines of our life and work that we largely take for granted [are] clues as to how individual people shape culture. They testify to the tactics they employ in order to appropriate a personal or group-related living space and invest it with their own meaning. This takes place in an environment offered to them as a strategic 'concept' from above or from the outside by the institutions that wield power, such as the state, the community, the business world, or any number of other intermediary corporations. People accept those

193 In different disciplines, the term "culture" is used more broadly—so broad in fact that it is the unifying concept for virtually everything that is indicative of a given society: language, typically dress or costume, patterns related to mealtimes and methods of cooking, and, with the expansion of genetic literacy, even ancestry and the particular way of understanding of ancestry is understood in terms of "culture." Sociological perspectives have been supplanted by seemingly more holistic approaches. The concept of "culture" now includes all of the features that make up daily life of a given people and the history of the assumptions on which their lives are constructed. (See generally, Alessandro Arcangeli, Cultural History: A Concise Introduction (2012).)
institutions as conditions and frameworks for their action, but...[t]hey 'poach' on the territory of others in order to realize their own culture.\textsuperscript{195}

Culture is a realm of creativity and human agency influenced by social institutions, social structure, and social interactions. The distinction between a society and a culture is somewhat contrived, since "the cultural perspective has constantly competed or been woven together with the social."\textsuperscript{196} Cultural identity and collectivity can be known by shared points of reference—the similar ways that different individuals imbue their experiences with "importance and implication"—which over time exhibit both constancy and flux. The shared points of reference serve as the glue by which society experiences continuity and by which culture becomes something abstract, outside of the individual. Thus, culture can be conceptualized as a pattern of creative attributes,\textsuperscript{197} reflecting both innovation and resistance\textsuperscript{198} from a tension between individual and collective,\textsuperscript{199} as well as the norms and institutions that comprise social systems or systems of individual personalization.\textsuperscript{200}

Emphasizing its enterprising quality, culture has been described as "the search for meaning, and the meaning of the search itself."\textsuperscript{201} Thus, "culture" is as much about the formulaic expressions of hatred toward a particular social group as it is about the victim-offender dyad in which the hatred is given force; and it is as much about the language of law that implies a history of violence against a protected category of people as it is about the criminal violence that gave rise to the protection in the first place.

\textsuperscript{195} Alessandro Arcangeli, Cultural History: A Concise Introduction 68 (2012) (describing the "symbolism of the unconscious" by which people may oppose "official, 'utopian' programming" in deterring their own "culture").
\textsuperscript{196} Alessandro Arcangeli, Cultural History: A Concise Introduction 3 (2012).
\textsuperscript{197} Zygmunt Bauman, Culture as Praxis (1973).
\textsuperscript{198} Jock Young, The Criminological Imagination 204 (2011).
\textsuperscript{199} Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation (2008).
\textsuperscript{200} Talcott Parsons, Structure and Process in Modern Societies (1960).
\textsuperscript{201} Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 2 (2008).
The term "culture" serves as an easy shorthand to describe a complex feedback loop with symbolic interactionist mechanisms, articulated by Mead, that feeds both self-identification and Other identification.\textsuperscript{202} Culture is at one time both reinforcing and innovative: It supports both "creativity, invention, self-critique, and self-transcendence," and continuity and stability as "a handmaiden to social order."\textsuperscript{203} The order arises from Weberian and Durkheimian conceptions of culture as a set of general value orientations.\textsuperscript{204} The concept involves a tension between factors that create cohesion through "collective belief in tradition" and factors that invent alternatives to these beliefs and traditions.\textsuperscript{205}

To be cultivated by people, "culture" must be shared—collectively made and collectively understood. The sharedness of what is cultivated loosely constitutes a collective identity, articulated through publicly available systems of meaning in which social and historical events are understood within cultural "webs of significance."\textsuperscript{206} These "webs" demonstrate the strong link between culture and values, and even more importantly, between culture and "orientations," or worldviews. An orientation implies directionality—progression to or regression from a particular juncture, or (dis)harmony with a fixed perspective. In examining a concept like "hate crime" that is infused with moral meaning, it is the departures from certain general orientations that become the interesting historical "moments" that are "cultivated" over time that form the sites of inquiry of this project.

What is cultivated occurs diachronically, adapting over time and within a given context; "culture" is affirmed in and altered by the practices of its time. In that sense, the shorthand term "cultural moment" also acknowledges its limitation. Plucking out of the flow of history a particular event or document may be useful to illustrate real processes and meanings, but these

\begin{footnotesize}
\begin{enumerate}
\item George Herbert Mead, Mind, Self & Society From the Standpoint of a Social Behaviorist (1934).
\item Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 3-4 (2008).
\item Clifford Geertz, The Interpretation of Cultures: Selected Essays (1973).
\end{enumerate}
\end{footnotesize}
"moments" represent a somewhat artificial (synchronous) reality offers a useful exploration of the dangers of "pausing" an historical event to examine it separate from its contextual "baggage"—whether historical, legal, or otherwise—without circling "back from the synchronic analysis to enrich our understanding of the contingent historical circumstances or structured social tensions that produced the cultural performance in the first place."²⁰⁷ Examining an event as a fixed item within the model requires "bracketing the question of the processes that produced it in order to work out its internal logic."²⁰⁸ Also, research looking backward in time has some similarities to research undertaken in another geographic place; the impulse to interpret the unfamiliar (observations) according to the familiar (researcher's knowledge base) requires assiduous attention to the ability of the material to provide its own explanatory cues.

The events and documents upon which the genealogy is built are contingent on historical norms and societal development; Foucault quotes Durkheim in emphasizing that a "social fact can be said to be normal for a given society only in relation to a given stage in its development."²⁰⁹ Perry suggests that crime is relative and historically and culturally contingent, and in line with Durkheimian views on conditions of social disruption that "breakdown" norms, new categories of deviance are defined via the lawmaking process.²¹⁰ And Sahlins emphasizes the way that even accidents can shape future events, especially if the meaning made of those events are among the forces that shape the way they affect other historical events.²¹¹ The varieties of disruptions along the historical arc that gave rise to the emergence of the concept of "hate crime" may explain the difficulty in giving an accurate and effective definition to the term.

²¹⁰ See, e.g., Barbara Perry, In the Name of Hate: Understanding Hate Crimes 57 (2001). See also Kai Erikson, Wayward Puritans: A Study in the Sociology of Deviance 200 (2005 [1966]).
Certainly, historical contingency can explain the diversity of definitions that exist in the U.S. and around the world.  

### III.A.4. Interpreting the Documentation

> [Y]ou will very often read parts of many books from the point of view of some particular theme or topic in which you are interested and concerning which you have plans in your file. Therefore, you will take notes which do not fairly represent the books you read. You are using this particular idea, this particular fact, for the realisation of your own projects.


The archival information about events that fit the initial criteria presents documentation about specific events in history, issues affecting social life, and innovative ideas or material goods, among other things. The documentation contains imagery and discourse that portray these matters of public concern and the meaning made of them. Imagery may take the form of photographs of events or people in newspapers and books that depict or have significance to the concept of "hate crime." (Burning crosses, swastikas, and confederate flags are examples.) What happened, how it occurred, when, where and by whom form the most basic information contained in the sources, and layered on this descriptive discourse are further descriptions of how the events, issues, and ideas are understood (why they occurred), how they *should be* understood, and what should be done about it, which may take the form of debates, polemics, policymaking, and plain commentary, which in turn generate more discourse, and so on. In this spirited and often dialectical way, meanings are made, altered, understood, or misunderstood.

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212 See Section II.B.
The documentation provides a window on what Young described as the "blurred and contested nature" of history-making.\textsuperscript{214}

**Magical Cubistic Perspectives.** Regarding the legal prohibitions on "hate crimes," it seems nearly everything is blurred and contested. Commentators have raised questions about the concept's intended legal meaning,\textsuperscript{215} its social meaning,\textsuperscript{216} its constitutionality,\textsuperscript{217} its deterrent value,\textsuperscript{218} its symbolic value,\textsuperscript{219} its moral efficacy,\textsuperscript{220} its threat to American libertarian values,\textsuperscript{221} and cynically, its exploitation by social groups to leverage political power through punitive control of their potential oppressors.\textsuperscript{222} And, the division between supporters and detractors of the laws do not line up neatly according to a liberal-conservative axis, nor do they align with concept-versus-law stances. Some vehement supporters of the laws admit to uneasiness with the conceptual foundations, while some adamant detractors confess to an admiration for the concept. These debates are an attempt to sharpen the edges of a blurry law by contesting its conceptual "fit" with criminal law traditions. Or, on the other hand, with feasible social goals. Or, perhaps with long-overdue moral imperatives. The scholarship on "hate crime"


\textsuperscript{218} Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20(2) L. and Philosophy 175 (Jan. 1, 2001).


reflects a "magical cubism of perspectives," fractured by the differences between "hate and bias crimes and virtually all other sorts of crimes with which the criminal law is concerned." \(^{223}\)

These fractures seem to reflect an incursion on the law of the kind of hyperpluralism Young envisioned that runs counter to the law's traditions. \(^{225}\) For good reasons (having to do with bedrock ideals related to rule of law), law attempts to be assiduously predictable, guided by values of stability, logic, and limpidity. If law is founded on the continuity of rules of precedent, for which the sine qua non are its formulaic, blindly applied prescriptions of guilt and punishment, then the debate sparked by "hate crime" laws signals a crisis, because their implications are so "practically and philosophically profound." \(^{226}\) These laws seem to call into question our agreement about what exactly law is, what it can do, and whether it is in fact related to the concept of justice and, if so, what exactly that concept is, and so on. In the intellectual and practical skirmishes over the reach of "hate crime" laws, the many voices taking a stand on the subject, not surprisingly, assert their own legitimacy. But, because this concept has hybridized seemingly settled matters of jurisprudence—"[encouraging] a double-take" \(^{227}\) among scholars and practitioners alike—these voices must also take pains to specify not only why their perspective is valid but how they have interpreted the whole of criminal law and even the philosophy of punishment as a foretoken of their arguments.

This raises one hurdle of this research project: How then should the events be interpreted? If the presumptions of the structure in which the concept emerged are called into question by its emergence, on what scaffolding can an interpretation be built?

**Interpretive strategies.** Genealogical strategies, like the strategies of grounded theory, involve processes of discovery—not simply through observation (or even the reflexive learning


\(^{225}\) See Jock Young, *The Vertigo of Late Modernity* (2007).


that can occur by offering "rich description," but through recontextualization. Meaning is "discovered" by turning the kaleidoscopic lens on the subject of study to vary the point from which it is interpreted or the stance from which it issues. Language usage may suggest the user's cultural perspective, moral or political agendas, claims-making, and access to power, among other things. Although these subjective discursive mechanics are not the research aim of this project, they may be useful to further add hue and "emotion" to the interpretation.

Recontextualization is somewhat distinguishable from Young's "detournement," in which an inversion of everyday coded meaning is used to undermine, analyze, or critique that taken-for-granted meaning. Detournement is a tool of cultural criminologists by which they "[mine] late modernity's own saturations of image an information for alternative understanding." Genealogical interpretation embraces the fundamental assumptions of critical criminology that "the world may be different from what it is": What is discovered in this project will not capture objective reality or fundamental truth, but discoveries may present important "[grains] of social reality" that reveal something about human predicaments and "ironical" insights on the functions and consequences of legislative innovation, of Othering, of physical and intellectual inventions in society that are implemented in crime and victimization, among other things.

Genealogy employs qualitative analytic techniques to advance the theoretical underpinnings of the structure. In this project, the illustrative techniques used to build the genealogy exploit the systematic processes of qualitative interpretation, such as those used in grounded theory,

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229 Jock Young, The Criminological Imagination 105-06 (2011). See also Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 204-06 (2008).
230 Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 199-201 (2008).
233 W. C. Chenitz and J.M. Swanson, From Practice to Grounded Theory: Qualitative Research in Nursing 3 (1986); see also I.T. Coyne, Sampling in Qualitative Research: Purposeful and Theoretical Sampling; Merging or Clear Boundaries?, 26(3) J. of Advanced Nursing 623-30 (Jan. 1, 1997).
constant comparative analysis,\textsuperscript{234} category development based on historical relationships and cultural interrelationships among elements in the data,\textsuperscript{235} and purposive "selection" of further data from the archival documentation to "check out" and refine the framework.\textsuperscript{236} All of these processes emphasize important features of illustrative techniques: They are iterative, comparative, based upon associations among the elements, and they demonstrate intentionality toward building a coherent structure by which theory is advanced.

The researcher "continually asks questions as to fit, relevance, and workability" about the emerging taxonomy.\textsuperscript{237} Although the processes are systematic, the findings may be messy. Like Foucault's archeology,\textsuperscript{238} the process sifts through the "back alleys...and dark corners" of historical events to locate "dirty ambiguities" of Othering and "hate."\textsuperscript{239} These patterns of Us-Them phenomena are use to illuminate the theoretical model (detailed below). Unlike the reverse engineering of grounded theory, however, the documentation (the data) is used not to build a theory but to extrapolate the theory. Historical events are the entry point, and the discourse and images engendered by them will be examined for meaning, interpreted and reinterpreted, as connections are drawn to Othering as a catalyst for the emergence of the concept of "hate crime."

**Principles of Interpretation.** Scholars of the hard sciences observe that, if your studies take you far enough into a particular discipline, you will come out on the other side in another discipline—for example, a deep study of biology may lead you into physics, and deep scholarship in astronomy may lead you into chemistry. Qualitative research also can be described this way: Qualitative approaches require researchers to acquire a deep knowledge of their material such

\textsuperscript{235} W. C. Chenitz and J.M. Swanson, From Practice to Grounded Theory: Qualitative Research in Nursing 3 (1986).
\textsuperscript{236} Howard S. Becker and M. McCall, eds., Symbolic Interaction and Cultural Studies 253 (1993); Michael Quinn Patton, Qualitative Evaluation and Research Methods (1990).
\textsuperscript{238} Michel Foucault, The Archaeology of Knowledge (1974).
\textsuperscript{239} Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 158-59 (2008).
that they come out on the other side of their preconceptions, where the material can be seen as if from a different discipline. The freeform possibilities of qualitative approaches require researchers to interpret their texts iteratively, like an archaeologist revising his or her interpretation of a ceramic shard in light of newly discovered pieces.

In this project, the guiding principles can be found in legal developments. The interpretation of the archival material is anchored in both criminological/sociological and legal training. With the law as the backdrop, the process requires some agility in moving between cultural eras to make sense of the threads of social progress. The process of interpretation also requires an appreciation for the differing effects of technological or material advances versus social advances; notably, the former (usually) creating permanent change and the latter tending toward cyclical effects. In this type of project, the freeform nature of qualitative research and the somewhat bohemian nature of bricolage benefits from a disciplined implementation of methods.

**Taxonomies of Interpretation.** Because the concept "hate crime" is activated by legal meaning, the term's discursive threads are viewed as presenting social problems in relation to which the social institutions have a role. For example, the concept did not emerge in religious circles as a systemic reaction to the "sin of hate." The concept did not take on social significance for educators as a problem of "illiteracy," nor did counselors develop remedial plans based on bias as a learning disability. To the extent that discourse expresses the "normative beliefs, values, and attitudes collectively held by groups of actors in a society at a given time,\(^{240}\) discourse analytic tools may be useful touchstones in developing a taxonomy of the concept. These cultural sensibilities are part of the engine that drives transformations of meaning about events and ideas. Sensibilities inform "the moral foundations that govern normative decision-making,"\(^ {241}\) which migrate up and down the levels of cultural conversation—for example, down from the Supreme Court and up from news reports, and the reverse—and at certain moments coming to rest in judicial opinions that "settle" (temporarily) certain aspects of matters of public


debate and governance. Discourse analytic approaches are "useful in illuminating the 'interpretive repertoires' utilized to construct"\(^{242}\) an understanding of a given subject,\(^{243}\) and through discourse, we learn the "Knowledges" active at a point in history or within a particular social institution.

As an entry point for developing an interpretive taxonomy that will support the genealogical process, the language of the HCPA itemizes several important concepts: bodily injury, race, color, ethnicity, sexual orientation, religion, gender, gender identity, or disability, and of course, hate. (See Appendix HCPA.) The literature on ABL more generally discusses the appropriate place of "hate" in legislation. (See Section II.) Cases of "hate crime" force us to contemplate, among other things, the power of subjective perceptions, the limits (or limitlessness) of the freedom to hold belief systems that frame them, the blameworthiness (and blamelessness) of victims for characteristics of their identity they cannot choose, the harms associated with intimidation, and the nature of "identity" as it is lived, threatened, violated, and expressed across society. (See Sections V, VI.)

### III.A.5. Social Constructionism

A social constructionist stance on the concept of "hate crimes" is somewhat inevitable. The concept was cobbled together from two terms with social and historical dynamism to describe previously occurring "real" activities whose definitions and function in the social-historical world had dramatically changed.\(^{244}\) The concept encapsulates the passion of the violence that the term "hate" describes along with the dispassionate connotations of rule of law to harness widespread disapproval for both the act of prejudice and the actor. "Hate crime" marries the negative attributions of prejudice with the legal prohibitions against undesirable behavior, turning the offender into the object of hatred and the victim into the one protected. The roles of

\(^{242}\) Nigel Edley, *Unravelling Social Constructionism* (June 1, 2001).


\(^{244}\) See Nathan Hall, *Hate Crime* 54-55 (2005).
the parties are thus inverted. (For a discussion of "inversions" as a theme in this dissertation, see Sections V.B, V.C, VI.) This inversion is an important dynamic in part because it represents a cultural attitude about acts we now call "hate crimes" that was not the dominant attitude when these acts (e.g., lynching, violent obstruction at schools and voting booths, etc.) governed race relations.

Yet the construction of the concept is ironic, since the term as it has been implemented accurately describes neither the emotion involved, in layspeak or in law, nor the relationship of the act to criminality or criminal law. The term's contingency on social and historical processes reflects the way that meanings emerge in interaction, become sedimented, and finally become taken for granted over time. Entrenched meanings remain relatively fixed in social institutions, such as law, and these processes are not entirely within the control of actors within them. Social constructions must exist, in part, independently of us, even as they are shaped individually (through agency) and collectively (through structures), and shaped by material circumstances and ideation, "in circumstances not chosen by ourselves, but encountered and transmitted from the past." (See Sections V.D.3-V.D.7.)

But a social constructionist stance on the emergence of the concept of "hate crimes" concludes quickly in tautology: The concept was socially constructed from social and historical processes that gave currency to the emergence of the concept. Exploring the "how" (over time, through shared discourse, with the capstone precedents of judicial opinions and congressional Acts) and the "why" (to express negative judgments about violent discrimination, to link bigoted hatred with criminality, because civilization requires it) is merely preparatory to analysis and, without more, may lead to the kind of sociological sermonizing that fails to add new ideas to, but merely supplements the current literature, which itself contains some social science "noise."

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"Hate crime" might be a term constructed from social ideation, but the concept is linked to actual events and to frame it as merely a reflection of a process of social construction is to ignore the dead bodies hanging from nooses in the American South before the term was ever used.

Genealogy goes beyond social constructionism to examine the pre-existing narratives from which the meanings were constructed. That this concept emerged from a set of "building blocks" available in the broader cultural landscape acknowledges the extra-legal nature of the term and the act that has been criminalized, as well as the dynamic nature of victimization. As others have observed, crime, like victimization, is not an event; it is a process. Thus, several important trajectories will be examined in the research as part of the genealogy:

1. The historical trajectory from the current explicit impermissibility of certain types of violence to the tacit permissibility of similar activities (e.g., lynchings);

2. The socio-legal trajectories of the keywords in the language of the laws, including the expansion of the specific categories of protected identities (e.g., gender, gender identity, sexual orientation, etc.) and changing perspectives on protected conduct (e.g., free expression, free religion, rights to protest, etc.); and

3. To pursue latent understandings that the concept may represent, the disjunction between the concept's social usage and its legal implementation.

Research on the social construction of legal categories can be traced to the labeling theories, interactionist perspectives, and concepts such as ressentiment and "essentialization" that developed from the sociology of deviance of the 1950s and 1960s and form the cornerstones of the Othering theory used in this project. This theoretical backdrop operates at two levels: pursuing macro-level explanations—for example, the way "moral entrepreneurs" and other organized extralegal entities use mechanisms of policy-making and legislative reform to

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construct and promote definitions of deviant behavior. Jenness and Grattet frame the emergence of ABL as an example of these activities, and feminist theorists have attempted to simultaneously call attention to the way that femaleness has been pathologized through these processes and to use these processes to take control of the meaning of related concepts to achieve the "entrepreneurial" goal of greater equality and gender protections under ABL.

The second line of research emphasized the interactional nature of social construction. This inquiry examines micro-level processes in which individuals share meanings through their interactions, which produce labels identifying certain forms of deviance or deviant "Others." The labels may be applied to other actors or to specific actions, both of which hinge upon certain characteristics of the deviant’s identity and produce repercussions for the one labeled "deviant"—or the one protected by law. This project suggests a variation of these lines of thought: That macro and micro processes are integral to each other and are both influenced by historical context, cultural identity, and the Knowledges present in other spheres of social life.

253 Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation (2008).
III.A.6. Knowledges and Narratives

Roughly a third of American voters think that the Marxist slogan "From each according to his ability to each according to his need" appears in the Constitution…[These voters’] rights may happen to signify human dignity to us, but corpse-eating once signified respect for the dead in the Fore tribe of Papua New Guinea.

—Caleb Crain, The New Yorker (Nov 7, 2016) (quoting others)

In the process of "discovering" the genealogy, this project continually seeks to identify the cultural Knowledges that were necessary for the concept of "hate crime" to emerge. Like cultural narratives, Knowledges come to be "possessed only in and through participation in the history of dialectical encounters...[which require] shared understandings of meanings and shared discriminations of genres" in narratives that are exchanged, a necessary condition for which is "the possession of shared standards for identifying and understanding genres."254 "[K]nowing not just what was said, but by whom and to whom in the course of what history of developing argument, institutionalized within what community, is the precondition of adequate response...something itself characteristically presupposed rather than stated."255 Phillips and Grattet define legal precedent as a type of narrative that is constructed from present knowledges, noting that, "if hate crime laws were uniformly struck down, we could tell a similar story about a different set of precedents."256 As with legal precedent, "all claims to knowledge are the claims of some particular person, developed out of the claims of other particular persons."257 Narratives and knowledges thrive in discourse, and the discourse we speak speaks to us.

Knowledges—the development of ideas, philosophies, and things—emerge within specific material and historical circumstances, which generate and limit our Knowledges. Some theorists suggest that the codependence between what is formed (known) and what exists (circumstances) is so tight that knowledge and circumstance are inextricable social processes. The social conditions in which an idea develops shape the idea and the discourse related to it. In that sense, genealogy is—perhaps uniquely equipped—to expose the relationship between the conditions of the concept and the meaning of the concept at specific points in time.

One a basic level, the evolution of the categories of people protected by ABL reflects a change in the "Knowledges" at points in American history. The change in these categories illustrates the way that "truth" is framed by the available discourses. In the highly differentiated social environment of late-modernity, the social sciences have not been able to articulate uniform expression of reality that would not delegitimize the experiences of at least some who share in the larger cultural discourses. In considering the role of discourse in creating legitimacy, one question that resonates in the search for Knowledges in the project is whether the concept of "hate crime" emerged as a function of changed meaning (new Knowledges) about historical events and actions—i.e., the realization that a new term was needed to reflect the new meaning attached to actions like lynching—or whether the term emerged to change meaning (to create new Knowledges). Or both.

III.A.7. Concept Formation

I well know what a splendidly great difference there is [between] a man and a bestia [literally, "beast"; that is, a non-human animal] when I look at them from a point of view of morality. Man is the animal which the Creator has seen fit to honor with such a

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258 See Michel Foucault, The Archaeology of Knowledge (1974).
magnificent mind and has condescended to adopt as his favorite and for which he has prepared a nobler life.

— Linnaeus (c. 1774)

Linguistic Containers for Abstractions

Concepts—rooted in Latin conceptum—described broadly, are the shorthand expressions of that which has been conceived. They are linguistic containers for abstractions. To borrow from Geertz,261 they are designations of Knowledges and designations for Knowledges. They are representations of certain understandings—not necessarily the thing itself, nor the understanding itself; rather concepts are referents of a totality of what is comprehended, and for that reason, they demonstrate the crystallization of meaning(s) that has been made. Concepts label or describe what is comprehended, and they imply meaning beyond the label. Concepts are both denotative and connotative. When meanings or observations can no longer adequately be expressed in available concepts, new concepts are formed.

Concepts convey connotations. Concepts may develop organically from the needs of actors in a given social milieu. Aside from the goal-directed linguistic inventions discussed elsewhere, concepts may be created to express something that did not previously exist (for example, an iPad or a drone) or was previously not conceptualized (for example, a Freudian slip or a mulligan). In the case of the concept of "hate crimes," one area of interest in its formation is the that the term, like the latter examples above, conceptualizes actions that previously existed, but unlike the latter examples, it places an explicit value judgment on the actions that is intended not simply to name the actions or remind actors and observers that the acts are criminal, but also to communicate a strident social scorn for such actions, and by implication, the actors who engage in them. Both "hate" and "crime" have unwavering negative connotations.

Distinguished from the bland legal requirements for bias crimes in some state laws that parse *selection* of a victim from *animus* toward the victim, who is perceived to be a member of a protected group, the concept of "hate crime" is inextricably bound to the actor's violent and aggressive ideation. Etymologically, "hate" (*haton*; *hassen*) is found in nearly every language and is linked to cognates for emotions like spite (Old English), odium (Latin), pain and suffering (Greek), and anger (Welsh). In contemporary English, the word derives from "hete" meaning hate, hatred, or spite, and its Greek roots, "misos" or "misein" (to hate), are present in nearly every English word that specifies a particular target of hate: misogyny; misanthropy; misandry; etc. The roots capture the visceral nature of the term, the fiercely negative emotions it denotes, and the active quality of the condition of "hating" something. "Hate is a complex biological sentiment which, throughout history, has impelled individuals to heroic, as well as evil deeds. Unlike romantic love, it need not be directed against an individual; it may instead assume many varieties, being directed against an individual, a society, or an ethnic group."^{262}

**Connotations may involve judgments.** The emotion-laden words used to construct the concept suggest that the term is meant to communicate something beyond mere description. Repurposed and combined, the words connote a moral judgment about the discriminatory actions. One way to state it is that the term communicates intolerance for intolerance. The phrase may be understood as conveying judgment about crimes—any crime or crimes enumerated in the formal statute—oriented by "hate" or judgment about "hate" that is manifested in a crime. In the vertigo of Young's late-modern culture, the concept takes aim at prejudicial phenomena once viewed as tolerable—if not tolerable, then at least expected and seemingly intractable—and turns the meaning back on itself: Structural intolerance for minority groups was delegitimized in the push for tolerance for the diversity they bring to the culture, which in time reconstituted as more than tolerance, more than integration—an embrace of multiculturalism—and a refocusing of negative scrutiny on those who either failed to join the

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celebration or who reacted to it with more blatant and aggressive animus toward members of minority groups. The judging gaze has turned away from the Others toward to Otherers.

**Blurred boundaries.** Violence against minorities has always been illegal. Lynchings, beatings, bombings, shootings, even intimidation has long been prohibited and punished by law. But the innovations captured in the concept of "hate crimes" can be seen in the blurred meanings\(^{263}\) about what constitutes punishable action, about the boundary between motive and intention or thought (*mens rea*) and conduct (*actus reus*), the manifest harm across society resulting, among other things, from what I call "permissible iniquity"—that is, the tacit (or explicit) unequal treatment of categories of persons so habitual and inadequately redressed, whether or not the acts are also egregious or violent, the circumstances impress upon the cultural mindset an "official" imprimatur (societal and/or governmental) for the actions. The term describes a feature of culture so deeply embedded in our Knowledges and social narratives, the acts are part of an shared lexicon we understand without realizing it.

How do we define what is not permissible, not legal? Defining tolerance up, by instituting policies against prejudice, is coupled with the legal rejoinder that defines prejudice down, making it increasingly less tolerable. In the backdrop of the concept of "hate crimes," prejudice has taken on a tenor of maleficence. To overstate the point, one cannot simply be a narrow-minded bigot anymore, a curmudgeon with the protected right to have odious opinions; today, the bigot is a "hater" who is one act away from being a double criminal—guilty of both the outward act and internal bigotry that prompted it.

The phrase seems to reflect a shift in what makes Othered groups worthy of being Othered. Permissible iniquity in the U.S., as elsewhere, has been the site of contention and resistance,\(^{264}\) moving its sight from targeting skin color to socioeconomic status and perhaps to religion, among other categories, over history. Prejudice in America is not unexpected, is perhaps even accepted, and has long been situated somewhere on a continuum between "right and proper"


\(^{264}\) Jeff Ferrell, Keith Hayward, and Jock Young, *Cultural Criminology: An Invitation* (2008).
and regrettably inevitable, and if it led to violence against members of the pre-judged groups, that was an extreme manifestation of a widespread tacit cultural understanding of "the way things are" in social groups. The concept of "hate crimes" reflects a recognition that victimization will occur, and indeed that it will occur against members of particular groups. One of ABL’s innovations may be the attempt to bring negative attention to that type of victimization.

The concept may also convey a societal sense of responsibility for the protected groups. Certainly, the "paradigmatic hate crimes" in the U.S. against vulnerable populations, including "Blacks, gays, Jews and other members of identifiable historically oppressed groups," has "intuitive appeal."265 Assuming U.S. history as we know it to be, no number of racially motivated assaults on White persons by Black persons or on Christians by Jews in the United States could generate the same intuitive appeal for hate crimes laws” as do the current protected categories, because we recognize that the "hatred" captured in the concept has historically been directed one way.266

**Concept formation as linguistic innovation.** Concept formation is understood as social activity, using linguistic innovations, to "transition...from one standardized understanding" to some other understanding, which in turn affects peripheral ideas.267 Like the processes of meaning-making, the process of concept formation involves agency, the activities and choices of individual actors and institutions, in joint action that drives transformations of social conditions over time. This research is sensitive to the way the human agency influences social structure, and conversely, social structure influences and changes human choices. These are mutually transformative processes that may be observed in discursive "[places] of

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265 David A. Reidy, *Hate Crimes, Oppression, and Legal Theory*, 16(3) Public Affairs Q. 259, 260 (July 1, 2002).
266 David A. Reidy, *Hate Crimes, Oppression, and Legal Theory*, 16(3) Public Affairs Q. 259-85 (July 1, 2002).
struggle”\(^{268}\)—such as law and public opinion. The emerging narratives may shape the way that hate, crime, bias, and the objectives of law are understood. In a study of the term’s "settling" in cases challenging state sentencing enhancements for hate crimes, Phillips and Grattet observe that "the meaning of hate crime that emerges across the series of cases is much richer and nuanced than the collection of words contained in the statutes [that] converged around sets of arguments for negotiating [legal] challenges."\(^ {269}\) They further explain:

The controversy about hate crime has been fundamentally about the meaning that should be attached to the concept. The meaning of hate crime is not just assigned at the moment when political actors and legislators formulate statutes, or when police officers and prosecutors determine whether the behavior they confront can be plausibly interpreted within those statutes. Hate crime is also infused with meaning through appellate opinions that address constitutional questions. Such cases reflect a struggle between the parties to impose a particular meaning on the statute; and judges intervene in this process to assign an authoritative meaning. The judicial opinion is the primary vehicle through which this meaning is transmitted to other members of the legal field.\(^ {270}\)

Concept formation may reflect dialectical processes of rupture and continuity, in which events trigger alterations in the way a term is used and understood, followed by periods during which these become quondam innovations. Ruptures are points when meaning or usage fell into debate or broke from its antecedent meanings. Continuity stresses the gradual process by which the concept and its antecedents became embedded in cultural discourse and, with greater usage, became refined in meaning. Together, they may reflect the cycles of rupture and continuity in


the social spheres that engendered the altered meaning. The life of the concept over time is historically conditioned, dependent on the existing or emerging Knowledges:

Once established as form, ideas take on a life of their own; they acquire an existence which is autonomous or independent of their creators. For Simmel, the movement of life in 'civilized society' can thus be viewed as a struggle between life and form; between creators and ideas; between the creator's attempt to control ideas and the idea's autonomy, [meaning that alienation is always present in society]...Radicals...have attempted to understand the conflict between life and form historically, thereby suggesting that the degree of tension between life and form varies from one time period to the next, or form one place to another. This interpretation is most evident in the work of Mills (1959), who...suggests the possibility that alienation can be eliminated. In Mills' perspective, man has the ability to transcend form. However, this ability is not everywhere and always the same, as existentialists would suggest. Rather, the ability to transcend form is also a historically relative fact.271

Systematic inquiry of concept formation examines both points of rupture and threads of continuity in the spheres of discourse from which the concept or its antecedents emerged. The joint action of individuals joined in a social movement interact with the policymaking activities of legislators, judicial decisions, prosecutorial discretion, and the enforcement practices of police to modify the meaning of events over time, until the new meaning is no longer innovative and becomes a settled part of the cultural landscape. For example, undifferentiated acts of violence may be identified as particularly pernicious because the prejudice that inspired them is viewed with increasingly strong negative judgment, coupled with the sense that a change in the meaning is possible, which in turn may be linked with an urgent sense that formal action is

necessary to quell the pernicious effects or publicly denounce the motivating behavior, which may lead to an area of legal and political action the becomes a discrete policy domain.\textsuperscript{272}

\textbf{III.A.8. Meaning-Making}

\textit{There is no shame in looking as close as one can...The mistake [is] in assuming that, by looking closer, we have somehow learned to see better.}


Meaning-making can be understood as distinct from concept formation. Although their mechanics are reciprocal, codependent, and as utilitarian as they may be spontaneous, and their chaotic choreography might arguably be far from mechanical, meaning-making is ongoing and transient, while concept formation is momentary and reflects entrenched meaning.

\textbf{Content and connotations.} Meaning-making is both a communicative and a constitutive process. As terms are used and adapted, meaning is both stated and created. Through discourse and imagery, people express attitudes, beliefs, and aspirations; also, through these processes of communication, meaning is shaped. Messages may be explicitly (plain meaning) or implicitly (latent meanings and connotations suggested by context) conveyed in discourse and imagery. Through cumulative and successive meaning-making processes, innovations may emerge and become coherent.\textsuperscript{273}

Meaning-making is a normal part of social interaction, and its primary function is communication. Subjective meaning (the meaning that actors give to their own actions), is not favored over social meaning, or the meaning that society and institutions place on the actor's

\textsuperscript{272} Valerie Jenness and Ryan Grattet, \textit{Making Hate a Crime: From Social Movement to Law Enforcement} (2001).

conduct and words. The objective truth contained in the documentation is not as important as the representation of the "cultural moment" that the documentation conveys.

What is "cultivated" is experiential and expressive, ripe with communicative potential, and the interpretation of meaning used in the project is aimed at discerning the incestuous references that demonstrate the genealogy. In this way, meaning-making in genealogy hews close to cultural criminology's emphasis on negotiated cultural meanings intertwined with lived human experience. What is communicated is understood by reference to fluid webs of meaning, not primarily by reference to the structural categories (socioeconomic status, education level, etc.) of the meaning-makers. But it would be impossible to ignore that categories have been made according to the groups of people who have been routinely subject to discrimination—e.g., race, ethnicity, sexual orientation, gender, etc.—and these categories are employed in the service of the genealogy: The meaning made of these categories can be understood through historical events and the ooze of related discourse.

**Crafting meanings.** Meaning may be crafted through agenda-setting, claims-making, moral panics, or entrepreneurial legislating. Morality-policymaking describes the

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276 Agenda-setting describes the way a groups, notably the media, shapes discourse not by telling people what they should think but "what they should think about." (David A. Green, *When Children Kill Children: Penal Populism and Political Culture* 119-20 (2008) (quoting Bernard Cohen (1963:13).) The constraint is not on opinion, but on subject matter, which then shapes the flow of discussion on a given topic that proceeds through the set "agenda." (See Joanne M. Miller, *Examining the Mediators of Agenda Setting: A New Experimental Paradigm Reveals the Role of Emotions*, 28(6) Political Psych. 689-717 (Dec. 2007).)

277 Claims-makers are among the "primary contributors to the discourses shaping the cultural sensibilities that drive political responses" to criminal events. (David A. Green, *When Children Kill Children: Penal Populism and Political Culture* 152 (2008).) By asserting claims about the meaning of an event or its criminal actors, claims-makers attach significance to the subject matter that becomes legitimized through repeated use, whether or not it is backed up by objective evidence. The claims are typically directed toward a particular political or policy goal that becomes the solution to the problem created by the event. (See Valerie Jenness, "Hate Crimes in the United States: The Transformation of Injured Persons into Victims and the Extension of Victim Status to Multiple Constituencies," in *Images and Issues: Typifying Contemporary Social Problems*, Joel Best, ed., 213-37 (1995).)
transformation of highly salient public issues into policy through organized advocacy of affected groups, typically over matters that trigger opposition because they threaten the values, beliefs, security, and other fundamental attributes of certain members of society. All of these may involve construct elaboration and domain expansion. Changes in the usage of a concept involve domain expansion, homogenization, elaboration, and settling or institutionalization. Processes of change occur inversely against processes of settling and institutionalization of meaning.

Theories about exploitative meaning-making, such as the leveraging of issues in "identity politics" or in Tonry's model of moral reform thesis, take a cynical perspective on the way that meaning is crafted. Young asserts that law intervenes on a social problem only if a conflict

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278 Young succinctly describes moral panics as an acute form of the chronic moral disturbance that arises out of the human condition of moral indignation. (Jock Young, Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy Into Reality, 49(1) Brit. J. of Criminology 4, 10 (2009).) Moral panic theory describes the process by which events are defined as moral disturbances to allow latent structural changes and value shifts to be articulated. Typically, the events and actors involved in them are exaggerated by mass media, creating anxiety in the general public that leads to outsized fear oriented around a particular "folk devil" in the form of a person, type of person, or a repeatable danger. The "loops and spirals" of media reports and responses to it by control agents, moral entrepreneurs, and the public generate panic about the implications of the event, the characters involved, and the possibility that the event will repeat—even burgeon into more dangerous events of a similar nature of by similar types of actors. (Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 48 (2008).) The theory captures the dynamic among crime, deviant actors, the media, and public perceptions in which a symmetry in the action and reaction is energized by moral indignation and "self-righteous enthusiasm." (Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 49 (2008).) Young is disdainful of the "listless" emphasis on the role of mass media in moral panic theory. He reminds us that the focus on "mass media deception, [on] audience delusion, [on] simple mistakes in reason, the random displacement of grievances on hapless and passive targets and on fleeting events, peripheral disturbances in an otherwise regulated universe" leaves behind the roots of moral panic theory in 1960s New Deviancy Theory, Albert Cohen's emphasis on moral indignation rooted in Nietzschean Ressentiment. (Jock Young, Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of Fantasy Into Reality, 49(1) Brit. J. of Criminology 4, 10-14 (2009).)


of interests exists, immoral indignation spurs it, or as a humanitarian act, which he views as suspect.\textsuperscript{286}

**Cultural negotiations.** Although this dissertation does not propose to undertake an analysis of the discourse, an exploration of the posturing in crafted meanings may inform the genealogy of the concept of "hate crimes." Crafted meanings, exploitative meaning-making, and provocative media coverage are useful in the way they amplify the usages of the concept and its antecedents. The message may communicate as much as the amplification itself. (This is one facet of the theory of Othering that is employed in this project, detailed below.) The purpose of the project is not to analyze the discourse itself, but to interpret what is communicated in the documentation through a genealogical structure that reveals the cultural "negotiations"\textsuperscript{287} through which the concept of "hate crime" emerged in the U.S.

Based on the preceding discussion, it is likely already understood that the vantage point from which concept formation and processes of meaning-making are interpreted transcends phenomenology to examine cultural matters through interrogatory; what Ferrell, et al., call "critical humanism."\textsuperscript{288} The question might be posed as, *What does this event mean for the culture in which this event took place?* or *What communication about culture, and the Knowledges present in culture, are contained in these events, issues, and ideas?* With regard to patterns of Othering specifically, the research asks not whether Othering occurs or what are its measures, but how the patterns have changed and how those changes communicate something about the meanings made in the broader culture.

Meaning-making is not only a constitutive process, it is also a process of replication that may perpetuate attitudes (such as inequality and prejudicial opinions). In both its constitutive and reproductive forms, meaning-making is purposive, and its directionality follows its intended

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\textsuperscript{287} Jeff Ferrell, Keith Hayward, and Jock Young, *Cultural Criminology: An Invitation* 2-3 (2008).
\textsuperscript{288} Jeff Ferrell, Keith Hayward, and Jock Young, *Cultural Criminology: An Invitation* 88-89 (2008).
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utility. To "make" something is to craft it for particular usages, and its usages may in turn adapt it to an end that is itself in a process of change. For Klarman, the Supreme Court decisions that were vital to racial discourse over the approximately 100 years between Reconstruction and the Civil Rights movement, were important not as directives on attitudes and behaviors across society and not as precise mirrors of public opinion. Rather, the Supreme Court decisions that invalidated statutes that disenfranchised African-Americans leveraged the then-present social realities—such as the intensity of opposition, the ability for the protected groups to capitalize on the positive results of the decision, the quality of the sanctions imposed on violators, the "attractiveness" of stake-holders within the larger social structures, and the willingness and availability of lawyers to press claims of violations. To greater or lesser degrees, Supreme Court rulings presented the voice of one of several institutions with efficacious influence on the social spheres where minorities intersect.

Social institutions, including the law, are understood as sites where individuals engage in "recurrent patterns of joint action" to make meaning, express opinions, advance causes, and the like. The view of social institutions as conveying both structural and individual meanings is consistent with negotiated-order perspectives that reject macro-micro dichotomies in research that may be assumed to be solely structural.

Going a step further, this model suggests that changes in meaning and concept formation is in part regulated by law and bureaucracy, with legislation serving as a capstone to other discursive processes. Thus, law, like religion and bureaucracies, serves to stabilize a concept's variability, pacing its change over time, and emphasizing collective understandings over novel interpretations. Similarly, in this way, social institutions serve as mechanisms for the

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reproduction of meaning. Without external forces, such as social protest or electoral change, social institutions tend to resist innovation.

**Media innovates.** In contrast, media resist stagnation. News reports thrive on new information, new interpretations of known information, and the range of dramatic unveiling from fine investigative reporting to scandal mongering. Media outlets bring fresh events to the collective—often, but not always, with a preset agenda—feeding processes related to meaning-making. Moreover, media reports add dimension to thematic development by supplementing, restating, and recycling information already present in discourse across the social structure. Media reports describe events, which may lead to legal decisions that are also reported, which may lead to public discourse about the events and the judicial decisions later reported in the news, and so on. Journalism as a practice also moves between micro to macro perspectives, and thus, the Fourth Estate as a social institution can also be described as a channel of "joint action."

### III.A.9. Reliability, Validity and Researcher Bias Limitations

*There seems to be a subtle but profound confusion which plagues all those of a determinist, methodist, and rationalist persuasion, between the desire to observe the animation of the universe—which is perfectly admirable—and the desire to explain it—which is patently absurd!*


**Researcher as Tool**

All qualitative research is naturalistic, as described by Lincoln and Guba,\(^{292}\) in that the researcher is a tool in the study, the interpretation is inductive, and the choices of what to look at and how to look at it are, at the outset, subjective. This leaves questions of reliability and validity in qualitative research, it seems, unsatisfactorily settled.

Validity and Reliability. If validity can be settled by asserting "researcher's resourcefulness with regard to the various discourses and practices of contemporary issues," then the measure of validity can only be tested in hindsight by the researcher's success in "[extending herself] by force of play against the limits of the already said."293 The idea of "extending oneself" to accomplish valid research seems to invite weakness in reliability by emphasizing the researcher's subjective (if not wholly idiosyncratic) approach. Even without heightened subjectivity, the reliability of qualitative work cannot be firmly asserted. Recognizing the possibility that another study of the emergence of the concept of hate crime would choose the cornerstones of the genealogy differently, this project takes pains to ensure that the criteria used to identify the crucial cultural moments are transparent, self-conscious, and consistent to improve replicability.

The validity of the interpretation used in this project as an accurate depiction of emergence of the concept of hate crime rests on three methodological and intellectual pillars: (1) the archival material connects "cultural moments" either explicitly or implicitly to the discourse of hate crime, bias, or related concepts; (2) the facts and meanings made of events, issues, and ideas can be confirmed in public reports; and (3) the material serves as a culmination of multiple threads of discourse from a variety of social institutions. The portrayal of an event or an issue at multiple "sites" of inquiry shows the way that the cultural moment affected numerous segments of the social structure, and each adds a different perspective to its full meaning. The discursive habits of each "voice" in the material reflect particular views and shape other voices, which combined serve as contemporaneous records of the way the public grappled with the cultural moment.

Researcher Bias. The researchers point of view and her presumptions are an unavoidable part of the knowledge produced in social science research. The presumptions of research are its Achilles' heel—the points at which a worthy challenge may undermine the project's findings.

Although the protocols of the research are designed to prevent "leaping off the data," some inevitable limitations remain. Foremost in this project, relying on judicial opinions as statements that "settle" a matter of public concern implies certain presumptions. It may elevate the law as a claims-maker in broader cultural discourse, and it may exaggerate the law's function as a dispute resolution system or its ability to impose social order over its other functions and dysfunctions. It may not fully account for technical issues that may lead to legal outcomes that are inconsistent with the public's view or with what would be generally credited as "just." It glosses over various personal and political positions of judges and Justices who rule on particular social issues. As discussed elsewhere, it may at times suggest too neat an alignment of legality with morality or collective values. As with any interpretive endeavor, another exploration of the material might yield different conclusions. This project is intended to be only one contribution to the overall scholarship on the subjects touched up on the research. It is not intended to present all perspectives or interpretations, but to advance the academic conversations it may illuminate.

**Epistemological limitations.** The epistemological perspective of this research rests in critical theory. Post-positivists believe that there is no single objective reality but that any given reality is interpreted through social, political, cultural, economic, ethnic and gender values. Reality is always mediated by the stance that the "reality" presented—with all the attendant influences of politics, economy, gender, and the like. (See Sections V.B., V.C., VI.) Reality, if it exists and can be expressed at all by the researcher, can be known and expressed truthfully if, in doing so, it is expressed with an awareness of reciprocity among all "stakeholders" or participants in the creation of reality. A reality that is acknowledged as created, or conceptualized, need not be proven to be objective. (See Section VI.) This mediated reality is


"knowable" through genealogy, which is inherently tied to strings of knowledge, values, and cultural continuity that may not be objective, but in fact need not be.

This project assumes that the conversations of the collective about values, issues, ideas, and cultural identity, among other things, are expressed (and thus knowable) in various areas of discourse. Among those areas of discourse, the gatekeeper is the legal system. (See Sections V.D.1, V.D.3, V.D.5, V.D.7.) This project assumes that cultural understandings of crime and related topics, in particular "hate crimes," can be "known" by examining the standards by which the judiciary (as the arbiter of legal disputes) makes decisions, which is the amalgamation of the trends and values that are active and knowable at the point at which the decision is handed down (from the perspective of one social institution). That this represents a reality not entirely free from critique is acknowledged.

This research assumes no objective reality—or fragment of it—is waiting to be discovered by a neutral researcher with no preset theoretical design. The ontological question of whether or not there is a single objective reality and whether or not social science research can state that reality, and whether, in doing so, it is thus expressing "truth" are answered with its grounding in history. The various statements about historical events, whether descriptive or analytical or claims-making, are enough to gain insight into the reality that is "known."
III.B. Clarifications and Disclosures

*After great pain, a formal feeling comes.*

—Emily Dickinson

I have found genealogical work to be a bit like drawing up a list of invitees to a wedding. Some friends or cousins might be left out—in part because they are friends of friends who are definitely excluded, or they are cousins several times removed and therefore not quite relatives in a meaningful sense, or they are "dead"—but the rough edges created by these decisions does not make the list invalid. For another family function, a somewhat different but equally serviceable list might be drawn up that would have produced an event from which an observer might have reached essentially the same conclusions about the family. Like the wedding list—and even the wedding itself—genealogical research, with its messy borders, must end in a well-calculated compromise on the total endeavor. Mindful of these idiosyncrasies, I offer the following clarifications and disclosures.

First, the attempt to bring clarity to subject matter that lacks brightline borders leaves ample room for criticism of the choices I have made. Determining the relevance or irrelevance of the historical data mined from archival sources is partly subjective, as is establishing limits to the range of issues presented. A different determination about relevance might have stemmed from a slightly different interpretation of meanings, which would then yield a variation of the genealogical structure I have presented. However, the variation would be slight, because the laws themselves indicate their relevant "cousins," and in any event would remain compatible with the larger conclusions I have drawn.

Second, the decision to prune several categories from the genealogy (namely "gender," "gender identity," "disability," and "ancestry"), and later to set aside the pursuit of categories altogether, was practical as much as content-based. The (legal) categorical breakdown would have required separate studies of those categories, in eight or more the subgenealogies of their
relationship to prejudice and "hate." The more fruitful lines of analysis came from exploring the paradoxical inversions of meaning related to the overarching concept of "identity" (discussed in Section V), which was more easily understood without the limitations of various categories. These decisions are further explained in the dissertation.

Third, this dissertation's perspective is self-consciously American-U.S. By "American," I mean that which is part of the U.S.A., not the Americas, as a convenience. (In the current cultural climate, it seems important to explicitly note that this usage should not be misconstrued as a statement about the relative status of countries in the Americas or the people in them.) Limiting the genealogy by taking a U.S. stance was based on two rationales: (a) as the interpreter of the data, it is obvious my ability would be hobbled in contexts outside U.S. borders, such as Germany, Norway, Israel, and other countries, despite their rich and informative material related to the 20th and 21st century uses of the term "hate crime"; and (b) because U.S. lawmaking does not return the compliment of consulting other countries' comparative experiences when enacting new law, sourcing from other countries was not organic to the work.

Fourth, the terms "African-American" and "Black" are not used interchangeably. Like additional related terms found in this dissertation, they are used with specific application to their respective sections, where they mimic statutory language or other documented texts that describe this group at a particular stage of history. For readability and convenience, I have removed the quotation marks that might express these language usages. Similarly, in keeping with contemporary editorial style, the references to "Whites" and other peoples are capitalized, regardless of the choices of the original texts or spoken word. None of these stylistic choices should be construed as having any meaning beyond editorial efficiency and consistency.

Fifth, the scope of history is limited to the point at which colonists arrived at the shores of the "New World." This gives the genealogy internal consistency and conforms to the limitations of relevant laws and authorities. I present this point among these disclosures because it goes to
the heart of my genealogical tools. The abandonment of one genealogical approach and failure to self-consciously resurrect another may be a point of criticism. Before I began, I had read about, but not adequately understood, the importance of choosing the right theory of genealogical research to undertake this type of project. Not until I was far into the work, when I found myself floundering and, frankly, depressed by the process, did I understand the significance of my choice. By that point, I had invested most of my disposable mental energy on fantasies of hoisting my computer out the window to end my misery. I may have invented an admirable variety of multicominded curse-words unfamiliar even to professional linguists. Rather than just give it up and jump the doctoral ship, I spent more months than I care to count finding my way back to the project, and I cannot honestly say that the diversion ultimately made this a better project or that I came across important lessons that could not have been learned in a less time-consuming way. It was just one of those stumbles that are built into the doctoral process, and because I tend more toward obsessively thorough research and scrupulous preparation, I did not think I would be one to make that particular mistake.

What was my mistake? When proposing this project, I borrowed the Foucaultian view of genealogy, that is, as an exploration of the origins of origins. The very idea of "origin stories," it seems to me now, is a bit of an oxymoron. (To really get at the origins of origins, one should go to the very beginning, to metaphysical states that transcend the idea of origins altogether—otherwise you do not know what you are really dealing with—which inevitably leads all the way back through human history, such as we know it, and tangles with theories about strings, black holes, and expanding or contracting universes, perhaps to the Big Bang. Accordingly, any grand achievements a Foucaultian genealogical project might claim could only be hailed at half-mast, because the project would be ever unfinished.) So, although I did look back to the beginning of human history to understand the significance of changes in narrative and the cultural importance of language use, I limited the actual genealogy to U.S. history, and I focused on the turning points more than the branches. While holding fast to the legislative framework, I trained
my attention to issues or words for which the meanings underwent a 360-degree change, the
dynamic I refer to as "inversions"—that is, inversions of meaning. This focus and the associated
research decisions, as well as the lens through which they are cast might not be, strictly
speaking, part of Foucault's form of genealogy.

Sixth, in the debates about "hate crimes," there is a tendency to blur the distinctions between
the language of the HCPA and the federal sentencing enhancement law, the HCSEA, which
preceded the HCPA by 15 years. (See Appendices HCPA, HCSEA.) There is also a lack of
uniformity in the way the term is operationalized in different jurisdictions, in different areas of
law, and by different actors—i.e., prosecutors and law enforcement. Therefore, to make use of
the conflated usages, either in public discourse or in court opinions, was to focus on the meaning of the blurring itself, rather than on the content.

It is understood that limiting the term "hate crime" to the usage presented in the HCPA may
affect the way the archival and legislative material is interpreted and the way the concept is
studied. It is anticipated that any limitations associated with this choice will be offset by the
transparency with which the choice is made.

Seventh, the challenge of qualitative research is establishing valid, reliable, generalizable
findings. In this research, I believe my findings meet those challenges because the
interpretations (on which my conclusions are based) generally can be confirmed in more than
one source. From another angle, my conclusions could be "discovered" in and supported by a
research project examining a different topic from mine; for instance, projects examining the
development of "race" or "identity" or "American exceptionalism," etc. The soundness of the

[296] The patchwork of state laws has created some gaps and disparities in understanding the scope of
"hate crimes" and the best legal responses to it. For example, categories of people protected in one state
may not enjoy protections just across the state line. Some states define "hate" as intimidation or
harassment, applying it to relatively low-level offenses, while other states have adopted sentencing
enhancements that mandate higher sentences for crimes motivated by prejudice. Some states require
"hate" to be manifested in the criminal conduct itself, while others only require that the evidence of
defendant's actions, opinions, or character demonstrate prejudice. (See, e.g., Nathan Hall, Hate Crimes
(2005).) Given that most criminal law is state law and that federal jurisdiction in criminal cases is limited,
the mishmash of state statutes most directly affect the way that the majority of "hate crime" cases are
processed.
structure I have presented was fairly tested by the repetition of associations, built up something like neural myelin, in different contexts at different points in history in my data.

Eighth, archival material that cuts across history takes time to process. Reading and rereading the material, including documentation that may not be directly related to the research, is the only way to absorb to any degree the tenor of language or the perspective of a particular group at a remote point in time. Undoubtedly, my absorption has been imperfect and my processing incomplete. But, to round off these flaws, I have attempted to share some glimpses of the mood, the discourse, the attitudes, and the visual cues related to the research both in graphics and in the epigraphs that appear periodically in the dissertation. While they are not essential to the research arguments—and it is fair to regard them as my valentines to the archives that I enjoyed swimming (or at times floundering) in—these artifacts are not window dressing. They add important dimension to the dry points made in this dissertation. Their content reflects the concerns of the day as much as it may illustrate the style of communicating. They may be mundane bureaucratic forms (e.g., a will; a cargo manifest; a census forms, with boxes for types of slaves) or florid descriptions of a pertinent event or belief (e.g., an op-ed demanding an end to slavery; a description of the slaveowner from the perspective of a child slave). Both give flavor when a verbal equivalent would be clunky. For example, a guide of Do's and Don'ts for library users, admonishing readers for eating while handling books, has resounding implications for the reverence for writings and the history of narrative when one realizes the guide was "published" an estimated 100 years before the printing press. For a project that is heavy-handed about the power of words and the narratives they convey, it is surprising and funny and maybe nostalgic to consider that we can still lament youngsters who laze around reading books while eating drippy fruit and inattentively drinking beverages, but the author was taken seriously in his day, seriously enough to have his guide posthumously committed to print after the press was invented. As with other graphics and epigraphs, these four lines convey many more about the rarity and powerful force of Letters in human social life.
And, while this latter point is made in the text, the excerpt is relatable and suggests a much larger cultural context in which to consider what, in this era, is not altogether relatable—the dignity of Letters. Similarly, for example, the phrase “rabid monkey” (to denigrate an Out-Group) reads as odd, perhaps humorous, and hyperbolic. But the image that those words describe expresses an aggressive, sick portrayal that depicts more than just one cut out of magazine propaganda. Also, a brief quote from Shakespeare’s will spells out the relative status of his beneficiaries according to their bequests, notably demoting his wife in a way that is generally surprising to a modern sensibility (e.g., wives being more than chattel, etc.), as well as outlining the sorts of things that were considered valuable (i.e., real property, furnishings, or other weighty objects; not ethereal complex abstractions like brandnames or the right to exercise an option). These artifacts may also summarize a tertiary area of discourse, such as the complaint about women being left behind in the fight for the right to vote, expressed by Francis Granger, to acknowledge the discourse that did not make the final cut into the main text.

In sum, the various archival illustrations serve the dissertation by giving "evidence" of an overall societal mood or specific attitude at a given point in history. I found these touchstones and others useful as I cycled through the wide-ranging archival material, comparing language usage and ideation over time. If their import is not accessible to the reader, certain pleasures may be lost by ignoring these gems along the way, but not the dissertation’s main content.

Finally, a few words on terminology, structure, and enunciation:

Throughout the genealogy, dates are provided as annotations to each segment of text to orient the reader in time, and when appropriate, particular geographical places are noted to orient the reader to place. These are not choices made by the researcher but definite anchor points presented in the archival documentation.

For convenience, I use the phrase "hate crime(s)” to denote contexts in which the public discourse and popular notions are active. The phrase is placed in quotes to indicate that this is a concept or a crime so-called. (Without quotation marks, this usage may reflect the legal
determination that the event met the legal standard of a hate crime.) Because the concept of "race" lacks currency in modern understandings of "identity" and humanity, as shown in this dissertation, this term is also placed in quotes. Similarly, the word "identity" is placed in quotes to indicate a discussion of the concept.

Unless speaking about a particular piece of legislation, for which the title or abbreviation will be used (e.g., HCPA), I use the abbreviation ABL (anti-bias legislation/law) to denote "hate crime" law or legal standards generally.

I have capitalized special terms, like "Knowledges," "Self," and "Other," as a way of indicating the internal terminology of this dissertation. Similarly, the words "Their" and "They" are capitalized when used as pronouns for transgender persons, to distinguish these terms from the traditional uses of "their" and "they."

The citation form is Bluebook (legal citation form), because this dissertation is based in law and, in my opinion, the citation form is more informative and precise than other citations forms. However, the short citation form of Bluebook is suspended for the convenience of the reader.
IV. FRAMEWORK: THEORIES OF OTHERING

IV.A. Inclusionary-Exclusionary Momentum

In presenting the overview of this project above, I noted that the question of why the concept to "hate crime" emerged at all is linked to a theoretical framework in which Othering is central. Othering is a process by which individuals and groups identify another person or group as members of an Out-Group—at least relative to an In-Group, to which the persons engaged in othering presumably belong.\(^{297}\) That framework is itself linked to historical realities. For the purposes of discussion in Section V, chiefly in the chronology of laws related to "hate crime," these "realities" are given unrealistically hard edges and "blocked out" like the paint on a basketball court, such that material that is "in the paint" scores better for the purposes of this project than material that is equally significant historically but unrelated to "hate crime." (See Section III, regarding legislation reflecting a culmination of the historical imperatives present in a given cultural era.)

The introduction to this project also noted the curious nexus of opposing narratives that are represented in the concept of "hate crime" no less than the related legislation. The concept of "hate crime" and the ensuing legislative responses encapsulate both politically liberal and conservative forms of Othering, as defined by Young.\(^{298}\) Conservative Othering can be seen as expressed in bias crimes, and liberal Othering can be seen as reflected in responsive legislation that identifies the Out-Groups to be protected. But the dynamics of Othering in the context of bias crime is distinctive in that, unlike other systems that attempt to maintain a social order by placing in a category of "misfits" anyone behaving deviantly, ABL is organized around protecting


those (minority or marginalized) Others. By establishing formal protections from violent or criminal acts of Othering for these minority Out-Groups, the law formalizes their Othered or Out status. Yet, the protections are typically drafted and promoted as a way to include these vulnerable populations in the In-Group. As with Young's "late modern vertigo," an examination of "hate crime" phenomena leads one to conclude that nothing is quite what it seems.

IV.A.1. Reinforcing Influences on Identity Formulation

The relevant patterns of Othering theory are outlined below. Following the presumptions of interactionist traditions (e.g., Mead), the theoretical framework accounts for the emergence of the concept of "hate crimes" through reinforcing processes of Othering and identity formulation occurring over time.

**Identities Are Formulated.** Integrated identity theory (so-called because it integrates the structural components discussed in social identity theory with the individual-level processes of identity theory) begins with the premise that individuals view themselves—formulate themselves—in terms of meanings imparted by a structured society. Identity formulation is reflexive; "it can take itself as an object and can categorize, classify, or name itself in particular ways in relation to other social categories or classifications." Young suggests that the boundaries of the Self are known by its divisions from the Other. Othering sets up the classification for what is repulsive and undesirable. Social comparisons selectivity accentuate positive attributes of the Self and Us-Group, while accentuating the negative attributes of the

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Others and members of the Them-Group. This accentuation occurs for all the attitudes, beliefs and values, affective reactions, behavioral norms, styles of speech, and other properties that are believed to be correlated with the relevant intergroup categorization. There is a reciprocity of perception and action among persons when they take on a group-based identity. Social identification is one of the prime bases for participation in social movements. Social stereotyping is primary among the negative outcomes; stereotyped perceptions of Us-Group members and Them-Group members become increasingly homogeneous with the strength of the person’s identification with the Us-Group. The Other becomes a shorthand embodiment of the things the Us-Group is not.

The key significance of identity theory to this dissertation is its premise that cultural narratives exist outside of a concept of "identity," yet they influence the formulation of Self and the identification of Other. Identity theories speak in terms of social categories and role expectations, which precede—yet partially define—individuals and limit their behavior. Both identity and Othering processes depend upon and interact with cultural narratives to give them shape and meaning. Briefly, social conditions motivate us to Other; narratives delineate whom we should Other and how we should formulate our Self-identity; and expressions of Self and enactments of Others, which may be the same process, are influenced by historical contingencies, including social conditions and cultural narratives.

Because it is a process (not a value), identity-formulation may in fact be limitless. This term describes an organic process that operates regardless of the individual(s) implicated in the

process. If examined as a snapshot in time, the process of identity-formulation could be examined at the individual (micro) level, as well as the mezzo (institutional) and macro (structural) levels. Since the "formulation" depends on the context and social milieu in which the process takes place, this type of identity conceivably has endless variation. However, for individuals, the process is constricted by the "facts on the ground" at a given point in history. That the formulation is influenced by the way national identity is understood is particularly important for this dissertation. Indeed, that the formulation is influenced by the way the very idea of "identity" is conceptualized has special significance throughout this dissertation. The process can be seen in social constructions, such as "race" and "gender," which in turn find their way into public discourse and legislation. The process can also be seen in the alternating emphases (and emphases of meaning) placed on founding ideals, such as "freedom," "equality," "liberty."

"Self" Is Elevated by Demonizing "Other." The process by which these binary categories are drawn can be imagined as a seesaw: As the Self becomes more superior, more securely embedded in the In-Group, the Other becomes inferior—increasingly worthy of denigration as he or she is denigrated. Young explains the sharpening of Self-Other boundaries in terms of "deviance amplification," in which the virtues of the Self are contrasted favorably with the vices of the Other, which are exaggerated, reduced and essentialized.

Essentialization is a reaction to economic and ontological upheavals, notably occurring in late modernity, which heighten individual insecurities. Insiders are impelled to define themselves as "Us" in opposition to outsiders defined as "Them"—"a fixed demon involving all vices which are the inverse of our virtues."307 One may even make a virtue of tolerance and

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indulgence of others' moral deficiencies, thereby implicitly calling attention to one's own special strength of character."\textsuperscript{308}

**Needs Are Fulfilled by Excluding Others.** The insider employs processes of exclusion to fulfill the need for security; security and social exclusion of an Other become intertwined. Self is grounded in the "material base" of economy, community, and family,\textsuperscript{309} and to that groundwork, I would add political affiliation, which has recently taken on an explicit materiality in its link to labor (embodiments of economy) and protests (communities embodying ideological positions), and even religious practices (embodiments of family). (As a research curiosity, it is worth noting that some state ABL includes a protected category for "political affiliation," which reflects the flashpoint that this category of identity has become.)

**Essentialization Is Reflexive.** The individual engaged in essentialization is not free from it: In the process of defining the Self as "Us," an individual necessarily essentializes him or herself. Both sides of the dyad—Us and Them—are essentialized by the insider. Foucault observes that, as meaning is made of an identified threat, the source of threat comes into focus, and as the focus on this Other is sharpened, the attributes become institutionalized, condensing the meaning of the threat with the Other's perceived and perceivable attributes.\textsuperscript{310} Although these meaning-attribute connections are more nuanced and more complex than simple pairings, they are nevertheless reinforced simplistically as they are recycled through social discourse. Structures that put these processes to use are "mass media, mass education, the consumer market, the labour market, the welfare state, the political system, the criminal justice system."\textsuperscript{311} Echoing Young's emphasis on mass media, Green details the uses (and abuses) of media to

\textsuperscript{310} Michel Foucault, *The Archaeology of Knowledge* (1974).
widely disseminate meaning and to manipulate meaning through sensationalism and agenda-driven discourse.\(^{312}\)

**Identity Itself Is Reciprocal Attraction and Repulsion.** In its most basic form, Young's conception of Othering is "a process both of threat to identity and of confirmation...a function both of attraction and repulsion."\(^{313}\) Othering occurs in "a society which has both strong centripetal and centrifugal currents: it absorbs and it rejects...massive cultural inclusion is accompanied by systematic structural exclusion."\(^{314}\) Dialectical processes of depersonalization (merging with group identity) and Self-verification (identifying Self as separate from but reflective of group), motivation (impulse) and Self-efficacy (choice) are all processes by which individuals and groups reaffirm their place in the social structural arrangements.\(^{315}\) Attraction and repulsion reflect the existence of narratives searching for embodiments in Self and Other.

"Self" Identities Conflict. Social identity, along with role expectations and Self identity, are the key components of integrated identity theory. The Durkheimian "social" and "role" bases of identity correspond to organic and mechanical forms of societal integration. "People are tied organically to their groups through social identities; they are tied mechanically through their role identities within groups."\(^{316}\) Like Young's processes of Othering, integrated identity theory recognizes that individuals encounter conflict in reconciling the cultural meanings and social expectations tied to these different identities.

Self-identity must be experienced as logical and resonant with the individual's knowledge of world, which changes over time. Meadian symbolic interactionist dynamics submerged in

\(^{312}\) David A. Green, When Children Kill Children: Penal Populism and Political Culture (2008).
Young's *Exclusive Society* (1999) take on a cynical tenor in which the driving factor is ressentiment.\(^{317}\) In its roots, *ressentiment* carries the Latin prefix for "expressive force" and the French verb "to feel," which gradually took on solely negative connotations; "deep feeling" gradually came to mean "deeply aggrieved by."\(^{318}\) There are two features of this motivation for Othering\(^{319}\): One stems from ressentiment as *scapegoating*; the other is ressentiment stemming from the *failure of role expectations*.\(^{320}\)

**Ressentiment.** Ressentiment may be understood in the active Weberian sense of "an ethic of the disadvantaged" or, borrowed from psychology, as a suppressed bitterness, indignation, or hatred toward another that may result in self-sabotaging or self-denigrating behavior, or the Nietzschean variation of a misplaced but instinctive impulse to want to "make the bird of prey accountable for being a bird of prey."\(^{321}\) All of the propositions give directionality to the Othering process inherent in hate crimes.

**Scapegoating.** According to Young, ressentiment describes hostility aimed at an Other whose identity is outlined according to the particularities of the actor's perceived disadvantage. Ressentiment is formulaic; negative sentiment is drawn from one's experiences in social life and observations of social conditions, using stereotypes, slogans, populist impressionistic beliefs—(i.e., that which is not well-understood but, without analysis or scrutiny of the message or the impressions it gives, fits an overall narrative)—and prejudices. Ressentiment does not require facts, nor does it engender a pursuit of the justifiability of the feeling.

Ressentiment may be quickened by a perceived threat, particularly an economic crisis.\textsuperscript{322} Erikson observes, "[W]henever a community is confronted by a significant relocation of boundaries...the crisis itself will be reflected in alternate patterns of deviation and perceived by the people of the group as something akin to what we now call a crime wave. These waves dramatize the issues at stake when a given boundary becomes blurred."\textsuperscript{323} Young explains, "Ontological insecurity gives rise to the search for clear lines of demarcation, crisp boundaries in terms of social groups (both in terms of the othering of deviance and conventional notions of multiculturalism and ethnic distinctions)."\textsuperscript{324}

According to Young, "tectonic plates of inequality generate crime, disturbance, moral indignation and, at times, moral panics. The system 'calls forth deviance,' as Merton put it, but it just as inevitably calls forth moral indignation and punitiveness."\textsuperscript{325} "[T]he appearance of a boundary crisis does not necessarily mean that a new set of boundaries has attracted attention or even that some important change has taken place within the basic structure of the community itself."\textsuperscript{326} Rather, the "crisis" is insecurity stemming from the unsettledness of boundaries that were once perceived as clear. The panic takes shape in the Other. Borrowing from Merton, Young captures the corrosive nature of ressentiment—"sour grapes, the rejection of that which we secretly desire"\textsuperscript{327}—he quotes:

\begin{quote}
This complex sentiment has three interlocking elements. First, diffuse feelings of hate, envy and hostility; second, a sense of being powerless to express these feelings actively against the person or social stratum evoking them; and third, a continual re-experiencing of this
\end{quote}

\begin{footnotes}
\item[324] Jock Young, The Vertigo of Late Modernity (2007).
\item[326] See Kai Erikson, Wayward Puritans: A Study in the Sociology of Deviance 70 (2005 [1966]).
\end{footnotes}
impotent hostility. The essential point distinguishing ressentiment from rebellion is that the former does not involve a genuine change in values. Ressentiment involves a sour grapes pattern which asserts merely that desired but unattainable objectives do not actually embody the prized values — after all, the fox in the fable does not say that he abandons all taste for sweet grapes; he says only that these particular grapes are not sweet. Rebellion, on the other hand, involves a genuine transvaluation, where the direct or vicarious experience of frustration leads to full denunciation of previously prized values — the rebellious fox simply denounces the prevailing taste for sweet grapes. In ressentiment, one condemns what one secretly craves; in rebellion, one condemns the craving itself.\(^{328}\)

This is similar to Erikson's description of the "long and often painful search for signs of [inner] grace" that afflicted Puritan life; in its modern form, it is a search for not grace but evil, and it is not a process of self-scrutiny, but scrutiny of others—an exploration of the habits, thoughts, and impulses of others for signs of evil or Otherness.\(^{329}\)

**Failure of Role Expectations.** The second is ressentiment stemming from the failure of role expectations. Othering is heightened, and may become aggressive and immediate in an act approaching a "hate crime," when the victim does not fulfill traditional (or anticipated) role expectations.\(^{330}\) Role identity theorists have focused on the match between the individual meanings of occupying a particular role and the behaviors that a person enacts in that role while interacting with others.\(^{331}\) By taking on a role identity, people adopt self-meanings and expectations to accompany the role as it relates to other roles in the group, and then act to

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\(^{328}\) *Id.* (citing Robert Merton, *Social Theory and Social Structure* 155-56 (1957)).


represent and preserve these meanings and expectations.\textsuperscript{332} If each role is to function, it must be able to rely on the reciprocity and exchange relation with other roles. By maintaining the meanings, expectations, and resources associated with a role, role identities maintain the complex interrelatedness of social structures.\textsuperscript{333} Without them, the order in which people engage in roles is perceived as unstable. This is slightly different from the ontological insecurity Young describes.\textsuperscript{334} In this instance, the insecurity is not about the individual’s security in the social structure and the need to remove Others who threaten to that security. The threat to one’s place in a social order is not as much the problem as the threat to the social order itself.

**Othering Processes and "Hate Crime"

Young’s inclusionary-exclusionary impulses are not simply dialectical, running on the logic of parallel opposing forces; they are fundamentally reciprocal, feeding one another, and this reciprocity is the same dynamic that Foucault and others assert is inherent to culture. By its very nature, culture must tend toward reciprocity, shared meanings, collective forces, value consensus—an unseeable but implicitly known "central tendency" of human Knowledges.\textsuperscript{335} This is why Foucault argues that, during wars and times of serious crisis, the level of integrative norms in the social environment falls sharply, making society "much more tolerant than in ordinary times, when it's more coherent and under less pressure from events."\textsuperscript{336} He uses "tolerant" to describe a condition in social relations—tolerance stemming from the distraction presented by serious crises. But tolerance today has other significance, and the idea implies the


\textsuperscript{333} George J. McCall and J. L. Simmons, Identities and Interactions (1978).


\textsuperscript{335} See, e.g., Michel Foucault, The Archaeology of Knowledge (1974).

\textsuperscript{336} Michel Foucault, Madness: The Invention of an Idea 130 (1954).
need for a sincerity in one's embrace of Others, even a pressure to erase "Otherness" from our lexicon of human interactions while simultaneously keeping it in the forefront of our minds.

Like identity formulation, Othering is a normative process. According to Perry, "[r]acially motivated violence is not an aberration associated with a lunatic or extremist fringe. It is a normative means of asserting racial identity relative to the victimized other; it is a natural extension—or enactment—of the racism that allocates privilege along racial lines." People do not so much "do" hate as they attempt to join some Us-Group by doing "hate crimes." This may explain (or not) why ABL is oddly contradictory. The act of a "hate crime" does not confirm the Otherer's membership in the Us-Group, nor does the act or the law invite the Othered victim into the Us-Group. Ferrell et al. describe the social conditions as "a bulimic world, where massive cultural inclusion is accompanied by systematic structural exclusion." In the context of hate crimes, the prohibitions and legal sanctions do not undo the exclusionary process. Not only does "hate crime" fail to shift both victim and perpetrator from an excluded group into an included group, it may reinforce their exclusion. The criminal act, the law, and the concept work together in a more complicated way; the criminal act against protected Others (victims) turns the perpetrator into different type of Other—unprotected by law—who is not viewed in more positive terms than the Them-Group and who is not protected from social exclusion.

If "hate crimes" are, from one perspective, acts of identity-formulation that employ violent Othering, the laws prohibiting these acts represent society's rejection of the particular Othering the offender employed. They may also represent a rejection of aspects of the actor's identity that he or she attempted to confirm in the "hate crime." The laws may also be intended to reject these Self-Other processes entirely.

339 Jeff Ferrell, Keith Hayward, and Jock Young, Cultural Criminology: An Invitation 63 (2008).
In sum, the discussion above explains that Young’s Othering processes and integrated identity theory both explain how people come to identify themselves as individuals and as members of one group or category (the Us-Group) in comparison with another (the Them-Group). Integrated identity theory closes the structural divide between microlevel and macrolevel identity formulation by contemplating the broader cultural consequences of this Us-Them categorization (e.g., racism, ethnocentrism, xenophobia). Whereas the specific Othering processes described by Young are embedded in the social conditions of late modernity (and may occur at other times when similar conditions exist), integrated identity theory posits that the impulse to identify Self and Other is inherent to humanity. Identity-expression is inherent to being human, while identity-formulation is inherent to social life.

IV.A.2. Adjusting the Framework to the Research

Initially, my research developed within this theoretical framework of Othering. The central feature of "hate crimes" is the social dynamic known in sociological literature as Othering, and the project therefore launched by examining these processes, with particular attention to related discourses, in the context of "hate crime." The project hypothesized that the innovation of a separate criminal violation for "hate crime"—the HCPA—was the product of changes in the cultural understanding of Othering. The type of change might stem from greater knowledge of genetics, inviting sympathetic connection among individuals previously divided by "race," or from social media exposure to the hardships in distant regions for individuals of different religions and nationalities. I entertained the possibility, for example, that intellectual insights might prompt emotional and social shifts, leading to intolerance for Othering. I expected such changes to be reflected in documentation of the way that judicial, public, and other discourse framed widely reported crimes used to advocate for the HCPA.

Also, I expected the documentation to reflect reciprocal features of these changes: the way that Othering expresses an understanding of culture. For example, the cultural understanding of liberal democracies is marked by expansive cultural "safety nets" for expressing Othering ideation but not that which exceeds simply ideation: One can have a bigoted (Othering) idea and one can express it; but one cannot enact it in violence. Thus, accepting Othering-speech but not Othering-action is one way to understand liberal democracy. ABL is the legislative embodiment of these ideals.

However, my hypotheses were neither proven nor nullified. Individual cases of Othering revealed little to support the genealogy. And, the centrality of Othering to the emergence of the concept of "hate crime" was only useful to the extent that Othering processes illuminated the dynamics in conceptualizations of Self and Other. This should not have been surprising, since the central problem of Othering stems from the way the individuals or groups involved shape the narratives about themselves and each other. In the end, the theory provided an appropriate framework from which to launch the project, because Othering processes accurately describe the dynamics of "hate crime" (as a crime and a concept) on both interpersonal and societal levels. But the framework serves this project best as a segue to future research that places the concept of "hate crime" and the findings of this dissertation at the precipice of new sociolegal mechanisms.

The theory was not entirely eclipsed in the research, however. In a theory-of-Othering framework, HCPA is innovative in its explicit recognition that "hate crime" causes unique harms, which affect individual victims as well as communities of Out-Groups. In relation to the theoretical framework, the HCPA thus emphasizes equally process and outcome—i.e., processes of Othering as much as the harms produced by these processes. By allowing my application of the theoretical framework to be more fluid, I was able to adjust the lens of the research to focus on the meaning of "identity" at the intersection of the theory and the HCPA. This led to such disparate parts of the genealogy as the geographic correlates of "hate crime," moral panics in
lawmaking, crime victims’ rights, among other things. In the end, the archival material revealed a genealogy driven less by processes in Othering than the developments in the conceptualization of "identity." Developments in self-concept and concept of Self are detailed throughout the genealogy in Section V.
IV.B. Othering Processes and Conceptualizing "Identity"

The discussion of the theoretical framework above suggests several important points regarding the development of "identity." First, "identity" in modern social life has been recast as a tool of expression. One does not "have" an identity or a particular feature of identity; one expresses identity. "Identity" in this sense is like a flag one waves: One "identifies as" something; the word itself has become intransitive. The features of our identity are declarative, performative, demanding attention and acceptance from those around us. At this point in cultural history, political and public discourse has all but dropped calls for "tolerance"; merely tolerating is far too passive. Identities require a fist-pumping show of support, the respectful use of deliciously hypermodern pronouns (e.g., Theirs, They), alternative bathroom access, and the cover of Vanity Fair.

Second, "identity" conceptualized as a tool is not fixed or monolithic. "Identity" elements may be unpacked, like opening the lid of an old-fashioned sewing kit, which lifts multiple staggered trays of notions, from which one may select whatever serves the current mood or objective. For example, gender traditions have been especially fragmented, to the point that roles, clothing, pronouns, and with medical intervention, even physiology and physical biological structures may be combined without regard (and in fact with dedicated disregard) to maleness or femaleness. Thus, "identity" expressions may schismed and reassembled.

Third, the "tool" of identity is as multipurpose as there are objectives; the concept of "identity" is like a Swiss Army Knife. Beyond simply being adaptable in myriad ways, "identity" can be designed with a specific purpose in mind. Calculating "identity" expression to achieve a particular result almost always contemplates the reaction of other persons. For example, if a transgender person seeks acceptance from others and the same basic respect for one's gender orientation as "regular folk," the reaction of persons in the immediate social environment is one way to gauge whether the purpose of Their identity expression was achieved. So, although
"identity" may verge toward manipulation, this use also reveals the interdependence of "identities" across the spectrum of expressive options.

Fourth, one may perform "identity" the way one exercises a right. In fact, expressing or performing "identity" is considered a fundamental right. The idea of "identity" and the idea of rights have merged. The previous civil rights era battles to make individual rights equally acknowledged and accessible to all citizens, regardless of such identifying features as skin color or sex, seem quaint when identity itself is viewed as a right. Because rights are available simply by virtue of being, one really does not have rights as much as one embodies them.

In all of these perspectives, "identity" is not passive. Identity formulation does not end at what one has by way of identifying features. Rather, "identity" is active; it is a condition, a question of what one does. Today, to identify oneself does not mean to provide one's name, rank, and serial number. This transitive way of being means to participate in a process of presenting to the social world a composite of one's external genetic features as well as one's internal attitudes, including one's political, sexual, and dietary persuasions. Thus, the major modern trends in identity formulation rest on the presumption that individuals are actors with agency to pursue—and even embody—their own objectives through expression and participation in the process of identifying themselves.

IV.B.1. "Identity" Formulation and "Hate Crime" as National Pastime

How do these various lenses on the conceptualization of "identity" relate to the concept of "hate crime"? I offer two different approaches that bridge these themes of the dissertation: first, the relationship between personal identity formulation, as summarized above, and national identity.

National Identity. This dissertation uses historical documentation to flag certain features of a national identity relevant to the concept of "hate crime." These features are visible across U.S. history. One foundational features is a national pastime of pursuing "happiness," discussed
in further detail in Section V.B-C. The right of American citizens to "pursue Happiness" is so basic, it is "self-evident."\textsuperscript{341} The pursuit of happiness—what might, in its most basic form, be translated to mean individual autonomy and personal perfectibility (reflected in property or wealth)—is the primary way that the nation \textit{embodies} its identity. This facet of national identity reinforces the modern conceptualization of "identity" as both an objective and an expression. As discussed in Section V, national identity does not view "happiness" as a feeling. The nation is not understood to share an emotion (happiness), but a \textit{pursuit} of a state of being. The pursuit \textit{is} the "emotion" of something our founding documents refer to as "happiness." Thus, throughout this dissertation, I cast the American national identity as a \textit{condition}, one that I describe as emotivity—that is, in perpetual pursuit of objectives, such that the identity derives not from the goals but from condition attendant to seeking them. (See Section V.)

Similarly, as explored further in Section V, the concept to "hate" in "hate crime" is not understood as a feeling. "Hate" is understood as a condition of emotivity. In this context, it is less about the negative emotion than the continuity of a way of being, perhaps best summarized in the word "hate-ism"—analogous to the ideological terms, "nationalism," "fascism," or "Islamism."

For the purpose of this dissertation, the important point of viewing national identity as a condition—i.e., in motion, processual, limitless, and perfectible but endlessly so—is that it speaks to the central element of "agency." This lens on American identity places us in the correct vantage point from which to understand the reinforcing development of "identity"—specifically identity-as-agency and the concept of "hate crime." Aside from legislative developments, the interplay of these two themes serves as the foundation of the genealogy, and these points are discussed throughout the genealogy in Section V as well as Section VI.

Other forms of "identity" support the thematic importance of "agency" to this dissertation. Although theoretically limitless in American constitutional democracy (emphasizing freedom of

\textsuperscript{341} See Appendix Self-Evident.
expression), identity-expression must be channeled through the Bill of Rights (as interpreted by the Supreme Court and supported by statutes passed by Congress). The paradox of granting a series of personal rights to the People is that the grant empowers them to pursue personal goals—such as the idea of "Happiness" in the Declaration of Independence—to the fullest extent their own motivations and talents allow, but the rights prescribe the way identity-expression may be enacted, actualized, or "performed" in social life. Expansion and striving are as much a cornerstone of the American identity as the "narrow places" that force citizens to channel their activities. Thus, identity-as-right is a democratic value created by and circumscribed by the U.S. Constitution, by which the national identity was formed.

On a broader stage, this might arguably be called the "Westernization" of the conceptualization of "identity" (contrasted with Eastern conceptualization of identity in which the individual is understood to be knowable only through the rich context of ancestry, community, and other areas of interdependence). Geopolitics over the last two decades or more show that certain individualized and self-justified autonomous "pursuits" have overwhelmed political structures in geographically distant versions of "identity" across the globe. But this is an area for future research, as it is beyond the scope of this dissertation.

**Criminal Law Traditions.** The second way to illustrate how conceptualization of "identity" relates to the emergence of the concept of "hate crime" is found in criminal law traditions. The federal HCPA has an unusual structure as a piece of criminal law. On its face, the statute prohibits "willfully [causing] bodily injury to any person." But the "hate crime" statute cannot be reduced to this activity alone. Even though bodily injury is prohibited under other criminal laws, the HCPA is not redundant in that it prohibits a specific formula for the "will" that carries out the injury: The statute only applies when this conduct is motivated by prejudice, which is the "hate" that is the centerpiece of the statute.

Remarkably, the HCPA is not used on its own. A charge for a "hate crime" has not been prosecuted that did not piggyback on another crime, such as murder, kidnapping, or assault,
according to my research. Prosecutions for hate crimes have consistently relied on an underlying offense, such as murder, assault, or vandalism, for the missing cornerstone. If "hate" provides the intention, then hate crime elements borrow from the underlying crime to fulfill the actus reus requirement. If "hating" is the act, intention is still lacking. Hate crimes are thus parasitic crimes. As a technical legal matter, they cannot occur without an underlying act to give the actor's prejudice one element of a crime, and the proof of a hate crime fulfills the proof of the underlying crime but not the reverse. Proof of "hate" requires separate evidence. In my research, I have encountered no other piece of criminal law that is structured this way.

Recall that the HCPA is not a sentencing enhancement. (The federal sentencing enhancement is the HCSEA.342) Sentencing enhancements are post-adjudication add-ons that require certain forms of proof during trial, but not the same proof required to secure the conviction that led to the offender's sentence (which may then be enhanced). Sentencing enhancements by definition do not require proof of criminal intention.

As a theoretical matter, the HCPA thus appears to be incomplete as a piece of criminal commonlaw. The law is premised on a conceptualization of criminal conduct in which there is no daylight between prejudicial "hate" and violent action. Breaking down the wording to highlight the distinct crime delineated in the HCPA, the statute can be read to prohibit "willfully" prejudicial—i.e., racialized, nationalized, genderized, anti-gay, anti-disabled, etc.—action that "causes bodily injury." The HCPA is also worded to prohibit "willfully causing [racialized, nationalized, genderized, anti-gay, anti-disabled, etc.] injury." With equal validity, the statute can be read to prohibit an offender's racialized, nationalized, genderized, anti-gay, anti-disabled will, if it "causes bodily injury." In the first instance, the HCPA addresses a particular type of action that embodies prejudice. In the second, the wording is geared to distinct harm—the harm of violent discrimination. In the last instance, the HCPA describes a distinct crime in which intention must arise from prejudice. Each of these restatements of the

342 See Appendix HCSEA.
crime in the HCPA speaks to a different interpretation of the "criteria for initial fit," discussed in Section III.A.2 (legislation, violence, patterned Othering, multiple stakeholders).

If we stop to consider the conceptualization of "identity" reflected in the wording of the HCPA, we find the same multifaceted, multipurpose perspectives on Self and Other that are detailed in the paragraphs above. The merging of intention/expression and action/embodiment takes full form in the law. Thus, we also have an example of the way that Young's blurred boundaries are demonstrated in law and human action—in this case, between intention (expression) and action (embodiment). Under the HCPA, these blurred boundaries point to the concept of "agency."

IV.B.2. Criminal Law Deficiencies: *Mens Rea, Actus Reus, and "Hate"

The consequence of merging intention and action is that it leaves the HCPA deficient theoretically under criminal law traditions. Which of the two necessary structural components is missing in the HCPA? Under criminal commonlaw traditions, a criminal law violation requires proof of both "bad intention" and "bad act." The respective legal terms are *mens rea* and *actus reus*. However, the law as actually implemented, the HCPA appears to be missing one of these two elements.

Law enforcement is concerned with evidence of motive, opportunity, and means. This formula is translated by the prosecution into two cornerstones of criminal prosecution: intent (*mens rea*) and criminal action (*actus reus*). The elements of a crime that comprise bad intention and bad act are enumerated in the criminal statute, and the prosecution plugs in evidence (facts) to prove these elements were carried out by the defendant.\(^\text{343}\) Motivation and

\[^{343}\text{The Model Penal Code, passed by the American Law Institute in 1962 to standardize criminal law, defines crimes in terms of a set of "elements of the offense." There are three types of elements:}
- Conduct of a certain nature;
- Circumstances attendant to the conduct at the time of the conduct; or
- The result of that conduct.\]
intent are not the same, but they are mutually supportive. The trier-of-fact (the jury or judge) interprets the evidence as either fulfilling the elements or not, weighed against credibility and other factors. At sentencing, the judge may increase the penalty based on a sentencing enhancement (additional element to be proven at trial beyond a reasonable doubt) and/or aggravating circumstances (demonstrated at sentencing by preponderance of the evidence), which speak to the severity of the crime (e.g., heinous, cruel and inhumane) or the way the crime was carried out (e.g., maliciously, with depravity), or the vulnerability of the victim(s) (e.g., elderly, disabled, children).

Where does the concept of "hate" fit into this schema?

Is hate the motivation for the crime, as defined in HCSA and FBI material? "Hate" as a motivation is akin to the mental state of a "crime of passion." When one is overwhelmed by

The prosecution has the burden of proof to establish each of these elements to the finder-of-fact beyond a reasonable doubt for the defendant to be found guilty. (Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952).)

See, e.g., People v. Fulmer, 2011 Cal. App. Unpub. LEXIS 3183 (2012) (discussing state hate crime enhancement law, "Motive is not an element of the "crimes charged"; motive is an element of the hate-crime enhancement, but an enhancement is not the same thing as a crime."). Lawrence distinguishes the two: "[I]ntent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of the offense. Motive, by contrast, concerns the cause that drives the actor to commit the offense." (Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 108 (1999).)

Criminal law almost always requires consideration of intent, or *mens rea*, to assess a crime; it does not "concern itself with motivations." (Rep. John Conyers Jr. Holds a Markup of Pending Legislation Before the House Committee on the Judiciary, 111th Cong. (2009) (Statement of Sen. Franks).) Congressman Gohmert stated, "If someone intended to harm a person, no motive makes them more or less culpable for that conduct." (Id. (statement of Rep. Gohmert).)

The Model Penal Code §1.13(9) offers the following definition of the phrase "elements of an offense":

(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
(a) is included in the description of the forbidden conduct in the definition of the offense; or
(b) establishes the required kind of culpability; or
(c) negatives an excuse or justification for such conduct; or
(d) negatives a defense under the statute of limitations; or
(e) establishes jurisdiction or venue.

All but the last two categories are material elements, and the prosecution must prove that the defendant had the required kind of culpability with respect to that element. Each material element of every crime has an associated culpability state that the prosecution must prove beyond a reasonable doubt. (Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952).)

For a discussion of the differing standards of proof for sentencing enhancements and aggravating circumstances under U.S. Supreme Court Apprendi standards, see Brown v. Wyoming, 2004 WY 119 (2004) (appealing sentences--not related to "hate" or bias crimes--based on constitutional principles newly articulated in cases applying "hate crime" provisions; citing Apprendi v. New Jersey, 530 U.S. 466 (2000)).
passion, intent is viewed as inapposite. Like expressions of jealousy or rage, the expression of hatred that motivates a violent act looks similar to the mental state of temporary (or permanent) insanity. Legally, insanity means the actor could not have formed the requisite criminal state-of-mind, or intent. The law creates exceptions to typical punishments for defendants who demonstrate insanity or temporary insanity.

Or, is hate the intention that establishes the actor’s mens rea? Under the Model Penal Code on which criminal statutes are designed, the actor’s culpability is expressed in one of several levels of "mental states," in descending order as follows: purposely, knowingly, recklessly, or negligently; the most culpable state-of-mind is "strict liability," which is rarely applied. "Hate" as a mental state for intention implies purposeful action or knowing action. (Reckless "hate" would likely be treated as a "crime of passion," discussed above, which would not be charged as a "hate crime.") Many legal scholars would say that "hate" is too amorphous a state-of-mind to prove legal intent for a specific act. While "hate" on its own would be insufficient to demonstrate intention, "hateful" intent coupled with specific proof that the intention was aimed at committing an unlawful act might be adequate to prove a charge of "hate crime."

If we prove intention by other means, does "hate" fulfill the action requirement? Can feeling "hate" be viewed as an act (actus reus) under the law? Actus reus has a somewhat expansive meaning in the law. In conspiracy, the "act" of merely agreeing with others to commit a crime satisfies the actus reus element in some jurisdictions, and the way such an agreement is proven

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349 Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952) (noting that the standardization of mens rea was one of the MPC’s most important innovations).
in conspiracy cases is not very different from the evidence used to prove hate in a hate crimes. In other words, although the elements are understood as distinct from each other, the single moment in which a conspiratorial agreement to do something criminal is evidenced fulfills both elements of a crime (act and intent). But conspiracy is understood as a stretch of criminal law traditions. The law of conspiracy is an aberration. Notably, this criminal law aberration has a prominent place in the genealogy of the concept of "hate crime," as detailed in Section V.D.3, V.D.5, and V.D.7, which discuss federal conspiracy statutes. In contrast, "hate" is understood as a feeling, and feelings are not technically actions under U.S. law. To be legally punishable, feelings must linked to criminal behavior. Threats, harassment, and even a conspiracy to do something criminal based on one's "hateful" feelings may be sufficient.

In sum, the law requires not just the intention to commit a specific crime but some substantial act in its furtherance. By definition, mens rea and actus reus are distinct. In the prosecution of a crime under the HCPA, whether "hate" is viewed as part of mens rea or actus reus, that still leaves the other element to be demonstrated in some other way. Could "hate" fulfill act and intent at the same time? This dissertation posits that the concept of "hate crime"—with its distinct features as a criminal law, its nearly impenetrable standards of proof, and its concomitant tendency to confuse observers into thinking that it presents an illiberal regulation of protected forms of speech—signifies a change in the way that identity-as-agency is conceptualized. In an era when "identity" reflects one's traits (whether genetic or chosen), one's expression, one's actions, and more, the HCPA—specifically its inconsistency with criminal law traditions—serves as a microcosm of these shifts in identity formulation in modern social life.

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V. INTRODUCTION TO THE GENEALOGY OF THE CONCEPT OF "HATE CRIME"

V.A. Geographic Correlates of "Hate"

In the early morning hours of June 7, 1998, police officers in Jasper County, TX, a prosperous timber region, responded to a call that led them to a predominantly Black-congregant church with an adjoining cemetery on Huff Creek Road in the town of Jasper, the county seat (pop. 8000). There the officers found a large section of bloody carcass that they initially thought was roadkill. On closer examination, they confronted the partial corpse of a headless African-American male, with its right arm and neck torn off, the remains of men's pants and underwear gathered around the ankles, and skin abrasions so profound bones and muscles showed through the skin. The officers followed a trail of blood, which was smeared into drag marks in the dirt and spattered on the winding macadam roadway for about a mile and a half, until they found the victim's head, neck, and arm strewn in a culvert. Continuing roughly another mile through the East Texas woods to a dirt logging road, the officers collected personal effects later identified as belonging to the victim, including dentures, keys, shirts, and a watch. The breadcrumb trail of evidence ended at an area where the grass was matted down, where the officers found a shirt button and a baseball cap, both later found to have belonged to the victim, along with a lighter engraved with the word "Possum" and the signifier "KKK," a wrench inscribed in cursive with the name "Berry," cans of "fix-a-flat" and black spraypaint, a woman's watch, and several beer bottles. In all, investigators encountered 75 separate sites where evidence was scattered—bloody body parts or inanimate objects—like the points along a starry constellation articulating the victim's prolonged torment before his death. At one of these
points, they found a wallet containing the identification (later confirmed with fingerprints) of the victim: James Byrd, Jr., 49.\footnote{State of Texas v. Lawrence Russell Brewer, District Court of Brazos County, [not reported] (Sept. 1999). The procedural history of Brewer's cases as follows:
- On October 30, 1998, Brewer was indicted for capital murder by a Jasper County grand jury. Venue was transferred to Brazos County for trial in June 1999.
- On September 20, 1999, Brewer was convicted of capital murder. After a separate punishment proceeding, Brewer was sentenced to death on September 23, 1999.
- On April 3, 2002, Brewer's conviction and sentence were affirmed by the Texas Court of Criminal Appeals on direct appeal. Brewer did not appeal the state court's decision to the U.S. Supreme Court. Instead, he filed an application for habeas corpus relief, which was denied by the Texas Court of Criminal Appeals on September 11, 2002.
- On September 29, 2006, the U.S. Court of Appeals for the Fifth Circuit rejected Brewer's appeal and affirmed the denial of habeas corpus relief by the district court. Brewer v. Quarterman, 466 F.3d 344 (5th Cir. 2006). (habeas).
- Brewer filed a petition for writ of certiorari in the U.S. Supreme Court on April 30, 2007, but the Supreme Court denied certiorari review on October 1, 2007.

The case sparked numerous movies, including a documentary launched to capture the inspiring literary beauty of the American South in 1999. The filmmaker, Chantal Akerman, shifted focus when she learned about the Byrd case. Instead, Akerman made "Sud" ["South"], a reflection on Byrd's case mixed with historical references to racial violence in the United States.

In 2003, a Showtime movie titled "Jasper, Texas" aired, and a documentary by filmmakers Marco Williams and Whitney Dow titled "Two Towns of Jasper" premiered on PBS's P.O.V. series.}

A later autopsy detailed the evidence of agony Byrd suffered, conscious and trying to hold his head up, as he was dragged along the gravely road to his death by decapitation:

Nearly all of Byrd's anterior ribs were fractured. He suffered "massive brush burn abrasions" over most of his body. Both testicles were missing and gravel was found in the scrotal sac. Both knees and part of his feet had been ground down, his left cheek was ground to the jawbone, and his buttocks were ground down to the sacrum and lower spine. Some of his toes were missing and others were fractured. Large lacerations of the legs exposed muscle. But his brain and skull were intact, exhibiting no lacerations, fractures, or bruises. A pathologist concluded that the lacerations and abrasions around Byrd's ankles were consistent with the ankles having been wrapped by a chain and that the abrasions all over Byrd's body were consistent with him being dragged by his ankles over a road surface. Red regions around the area where Byrd's upper and lower body separated indicated that Byrd's
heart was still pumping and that he was alive when his body was torn apart by the culvert. Therefore, Brown determined that the cause of death was separation of the head and upper extremity from the rest of the body. Some of the wound shapes and patterns indicated that Byrd was conscious while he was being dragged and was trying to relieve the intense burning pain by rolling and swapping one part of his body for another. 352

Byrd, a resident of Jasper called "Toe" around town because his toe had been cut off in an accident, lived on an anemic disability check in a small apartment in the eastern section of Jasper. Byrd's father was a deacon and his mother a Sunday School teacher at Jasper's Greater New Bethel Baptist Church. He was known for his singing voice and his trumpet and piano playing, which he shared with friends at parties and on occasions. The night he was murdered, Byrd had been at a bridal shower with friends, and after he left, one of whom saw Byrd walking on Martin Luther King Drive towards his home at around 02:00. He lived just a mile away. Another friend saw Byrd pass by in the back of a primer-gray pickup truck with three white people in the cab. 353

The three men in the cab were later identified as vehicle owner Shawn Allen Berry (23-years-old), and his roommates, Lawrence Russell Brewer (31) and John William "Bill" King (23), both of whom had prison records. King had cultivated a reputation in prison as the "exalted Cyclops" of the Confederate Knights of America ("CKA"), a White Supremacist gang. He wore tattoos depicting a swastika, a KKK emblem, the phrase "Aryan Pride," woodpecker (a signifier for Whites) in Klan robes making an obscene gesture, and a Black man with a noose around his neck hanging from a tree. King had been known to point at this tattoo while saying, "See my

little nigger hanging from a tree." Although neither of the men was known to have a history of criminal violence, King was an avowed racist who frequently complained that "[B]lacks are different from whites and are taking over everything—taking over welfare." 354

On the evening of June 8, 1998, Berry was arrested for several traffic violations. Police seized his gray Ford truck, in which they discovered a set of tools matching the "Berry" wrench. Forensic tests showed that the truck's tires, one of which had been repaired with a chemical substance consistent with fix-a-flat, matched the tread marks near the church where Byrd's body had been found and near the matted grass. DNA tests of bloods patters discovered under the truck and on one of the tires matched Byrd's DNA.

Police officers and FBI agents searched the apartment where the three unemployed men lived. They seized clothing and shoes, including two pairs of Rugged Outback brand sandals, one of which matched a shoe print found near a large blood stain on the logging road, a Nike tennis shoe with the initials "LB" in the tongue with blood stains matching Byrd's, among other items. DNA on the crime scene cigarette butts matched King and Brewer. In the nearby woods, police found a large hole in the ground covered by plywood and debris, where they discovered a 24-foot logging chain that matched a rust stain in the bed of Berry's truck next to Byrd's blood. Investigators also collected writings and drawings by King, depicting Klansmen on horseback with nooses hanging from the saddles and a Klansman standing near a lynched Black man while a Black family kneeled, as shown in Figure 5: Worse Than Slavery. 355

Figure 5: Worse Than Slavery

Source: Thomas Nast, *The Union as it was / The Lost Cause, worse than slavery*, 18(930) Harper’s Weekly 878 (Oct. 24, 1874), citing The Library of Congress, Prints and Photographs Division, LC-USZ62-128619.

The writings revealed that King intended to launch a Jasper CKA chapter and, to gain credibility as a leader in the CKA and signal that the group was active in the area, was planning a major public act to strike fear among local African-Americans on Independence Day, July 4,
Whether or not such an act would have sparked fear in a community already accustomed to systemic racism, a major public act demonstrating violent attitudes toward the Black community would not have surprised residents. East Texas was a home away from the Pulaski (TN) home of the Ku Klux Klan during its organized activities between 1866 and 1920. As recently as 1994, in nearby Vidor, TX, armed Klan members patrolled the area surrounding the town housing project to protest and prevent its integration. In an odd way, King's admission may have offered some narrow confirmation of the assertion of Jasper's mayor, R.C. Horn, an African-American, and the words of the local sheriff, who said during the investigation, "We have no organized KKK or Aryan Brotherhood groups here in Jasper County"—a statement that prompted mocking "whoops and catcalls from the Black residents" and elided the brutal treatment and deaths of Black men at the hands of law enforcement in the region. An expert later opined that leaving Byrd's torso in front of a church, rather than hiding it in a wooded area near the town, suggested that Byrd's murder was designed to terrorize the community, a tactic use by the KKK to oppress Black members of their communities.


Ironically, Byrd's memorialization and funeral served as both memorial and an opportunity for an organized protest against racial hatred. At Byrd's funeral services, 200 people inside the sanctuary and approximately 600 outside, including a small number of White townspeople, mourned with such civil rights leaders as the Reverends Jesse Jackson and Al Sharpton, Transportation Secretary Rodney Slater, Senator Kay Bailey Hutchison (R-TX), and Representative Maxine Waters (D-CA). Other residents wear yellow ribbons honoring Byrd's memory, and some area businesses fly their flags at half mast. Two groups of armed African-American men in paramilitary garb bearing Nation of Islam and the New Black Panthers insignia march from the Jasper sheriff's office to Byrd's former neighborhood, advising Black residents to arm themselves. (David Firestone, Speakers Stress Racial Healing At Service for Dragging Victim, N.Y. Times, Jun. 13, 1998, available at http://www.NYTimes.com/1998/06/14/us/speakers-stress-racial-healing-at-service-for-dragging-victim.html.)


The mayor of Jasper claimed that that the city was relatively racially tolerant, with "a strong bind together, both Black and White." (See http://www.HistoryCommons.org/context.jsp?item=a060798byrdrcrime#a060798byrdrcrime.) But the Texas chapter of the NAACP refuted this, stating that east Texas, including Jasper, has been a center of Klan activity for years, notably in the town of Vidor, a de facto "White town."

358 There have been a series of police killings and jailhouse deaths of black men in recent years in nearby areas of east Texas. In Hemphill, Texas, in neighboring Sabine County, on the Texas-Louisiana border, a young father of six, Loyal Garner, was arrested on a phony drunk driving charge, taken to the county jail and beaten to death in 1987. Another young black man, arrested for the theft of a fountain pen, died in a jail cell in 1988 after a police beating.
Townspeople speculated that the murder of Byrd was a retaliation for an earlier murder of a Jasper White man by one of his Black former employers, but the sheriff dispelled these rumors: "These guys aren’t smart enough to retaliate."359

While in jail awaiting trial, King wrote letters regarding the night of Byrd's murder to the Dallas Morning News. In his letters, King wrote:

[The] fact that my cigarette lighter with "Possum" inscribed upon it was found near the scene of the crime, along with other items--i.e., several hand tools with "Berry" inscribed on them, a compact disk belonging to Shawn Berry's brother Lewis, and my girlfriend's watch, as well as items of the deceased--are all verified facts implementing that these items could have fallen from Shawn Berry's truck during a potential struggle with the deceased while on the tram road. However, unacknowledged facts remain, that I, along with Russell Brewer and Lewis Berry, had been borrowing Shawn Berry's truck to commute to and from an out-of-town land clearing job each day. My girlfriend's watch was kept in Shawn Berry's truck for us to keep track of the time....[T]he aforementioned cigarette lighter had been misplaced a week or so prior to these fraudulent charges that have been brought against Russell Brewer and me. This, so forth, does not prove the presence of my girlfriend, Lewis Berry, Russell Brewer nor myself at the scene of the crime, verifiably only the owners of the property in question.

* * *

Against the wishes of my attorney, I shall share with you objective facts and my account of what happened during the early morning hours of June 7, 1998.

After a couple of hours of drinking beer and riding up and down rural roads...looking for a female's home, who were expecting Shawn Berry and Russell Brewer, Berry though [sic]

frivolous anger and fun at first, begun [sic] to run over area residents' mail boxes and stop signs with his truck due to negligence in locating the girl's residence. Becoming irate with our continued failure to locate the female's house, Shawn Berry's behavior quickly became ballistic…Shawn Allen Berry, driving with a suspended license and intoxicated, while taking Russell Brewer and me home those early morning hours, decided to stop by [the home of] a mutual friend of ours…On our way there, we passed a black man walking east on Martin Luther King Drive, whom Shawn Berry recognized and identified as simply Byrd, a man he befriended while incarcerated in the Jasper County Jail and, Berry stated, supplied him with steroids.

Shawn Berry then proceeded to stop his truck approximately 10 yards ahead of this individual walking in our direction, exit his vehicle, and approach the man. After several minutes of conversation, Shawn Berry returned to the truck and said his friend was going to join us because Berry and Byrd had business to discuss later and, thus, Byrd climbed into the back of Shawn Berry's truck and seated himself directly behind the cab... [Later], Berry asked if Russell Brewer and I could ride in the back of the truck and let his friend sit up front to discuss the purchase and payment of more steroids for Shawn Berry. Russell Brewer and I obliged on the condition Berry take us to my apartment without further delay, which, after a brief exchange of positions, he did.

Once we arrived at my apartment, Shawn Berry informed Russell Brewer and me that he was leaving so that he could take Byrd to get the steroids and then home. I asked if Brewer or I would bring a small cooler of beer down for him and his friend along with a bottle of bourbon Berry had bought a few days prior.

Russell Brewer and I went up to my apartment and began to fill a small cooler with approximately six to eight beers. Realizing I left my wallet and cigarettes in Shawn Berry's truck, I opted to bring the cooler back down to Berry. After retrieving my wallet, but unable to locate my cigarettes, I then returned upstairs to my apartment, into my bedroom, and

Shawn Berry told a different story: When Berry offered Byrd a ride, King became infuriated, cursing and calling Byrd racial epithets. King took over driving with Byrd in the pickup and eventually turned off Huff Creek Road onto a dirt road. He told the others he was "fixin' to scare the shit outta' this nigger." When they stopped the truck and got out, Brewer and King began beating Byrd, and Brewer sprayed Byrd's face with black spraypaint. Berry believed Byrd was unconscious. Berry told investigators that he started to run away, but King drove up to him and insisted he get in the cab. King told the others, "We're going to start the Turner Diaries early"—referring to a text written by and said to have inspired violent actions by White Supremacists.\footnote{White supremacist and separatist William Pierce, a leader of the neo-Nazi National Alliance (1970-1974), publishes a novel called The Turner Diaries under the pseudonym Andrew Macdonald.} Berry claimed that he was unaware that the others had chained Byrd to the truck, until he looked back to see Byrd hooked to the back of the pickup with a heavy logging chain that was wrapped around Byrd's ankles.

Berry said he asked to be let out of the truck and King said, "You're just as guilty as we are. Besides, the same thing could happen to a niggerlover."

In front of the church, King unchained the victim's remains, and the three men then went to a barbecue.

Texas authorities charged Berry, Brewer, and King with numerous felonies, including capital murder and kidnapping. Brewer and King exchanged letters while awaiting trial. Brewer wrote
from jail about his experience of the murder: "Well, I did it. And no longer am I a virgin. It was a rush, and I'm still licking my lips for more." ³⁶²

While both were in jail awaiting trial, King wrote to Brewer: "Bro, regardless of the outcome of this, we have made history and shall die proudly remembered if need be...Death before dishonor. Sieg Heil...Much Aryan love, respect, and honor, my brother in arms...Possum." ³⁶³

In 1999, Berry was sentenced to life in prison; King and Brewer (executed 2011) were sentenced to death. ³⁶⁴

The facts of the Byrd case presented the general public with the graphic image of the stereotypical "hate crime": the lynching of a Black man in the South, chained to a pick up by White Supremacists who intended to terrorize the community with renewed KKK activity. If

King's father, Ronald L. King, also a Jasper resident, is reported to have offered an apology for his son's actions:

"My sympathy goes out to the Byrd family. There is no reason for a person to take the life of another, and to take it in such a manner is beyond any kind of reasoning. It hurts me deeply to know that a boy I raised and considered to be the most loved boy I knew could find it in himself to take a life. This deed cannot be undone, but I hope we can all find it in our hearts to go forward in peace and with love for all. Let us find in our hearts love for our fellow man. Hate can only destroy. Again, I want to say I'm sorry."

Byrd's wife and three children—most vociferously, his only son, Ross Byrd—opposed the death penalty generally and requested the State instead impose a life sentence on James Byrd's murderers, to "show them the mercy" they did not show their loved one. In honor of his father, Ross founded the (anti-death penalty) James Byrd Foundation for Racial Healing.
Byrd's sisters favored capital punishment After wishing the Brewer family condolences at a press conference near the state execution facility in Huntsville, TX, in 2011, Byrd's two sisters and a niece spoke of the execution as a step toward justice for Byrd and a reminder of the destructive power of racial hatred. See Erin Kelly, Victim's Daughter Pledges for Stronger Hate-Crime Laws, USA TODAY, July 9, 1998, at 6A.
"hate crime" statutes had any applicability, this case was tailor-made. But Berry, King, and Brewer weren’t charged with and prosecuted under a "hate crime" statute. Why not?

The answer is twofold: First, federal law did not apply. While Byrd was among the categories of persons protected by then-existing federal criminal civil rights law under 18 U.S.C. 245 (detailed below), federal protections were applicable only in cases in which the victim had been engaged in a federally protected activity or on land under federal jurisdiction at the time of the attack. Second, at the state level, because applicable Texas sentencing laws already permitted prosecutors to seek the death penalty against the defendants, any enhancement in the sentences for the murder of Byrd would have offered symbolic, not practical, effect. But the larger problem was that the Texas provision was thought to be unconstitutional. An explanation of why this mattered outside Texas requires a brief review of the U.S. Supreme Court decisions affecting state laws.

365 Cong. Rec. S12538 (Oct. 14, 1998) (Statement of Sen. Specter) ("The current hate crime legislation was deemed inadequate on the murder of Mr. Byrd because the victim was attacked in a way where he was not seeking to exercise a federally protected right.") See also Kathleen Kenna, Victims’ Families Demand Hate Crime Crackdown, Toronto Star, Mar. 24, 1999, at 1 ("Current federal law is inadequate because it’s linked to specific acts, such as being preventing [sic] from voting or attending school because of one's race."). During the 2000 presidential campaign, advocacy groups working for racial equality, such as the NAACP National Voter Fund, accused George W. Bush of racism because he had refused to amend the "hate crime" enhancement while serving as governor of Texas.

Some scholars have critiqued the use of the Byrd case to rally for stronger federal ABL:

[The horrific nature of certain crimes, like the murders of James Byrd, Jr., Matthew Shepard, and the magnitude of the multiple murders at Columbine, has the power to transform a local crime into an event of national impact, generating demands for a federal criminal law response. Even when the state law response is adequate [as was Texas law in the Byrd case], the national attention drawn by these cases typically generates a corresponding call for a national response. As I found in testifying before the House Judiciary Committee, proponents of a federal "hate crime" statute use the headline cases to frame the debate as a test of opposition to or support for hate.] (John S. Baker, Jr., U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation, 80 B.U. L. Rev. 1191, 1194 (2000)).

366 Prosecutors did not utilize Texas’s "broadly worded" hate crime sentencing enhancement, which failed to specify which groups were covered under the statute, because they were already seeking capital punishment. (Rick Lyman, Hate Laws Don’t Matter, Except When They Do, N.Y. Times, Oct. 18, 1998, Section 4, at 6.)
U.S. Supreme Court Standards for State Sentencing Enhancements

In 1998, the existing Texas "hate crime" sentencing enhancement provision referred to the offender's "bias" or "prejudice" without enumerating categories of persons to be protected from targeted victimization.\(^\text{367}\) Because the statutory provision did not identify particular actions or protected Out-Groups, the state law was overbroad and, at the same time, did not speak directly to the acts of racial animus against Byrd. Until Texas passed the 2001 James Byrd, Jr., Hate Crime Prevent Act, which amended the state sentencing enhancement to conform with U.S. Supreme Court standards, the existing Texas law was thought to be unconstitutional.\(^\text{368}\) In fact, the 1993 version of the Texas statute, which did not use the term "hate," was passed nearly contemporaneously with two U.S. Supreme Court decisions that should have put the Texas

\(^{367}\) Tex. Pen. Code § 12.47 (1993); Tex. Crim. Code Art. 42.014 (1993) (increasing punishment to the next highest category of offense in crimes in which the court makes an affirmative finding that the offender was motivated by "bias" or "prejudice").


In the wake of the Byrd murders, State Senator Rodney Ellis (TX-D) rallied for the state legislature to revise Texas' then existing hate crime sentencing enhancement provision, which enhanced penalties for offenders shown to be motivated by bias against "groups" of people without specifically listing which groups were protected. This failure of specificity dampened the law's use by prosecutors and rendered it unconstitutional. The amended enhancement provision was drafted to conform with US Supreme Court standards in Wisconsin v. Mitchell, 508 U.S. 476 (1993), to preempt due process and equal protection challenges, and to add provisions for civil remedies by victims under specified criteria. Then Governor George W. Bush rejected the 1999 proposed amendments, stating (apparently without irony) that tougher laws were not necessary to punish violent crimes, omitting the influence of conservative religious opponents to the bill because it specifically included protections for LGBTQ+ victims.

In 2001, Governor Rick Perry, who inherited George W. Bush's unexpired term, signed into law the final version of HB Ch 587.

The current Texas law reads:

Art. 42.014. Finding That Offense Was Committed Because of Bias or Prejudice. (a) In the trial of an offense under Title 5, Penal Code, or Section 28.02, 28.03, or 28.08, Penal Code, the judge shall make...and enter the affirmative finding in the judgment...[that beyond a reasonable doubt] the defendant intentionally selected the person against whom the offense was committed or intentionally selected property damaged or affected as a result of the offense because of the defendant’s bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference.

(b) The sentencing judge may, as a condition of punishment, require attendance in an educational program to further tolerance and acceptance of others.

(c) In this article, "sexual preference" has the following meaning only: a preference for heterosexuality, homosexuality, or bisexuality.

legislature on notice that the law was unconstitutionally vague. These rulings were leveraged by Texas congressional representatives between 1999 and 2001 to argue in favor of amendments clarifying the state enhancement provision.

1992-1993

The only two U.S. Supreme Court rulings that have directly addressed state "hate crime" legislation were handed down one year apart, in 1992, addressing First Amendment limitations when regulating expressive behavior, and in 1993, upholding victim selection based on

See Martinez v. State, 980 S.W.2d 662 (Tex. Ct. App. 1998) (ruling that selecting a victim based on race was covered by the sentencing enhancement and that circumstantial evidence of a defendant's past prejudicial statements or acts could be used to establish biased motivation, but declining to address whether Art. 42.014 (1993) was unconstitutionally vague because the defendant had failed to timely raise this objection in the lower court).

R.A.V. v. St. Paul, 505 U.S. 377 (1992). The case has been widely reported and analyzed. Following is a summary of the case:

In R.A.V. v. St. Paul, 505 U.S. 377 (1992), the U.S. Supreme Court ruled that ‘s Bias-Motivated Crime Ordinance was unconstitutional under the First Amendment. The ordinance prohibited the display of a symbol which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. The defendant was charged under the ordinance after he and several other teenagers had burned a crude cross in the yard of an African-American family. Five justices of the U.S. Supreme Court, with the other four concurring in the judgment, ruled that the ordinance was unconstitutional because it prohibited otherwise permitted speech based solely on its content or message. While agreeing that burning a cross in someone's front yard was reprehensible, the majority asserted that St. Paul had sufficient means at its disposal to prevent such behavior without violating the First Amendment.

The First Amendment generally prevents the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. Restrictions on the content of expression are permitted only in a few limited areas, where the slight social value of allowing the speech is clearly outweighed by the social interest in order and morality. Prohibitions against pornography or defamation are such narrow exceptions. Even in these cases, the laws are not regulating the content of the expression, but only the way the ideas are communicated. Similarly, expressive conduct can be banned because of the action it entails, but not the ideas it expresses; for example, the government can punish a person for burning a flag in violation of an ordinance against outdoor fires, but it would be unconstitutional to punish the person for burning the flag because the government dislikes the ideas expressed by such an act. "Fighting words" are excluded from First Amendment protection, not because of the particular idea expressed, but because such words embody a particularly intolerable mode of expressing that idea, such as by inciting violence.
prejudice toward a specific Out-Group.371 The key difference between the laws contemplated in each case—and the respective Supreme Court decisions—was that the former ordinance, passed

371 Wisconsin v. Mitchell, 508 U.S. 476 (1993). This case has served as a guidepost for states with sentencing enhancements geared toward bias-motivated crimes. Following is a summary of the case:

In 1989, an African-American man was accused of inciting the robbery and brutal beating of a young Caucasian boy. The defendant was convicted of aggravated battery. His sentence was enhanced under Section 939.645, based on the jury's finding that he had intentionally selected his victim based on the boy's race.

The defendant alleged that the Wisconsin's penalty-enhancement provision violated the First Amendment. Under the Wisconsin statute, criminal conduct was punished more severely if the offense was motivated by the perpetrator's bias against the victim. The defendant asserted that because the only reason for enhancing his sentence was his discriminatory motive for selecting his victim, the statute violated the First Amendment by punishing him more severely based only on his beliefs.

The court differentiated this case from R.A.V., noting that the ordinance struck down in R.A.V. was explicitly directed at expression, while Section 939.45 was aimed at criminal conduct, which is not protected by the First Amendment. The statute singled out bias-inspired conduct for enhancement because this conduct is thought to cause greater individual and societal harm, possibly provoking retaliatory crimes, inflicting distinct emotional harm on victims, and inciting community unrest. The court found the state's desire to redress these perceived harms provided an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. It is reasonable, stated the court, that those crimes which are the most destructive of the public safety and happiness should be most severely punished.

The defendant also argued that the statute was unconstitutionally overbroad and would "chill" the exercise of free expression because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. He asserted that people might be discouraged from expressing certain unpopular opinions because if, in the future, they commit a criminal offense covered by the statute, their prior words could be used against them to enhance the sentence. The court rejected this argument, finding it too hypothetical and speculative. The court also noted that evidence of a defendant's previous statements is commonly admitted in criminal trials, subject to the rules of evidence. ||

in St. Paul, MN, regulated conduct that was otherwise permissible under the First Amendment, while the latter added punishment to conduct already deemed criminal. These two tracks of argumentation, both referencing deeply rooted constitutional issues, were used in congressional debates objecting to the HCPA from its early introduction in 1999 up to the year it passed in 2009.

According to the ruling in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the wording of the St. Paul Bias-Motivated Crime Ordinance prohibited "the display of a symbol"—clearly a category of free speech—that aroused "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender"—a result which the city deemed to be a form of incitement. (Incitement, along with other speech and expression that threaten public safety, is not protected by the First Amendment.) The Court held that "such a content-and view-point based regulation of hate expression" was *prima facie* unconstitutional.\(^{372}\) The Court also observed that the "fighting words" exception to free speech must be universally applied to all forms of incitement, not merely those against particular Out-Groups.\(^{373}\)

In the subsequent companion case, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), a unanimous Supreme Court upheld Wisconsin's "hate crime" sentencing enhancing provision, which allowed for increased penalties when a defendant convicted of a criminal offense is shown to have been motivated by bias to intentionally select the victim (or vandalize property) based on the race, religion, color, disability, sexual orientation, national origin, or ancestry of the target (including an owner, occupant, or typical patron of the property).\(^{374}\)

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Based on the reasoning outlined above, a unanimous U.S. Supreme Court upheld Section 939.645 of the Wisconsin Statutes, which provides for enhanced penalties for the underlying crime when the defendant intentionally selected the victim or vandalized property because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property.


\(^{374}\) Wisconsin v. Mitchell, 508 U.S. 476 (1993). The case arose when black youths, who had just seen the movie *Mississippi Burning*, attacked a white male. Mitchell, who instigated the violence, told the groups "There goes a white boy; go get him." (508 U.S. 480.)
Based on these Supreme Court decisions, virtually every state in the country amended or passed laws to conform with these standards. But it took nearly a decade for Texas to make the necessary changes. Thus, at the time of Byrd's tailgate lynching in mid-1998, state sentencing enhancements for acts then commonly described as "hate crimes" were in the process of becoming more unified as they were amended (or passed anew) to conform to the constitutional standards set by the Supreme Court.

Notably, the fact—easily overlooked—that Byrd's killers were not prosecuted under any "hate crime" statute (with no reduction in their sentences) did not diminish the influence of his racialized victimization on Texas legislators and the country to correct the flaws in state and federal "hate crime" statutes.375 Byrd's case called attention to gaps in the state-federal web of laws intended to protect people from random violence. Before legislators and the public had time to digest the implications of these gaps, another grotesque murder of a member of an Out-Group spurred national debates about "hate" as a crime just four months later.

|| October 1998 ||

In October 1998, a cold morning after a night of near-freezing temperatures, a bicyclist riding along a rural road outside Laramie, WY, noticed a scarecrow lazily dangling on its haunches, its wrists tied to a "buck-and-rail" fence—a term that "drips with the masculinity of

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375 The name James Byrd, Jr., is generally less widely recognized than the name of his counterpart, Matthew Shepard, who was victimized in Wyoming in 1998. Some believe this is because Byrd was Black, while Shepard was White. The more likely explanation is that Byrd's status as a legitimate victim was never questioned. As a category of protected people, the legitimacy of African-Americans has never been seriously challenged. Also, Byrd's killers were given the highest sentence possible for any crime; in fact, one was executed. In contrast, Matthew Shepard was subject to victim blaming; his status as a legitimate victim category worthy of protection was questioned by the conservative religious communities; and the antigay statements by his attackers was tacitly accepted as valid across Wyoming. (See Sharon Hope Weintraub, "State Hate Crime Laws Seek to Punish Prejudice," Sen. Rsch. Ctr. In Brief (Feb. 1999).)
ranch life” in Wyoming. As he approached, the figure took clearer shape: A man, unconscious and nearly dead, was propped against the fence with his hands tied behind him, his face encased in dried blood that also soaked through his clothing. Sheriff’s Deputy Fluty, who responded to Kreifels’s emergency call reported later that the “only spots [on the victim’s face] not covered in blood were the tracks cleansed by his tears.”

The victim had suffered approximately 18 blows to the head with fists and the butt of a revolver, a dozen cuts to his head, face and neck, as well as a massive and ultimately fatal blow to the back of his skull. His hands showed defensive wounds, and his groin was bruised from brutal kicking. He was later identified as a soft-spoken 21-year-old college student, Matthew Shepard.


Attacks on gays were reported across the country:
- In early 1999, Billy Jack Gaither was beaten to death with the handle of an axe and then set on fire (See John Koch, Weak Look at Antigay Attitudes, Boston Globe, Feb. 15, 2000 (describing Billy Jack Gaither’s death as “an outtake from “Goodfellas“)).
- In 1999, Henry Edward Northington’s severed head was placed in a walkway known as a meeting place for homosexual men. (See Seattle Gay News Online, Beheading Stuns Gay Community in Virginia, available at www.sgn.org/Archives/sgn.9.12.99/beheading.htm (last visited Feb. 1, 2001) (explaining that Henry Edward Northington’s head was found “placed squarely in the center of [a walkway leading to "a popular summertime meeting place for gays"]
- In July 1999, Gary Matson and Winfield Scott Mowder were shot to death in their bed. (See Supremacists Accused of Synagogue Arsons, Salt Lake Trib., at A7, Mar. 18, 2000 (describing the arrest of two men for shooting Gary Matson and Winfield Scott Mowder in their home).)


Investigators later learned that, after leaving Shepard tied to the fence, the attackers returned to Laramie and picked a fight on a street corner with two Hispanic men, Emiliano Morales III, 19, and Jeremy Herrera, 18, each of whom suffered head injuries.

Shepard was taken to a Colorado hospital, where he lay in a coma for almost a week before he died, his skull "too crushed for surgery." By the time Shepard died, he had become a "symbol of deadly violence against gay people." Mourners from Colorado to Maryland gathered in public candlelight vigils to honor Shepard and call attention to violence against gays. In Denver, mourners wrote messages on a graffiti wall as part of national Gay Awareness Week; in San Francisco, the giant rainbow flag that symbolizes the gay rights movement was lowered to half-staff in the Castro district.

Russell A. Henderson, 21, and Aaron J. McKinney, 22, were charged with attempted murder and their girlfriends, Chasity V. Pasley, 20, and Kristen L. Price, 18, were charged as accessories.


Shepard's death has been memorialized in national campaigns and cultural portrayals, including the following:
- The Matthew Shepard Foundation, founded by his parents, which advocates for gay and transgendered youth, including operating a website called Matthew's Place. His mother Judy became a full time gay rights advocate and gives speeches across the United States. She also wrote a book about her son's death, The Meaning of Matthew.
- University scholarships founded for Shepard, including one from the Eychaner Foundation for students in Iowa and a scholarship at Weber State University.
- An HBO film based on the off-Broadway play titled "The Laramie Project," by the Tectonic Theater Project in 2000 and the sequel "The Laramie Project: Epilogue" in 2008, all of which looked at how the Wyoming town of Laramie where Shepard was a student grappled with his horrific murder.
- A made-for-TV movie, which aired in 2002, bringing national attention to the murder and the whole issue of gay hate crimes and bullying. Countless songs, poems, stories and reflections were written by friends and strangers alike in tribute to Matthew over the years.

The Laramie police claimed that robbery had been the offenders' primary motive for the attack, which many found disingenuous since the offenders had encountered Shepard in a gay bar. The girlfriend of one of the two offenders told investigators that Shepard's beating was retribution for having embarrassed her boyfriend earlier that evening by flirting with him. The offenders convinced Shepard that they were gay to lure him out of the bar.

In 2005, McKinney and Henderson claimed in an interview on a national news program that they had become violent during a methamphetamine binge and that they were looking for drug money, not attacking Shepard for his sexual orientation.  

Aaron McKinney was convicted of murder, kidnapping, and robbery. Russell Henderson was convicted of murder and kidnapping. Both men are serving two consecutive life terms.

Wyoming was and remains one of the few states with no hate crime laws. Wyoming had previously rejected three hate-crimes bills since 1994, but the Governor suggested the subject might be revisited in light of Shepard's death. No law enhancing punishments for bias crime was passed in Wyoming.

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About ten states, including Wyoming, had no hate-crime laws, or, like Texas, none that identified which groups were protected by the law. At the time of Shepard's murder, many states did not include sexual orientation in their "hate crime" sentencing enhancement laws. Like Texas, many states were uncomfortable with the implied approval of LGBTQ+ "lifestyles" that came with state ABL. Religious and self-proclaimed family-based organizations were strident about their opposition to 'hate crime' law:

||"It would criminalize pro-family beliefs," Mr. Schwalm said. "This basically sends a message that you can't disagree with the political message of homosexual activists."

||"Hate-crimes laws have nothing to do with perpetrators of violent crime and everything to do with silencing political opposition," said Steven A. Schwalme, an analyst with the Family Research Council, a Washington group dedicated to defending "faith, family and freedom."

||Agreement came from John Paulk, who was featured this summer in advertisements about how he and his wife, Anne, "overcame" homosexuality through religion.
Classic Cases of "Hate Crime"

The Byrd and Shepard cases share more than fact patterns and offender typologies that reflect the classic template of a "hate crime." The case narratives also have in common violent acts demonstrating an indifference to human life so profound, so gruesome, that it is not possible to state whether the indifference was more dehumanizing of the victims or the offenders. The gore perpetrated by the offenders reminds us of Supreme Court descriptions of "obscenity" and in particular Justice Potter's exasperation when attempting to articulate a definition for something obviously "indecent, lewd, or depraved."

To define the unspeakable is to reduce it to human terms, to normalize it. Like obscenity, "hate crime" means something exceeding "acceptable" limits of violence, something so outside the norm we may not be able to describe it, but we know it when we see it. The term "hate crime" is intended to refer to the extremes of "heinousness" and "depravity"—both words used in sentencing statutes for aggravating circumstances. But the depravity of "hate crime" is not simply "within" the offender or his or her actions. The concept attempts to articulate a "depravity" of bigotry that stems not from the generalized inhumanity of the offender but from a specific lack of humanity the offender has projected onto the victim. In this sense, "hate crime" is a manifestation of a change in the way we understand our Selves and Others: The motivation for a "hate crime" is not the offender's bigotry or "hate" for the Out-Group represented by the victim; rather, the motivation arises from the characteristics that offend the attacker. The "hate crime" is not

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384 E.g., Dunlop v. U.S., 165 U.S. 486 (1897) (Upholding conviction for mailing and delivery of a newspaper called the 'Chicago Dispatch,' containing obscene, lewd, lascivious, and indecent matter); Hamling v. U.S., 418 U.S. 87 (1974) (affirming convictions for "knowingly sending obscene, lewd, lascivious, indecent, filthy or vile material through the mail"; approving district court's jury instruction, which stated that the defendants' belief about whether the materials were obscene was irrelevant.).

385 See 18 U.S. Code § 3592(c)(6) (enumerating "mitigating and aggravating factors to be considered in determining whether a sentence of death is justified"; "heinous, cruel, or depraved manner of committing offense.

The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim").
intended by the offenders in the traditional sense so much as it is "intended" by the Out-Group of the victim. Byrd was not "selected" as representative of a larger group of African-Americans against whom his attackers felt prejudice. Byrd was known to his killers and casually acquainted with one of them. To his assailants, Byrd did not represent an Out-Group. He represented, if anything, the narrative of Southern history permitting Whites to inflict their "supremacy" through mortal violence—a narrative that already existed in his murderers separate and apart from their victim before they all encountered each other the night of his death. Similarly, Shepard was not attacked for being gay; he was attacked for being an "invitation" to offenders. He "asked for it" not by acting, but by being.

The transition from conceptualizations of identity as a set of traits one has to a set of traits one enacts to a set of traits that one embodies (without affirmatively "doing" or "enacting" them) is one thread of the themes presented in this dissertation. The Byrd and Shepard cases illustrate the way that, in modern social life, an individual's existence, without any affirmative provocation, can become the basis for violent action by the offender. More importantly, because "identity" is conceptualized differently in the modern era than in previous cultural and historical eras, the offender's violent action is viewed as "caused" not by the victim's threatening behavior or "suitability" (weak, vulnerable to attack, or defenseless) but by the victim's identity. The victim's existence. "Identity" in this instance is not expressive. Unlike traditional formulations of crimes, the victim of a "hate crime" need not provoke, threaten, or engage the offender at all to "cause" the attack. The victim need not appear vulnerable to the offender. The victim's existence—the fact that they are "being" in the world at all—is adequate "justification" for the violent attack. In blunt terms, vulnerability is irrelevant and "provocation" pre-exists. Why? The answer has three elements.

First, as a matter of legal or criminological analysis, the predisposition or mental state (mens rea) that operationalizes the crime is always "on"; this can be described as the "hate" in the term "hate crime." Put differently, because "hate," as an ingredient of the crime, is part of an
offender's overall attitude about certain categories of Others, the "decision" to commit a "hate crime" is already made before the crime itself is carried out. (See Sections V.B, V.C, VI; see also IV.)

Second, "hate" in this sense is not a passing feeling, but an attitude or disposition that is continuously activated—emotivity not emotion. "Hate" is a feature of the offender's identity primed to be expressed in his or her physical action. The offender thus carries a readiness to act out a particular (bigoted) type of emotivity. (See Sections V.B, V.C.) Conversely, the victim is a ready target of "hate crime" by virtue of their "hated" trait. The victim need not do anything—there is no need to put oneself at risk by walking down a dark alley, "flaunting" one's unpopular religious practices or sexuality, or, as in the stereotypical rape victim-blaming, wearing a short skirt or having a "reputation for promiscuity." By being a member of a "hated" category, the victim is preselected and every-ready to be subject to a "hate crime." As discussed in the criminal law literature (Section II.C) and elsewhere in this dissertation, the way that the precursors of "hate crime" transcend temporality is one of the most significant distinctions between "hate crime" and other types of crime. In this sense, "hate crime" can be defined as the alignment of the offender's readiness and the victim's existence. This statement alone summarizes why "hate crime" requires a different legal formula—different from traditional prohibitions against violent crime—and, as explained throughout this dissertation, why the concept of the "hate crime" is a creature of modernity.

Third, building on the points above, in the context of "hate crime," "being" and "action" become blended. The offender's bigotry—or "hate"—is as integral to the offender's identity as is the victim's "hated" trait. In both instances, for offenders and victims respectively, the "hate" and the "hated" traits are both identity-as-being and identity-as-doing, because being in this context is tantamount to taking action (*actus reus*). (See Sections III.C, V.B, V.C, VI.)

Third, because the American identity is founded in a history of bigotry, the permission to transform "hate" into violent action is built into the narratives in which the parties exist. In
other words, American identity is bound up with revolution, expansion, conquest, and manifest
destiny—all of which emphasize the subjugation of Others to express (or increase) the
superiority of the dominant group. This is one way to distinguish the emotivity "hate crime."

In the legislative history of ABL, if the Byrd and Shepard cases reflected the limit of society's
tolerance for heinous violence against certain persons because of their Out-Group status, 1998
can be seen as the midpoint between initial interest in "hate crime" legislation voiced in
Congress in 1985 and the passage of the federal "hate crime" statute in 2009 as well as an apex
in national rhetoric about crime generally, which allowed for the launch of a number of new laws
with harsh punishments to send the message of society’s resolve to take a "zero tolerance" stand
against crime and criminals. But what were the building blocks of emerging concept of "hate
crime" and the HCPA? This question is answered in the legislative framework of federal ABL,
detailed below. This discussion also highlights the cultural Knowledges that animated sociolegal
concerns and the relevant historical events that influenced the process, spanning not just
decades but centuries.
V.B. Groups Attributes and Individual Identity

"Hate crime" protections are geared to a set of personal attributes that theoretically are descriptive of everyone. Everyone has a gender, a "race," even a religion, because under U.S. law the freedom to enjoy not having a religion is granted protections equal to religiosity. Under ABL, even the dominant In-Group of White males is a "race" that is protected against "hate crimes." Nevertheless, it is understood that the electrifying power of the fear sparked by "hate crime" is not universal. Not every community or category of persons is actually equally vulnerable to "hate crimes" or the fear they inspire. This type of fear is generally understood to run through communities that "have been traditionally stigmatized and marginalized in our society" and marked by condescending cultural prejudices that inflame aggression against members of the group. The most vulnerable communities are familiar to Americans, because the history of discrimination and abuse systematically inflicted on their members goes back to the founding of the country. Early congressional debate and formal governmental action reflected a consciousness of the prejudice that had been formally built into state and federal laws, even decisions of the Supreme Court, which is the supreme law of the land. That violent prejudice is a cornerstone in the nation's origin story is important to understanding the emergence of the concept of "hate crime."

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386 See, e.g., Roger Daniels, Prisoners Without Trial: Japanese Americans in World War II 113-14 (Eric Foner ed., 1993), (noting that "an American propensity to react against 'foreigners' during times of external crisis, especially when those "foreigners' have dark skins" has been demonstrated repeatedly through U.S. history.").
387 Jason A. Abel, Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims, 12 Asian L.J. 41, 44 (2005). See also Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 8 (1999) (stating that protected persons should include those historically subject to widespread attacks, such as racial and ethnic groups).
388 Stereotypes of Out-Groups expressed in derogatory statements are known to dehumanize Out-Group members, but they also serve to rationalize the attitude that members are unworthy of equal treatment with In-Group members. Observers who internalize these attitudes may perceive Out-Group members as legitimate targets of violence and aggression, which may in turn invite bigots to direct personal frustrations, even in criminal acts, against members of the Out-Group. (See Richard Delgado and Jean Stefancic, Ten Arguments Against Hate-Speech Regulation: How Valid?, 23 No. Ky. L. Rev. 478 (1996); Milton Kleg, Hate Prejudice and Racism 41 (1993); Iris Marion Young, Justice and the Politics of Difference 61 (1990).) For an in-depth study of stereotyping and its effect on cultural prejudices, see Alexander Tsesis, Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements (2002) (Ch. 7).
But American prejudice is not generalized; it is not an impulse without a target. Indeed, the Out-Groups who are the objects of violent prejudice in the U.S. are so well-known, so obvious, that among the extensive debates on "hate crime" laws over the decade prior to enacting federal ABL, I encountered no disagreements about which groups are vulnerable to violent discrimination.\(^3\) Instead, disagreements about federal "hate crime" legislation, summarized in the Literature Review sections of this dissertation, focus on whether ABL meets constitutional standards, whether it accomplishes any real punitive goal, and whether ABL is a reactive piece of legislation conceived during a panic about increasing rates of violent crime that, in a similar vein to Three Strikes Laws, Congress and citizens will later regret like a hangover after a night of retributive policymaking debauchery. Specifically, debate has questioned whether the HCPA reflects the kind of policymaking that aligns with such cornerstones of national identity as the First Amendment and equal protection. This link between national identity and the concept of "hate crime" will be explored later in this dissertation.

The peculiarities of federal "hate crime" legislation make it an oddity in the law—fitting neither the definitional elements of a crime nor the limited scope of a sentencing enhancement. The concept of a "hate crime" is an innovation, a new tool designed for purposes not yet understood fully by those who invented the term and those who use it. One objective of this genealogy is to draw back the curtain of colloquialisms around the term and locate the concept within larger historical arcs as a cultural phenomenon not a legal one.

This raises several important questions about the project: Is this a dissertation about the meaning of "hate" or the uses of provocative terms like "hate" to harness social movements? Is it a genealogy of the multiplying categories of persons to be protected by the law? Is it about the transformation of mechanisms of social control, from those designed to accomplish commercial

\(^3\) The legislation shows near uniformity about which social groups are targeted for violence. Differences in state ABL categories of persons reflect disagreements about which attributes of personhood are immutable and which are "lifestyle choices." State legislators who opposed protections for certain groups (most often the LGBTQ+ community) did not deny the higher rates of discrimination against members of the group. Rather, they opposed protection for LGBTQ+ citizens on religious or other grounds.
objectives (through slavery) that would build the nation to those that serve social dominance (through systematic discrimination) of Whites over non-Whites (primarily Blacks) that would "maintain" a national identity of inequality to a form of social control oriented away from both of these objectives but not yet realized? The answer, discussed more fully below, is somewhat different from what I had expected when I began this project. I was surprised that none of these issues took center stage in the dissertation, but I was not surprised that the genealogy examined all of these issues to varying degrees. The table below (Table 5: Timeline-Categories of Persons & Dissertation's Scope) provides a quick depiction of the genealogical expanse of these issues:

Table 5: Timeline-Categories of Persons & Dissertation's Scope

<table>
<thead>
<tr>
<th>Categories of persons multiply:</th>
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<tbody>
<tr>
<td>Term &quot;hate&quot; used in social movements:</td>
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<tr>
<td>Social control mechanisms transform:</td>
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<tr>
<td>Dissertation timeline:</td>
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<td>Approximate era: Present to</td>
<td>-1980s</td>
<td>-1960s</td>
<td>-1770s</td>
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Table 5 shows clearly that the increasing number of categories of persons recognized in law and in social life is not the central thread of the genealogy, as I had expected it would be. Also, the term "hate," perhaps somewhat paradoxically, has not been harnessed in public or political discourse long enough to be central to the genealogy. And, although mechanisms of social control subjugating predominantly African-Americans (and before the U.S. existed, Africans) has served to mold the nation in terms of its early commercial power, its (chiefly Southern) topography and physical infrastructure, and its socioeconomics as a stand-in for the caste systems from which its people descended and its model of government ascended, the subjugation of Others has also affected the nation in abstract ways. Most importantly,
subjugating Others served to mold the spirit of the nation, which I will later argue is premised upon (and therefore inextricably intertwined with) demarcating In-Groups and Out-Groups to such an extent, the national identity itself has come to be seen as somehow violated or voided without an ongoing practice of social division. Ongoing practices of division among social groups may be institutionalized in law, carried out in social or civic customs, or enacted by individuals. As examples of these three practices, consider (1) Jim Crow laws and separate-but-equal standards; (2) the customary exclusion of African-Americans from civil life, notably, for example, through mass incarceration, commonly referred to as the "new Jim Crow," and in localized customs of barring Black citizens from serving on juries, even or especially in cases involving a Black defendant; and (3) "hate crimes," especially those carried out by White Supremacists to terrorize African-Americans into a contemporary form of subjugation. Other scholars have observed the similar objectives and effects of these three practices, and they have noted that the tenacity of the American impulse to establish hard lines of social division by which the dominant In-Group (Whites) are granted superiority in civic life over Out-Groups (primarily Blacks).

Sociologists have explored the way that attempts through social movements to flatten social divisions may trigger moral panics, leading to violence against Out-Groups and/or tighter social controls over Out-Group members. The impulse to Other and to use social hierarchies to maintain social order is embedded in the national identity. The impulse is not simply a part of

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391 Before the Civil War, African Americans were excluded by law from jury service nearly everywhere in the nation, leaving the determination of guilt with exclusively White juries. In 1860, Massachusetts legislators acquiesced to protests calling for the word "White" to be removed from the statute regarding jurors. African Americans were seated on a Massachusetts jury.

In criminal cases involving Black defendants and White victims, some Massachusetts prosecutors continued to seek all-White juries, using their peremptory challenges to remove Black jurors. This discriminatory practice continued until 1979, when the Supreme Judicial Court held it was unconstitutional. At the 1977 murder trial of the popular Harvard football player, Andrew Puopolo, the prosecution used challenges to exclude 12 of 13 potential Black jurors. Two years later, the Supreme Judicial Court reversed the conviction and ordered that the case be retried.

the American self-definition, it operates at a cellular level. In the same way, for example, that sexuality is so integrated into individual identity, one cannot, whether heterosexual, homosexual, asexual, or located elsewhere on the spectrum of human sexuality, conceptualize oneself in the absence of this orientation. Othering is integral to American identity. It is possible that this "Othering orientation" may be intractable without a radical reform of what it means to be an American.

A discussion of American identity, the concept of "identity" as it related to the concept of "hate crime," and modern meaning-making is presented in the next sections.
I Know It When I See It

In 1964, in a First Amendment case discussing limitations on protections for free speech, U.S. Supreme Court Justice Stewart revealed a rare moment of exasperation in attempting to define the term "obscene." He declared, "I shall not today attempt further to define the kinds of material I understand to be embraced [by the term obscene.] But I know it when I see it." This approach is similar to the way we have come to define "hate crime": We know it when we see it.

We have seen it in the classic "hate crime" cases, the James Byrd, Jr., lynching and the Matthew Shepard murder, for which the HCPA was named. We have seen it in the widely reported murders of Sean Kennedy (NC 2007, sexual orientation), Angie Zapata (CO 2008, transgender), William McCoy (MO 2005, race), among many other cases. We have seen it in

393 Jacobellis v. Ohio, 378 U.S. 184 (1964) (concurring, is attempting to find a standard by which one could be punished for trafficking in certain published material, Stewart wrote that "hard-core pornography" was hard to define, but the motion picture in question, Louis Malle's The Lovers, was not obscene).

Later cases define pornography, unprotected by free speech rights, under a three-part test:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

(Miller v. California, 413 U.S. 15 (1973).) See also Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988) (regarding "outrageously vile" standard, "Indeed, one might argue that the ultimate vagueness...a virtue, because any determinate rule would necessarily disable the sentencer from recognizing the diverse forms that cruelty and depravity can assume.").

394 The following cases listed by the Leadership Conference (http://www.civilrights.org/publications/hatecrimes/lgbt.html) preceded the 2009 HCPA:

- 2008 Richmond (CA) gang rape and beating of an openly gay 28-year-old woman by four men, including two juveniles, on a street outside her parked car and at a second location, while making slurs about her sexual orientation. Humberto Hernandez Salvador (31), who was the only one charged with a hate crime, Josue Gonzalez (21), Darrell Hodges (16), and an unnamed 15-year-old were charged with kidnapping, carjacking and gang rape. Hate crime enhancements were added to charges against Salvador.

- 2008 Oxnard (CA), in school computer lab, gay junior high student Lawrence King (15) was shot twice in the head by Brandon McInerney (14). The victim, "Larry" King, was known as the "sassy gay kid" with a slight build who wore flashy attire and laughed off bullying such as name-calling, harassment, and "wet paper towels hurled in his direction." McInerney was fascinated with White supremacist literature espousing "racist skinhead philosophy of the variety espoused by Tom Metzger, David Lane and others." McInerney was tried as an adult on a murder count, plus a hate crime allegation.
300 years of violent acts in which the centerpiece was lynchings, all but a few of which occurred before "hate crime" laws existed. Setting aside other criminal acts of "hate," the trail of lynching victims going back to a time that preceded even the nation itself suggests that, in terms of criminal activity, "hate crime" might be the "oldest profession."

The term "hate crime" has been critiqued as "a vessel into which much can be poured." But the limited application of the federal HCPA demonstrates that the vessel is not without finite capacity. In cases such as the anti-Semitic shooting spree by F. Glenn Miller, Jr., who killed three people outside Jewish facilities in Overland Park (KS) in 2014, and the fatal anti-

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395 See, e.g., Ida B. Wells, "Southern Horrors Lynch Law in All Its Phases," New York Age (June 25, 1892) (pamphlet originally published under the title "Exiled," reprinted 1893 and 1894, enumerating cases of wrongly accused "Afro-Americans" lynched or imprisoned for raping White women).


immigrant, anti-foreigner beating of Luis Ramirez by local teenagers, the violence was directed at members of particular groups. These cases are distinguishable from other cases of violence, such as the Petit family murder (CT 2007) or the Aurora Theater shooting (CO 2012), which have been described as "heinous" and "vicious" but did not involve targeting of individuals based on their shared attributes with a hated group. "Hate crime" can be seen in criminal acts that would not have taken place but-for the offender's animosity toward a group based on particular shared attribute(s) that the offender has fetishized.

Legal traditions typically avoid subjective experiences like "hate." Emotions are uniformly eschewed as unsuitable foundations on which to define legal standards. Later in his life, Justice Stewart expressed regret for his comment, lamenting that "I know it when I see it" would surely be engraved on his tombstone. But, if Stewart regretted his attempt to articulate the emotion of repugnance or disgust as a legal standard, he was not wrong to think that legal formulae could be fashioned from the fact of a collective emotion. What makes his words memorable and humorous is that his sentiments, issued from the highest judicial bench in the land, were relatable. Like every exasperated parent’s prerogative, "Because I said so!," when he arrived at

398 In the 2008 Shenandoah (PA) fatal beating of Luis Ramirez, a 25 year-old Mexican immigrant and father of two, four teenagers, all of whom were then-current or former local high school football players, punched Ramirez, knocked him to the ground, and kicked him in the head until he was unconscious, convulsing and foaming at the mouth. One of the assailants reportedly yelled, "Tell your fucking Mexican friends to get the fuck out of Shenandoah or you'll be fucking laying next to them." In 2009, two of the teens were convicted of misdemeanor simple assault, and acquitted the defendants of murder, aggravated assault, and ethnic intimidation. A third teen was charged with aggravated assault and ethnic intimidation in juvenile court. The fourth pleaded guilty in federal court to violating Ramirez’s civil rights in exchange for charges of third-degree murder, aggravated assault, and related counts against him being dropped.


the edge of his capacity to state a legal standard for an emotional response we all understand, Stewart defaulted to a feeling common to nearly everyone: *We know it when we see it. And it's wrong.* Why? Because we say so.

Our shared experience should be able to count for something in law. What is law other than a codification of standards built from shared connections? If Justice Stewart had been ruling on a case of "hate crime," he might have attempted to harness the same faith that a subjective negative reaction to victimization of a particular kind did not place the casual factors for the victimization beyond the reach of law's objectivity: to recognize a sense of repugnance for a type of wrongdoing demands a collective response. The challenges of illuminating collective standards—even those that involve the process of shaping delicate moral positions with the indelicate tool of law—is not a reason to shy away from the duty to name it when we see "it."

**V.C.1. "Hate Crime" as Crime and as Concept**

What is "it"? The most basic understanding of "hate crime" is a crime of violence motivated by prejudice. This standard has been used by advocacy groups, in federal and state law, by the Federal Bureau in Investigation, among others, and it has been operationalized—somewhat unevenly—at the local level by police departments. As hinted above, formal legal definitions of "hate crime" seem to suffer from the law's perennial tautology that crime "is what the law says it is," because—another critique of the statute—the HCPA does not add new behavior or new methods of carrying out old behaviors to criminal law prohibitions. In fact, the elements of a

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401 See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 257 (1964). In that case, the Court made the following observation: 

|That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.||

(Id.)


403 This project focuses on federal ABL that criminalizes civil rights violations. As is outlined in its text, this dissertation excludes an examination of state ABL and federal sentencing enhancements.
federal "hate crime" piggyback on other established crimes (see Criminal Law Literature Review). The term "hate crime" was initially used to refer to violent crime that was especially heinous—malicious beyond description. What in particular about the crime was beyond our capacity to describe? It is not the level of violence, although the classic case of a "hate crime" involves a level of cruelty that might be considered a weaker cousin of the torture inflicted on Damien the regicide, so punctiliously described by Foucault, Young, and others.\textsuperscript{404} Both the James Byrd, Jr., and Mathew Shepard cases reflect a similar "spectacle" of violence—albeit without spectators. It is also not the change in our level of tolerance for such crimes that makes them beyond description. From a contemporary perspective, the violence inflicted on Byrd is intolerable in a way that the torture inflicted on African Americans such as Henry Smith, (pictured below) lynched in Paris (TX) in 1883, was not. But that higher threshold for does not make "hate crime" difficult to describe with old language. Along the same lines, although our modern sensibility about human dignity makes the act of using old descriptors for obscene acts of violence seem like an affront to the dignity of the victim, the old descriptors would apply. In the Byrd and Shepard cases, the violence inflicted on them was not just mutilation; it was also humiliation. Public spectacles of lynching illustrate the savagery of the indignities inflicted on Others in American society, notably the bodies of African-Americans, and the added cruelty that such spectacles, like that pictured in the image below, were once accepted entertainment in the South. (See Figure 6: 1893 Henry Smith Public Lynching.) Such indignities deserve a more extreme label, but they are not beyond our ability to describe. The reason a new term is useful is that "hate crime" reflects both a new context and a new meaning—not a new crime, not a previously unknown level of violence, not a new indignity, but a modern conceptualization of personal identity and the meaning of "Self." This conceptualization requires some explanation before presenting the genealogy of "hate crime."

\textsuperscript{404} Michel Foucault, \textit{Discipline and Punish: The Birth of the Prison} 1 (1979).
Figure 6: 1893 Henry Smith Public Lynching

Paris (TX). The public lynching of Henry Smith, accused of murdering a policeman’s young daughter, and without a trial, tied to a wooden platform, seared for an hour with red-hot irons, and burned alive in front of more than 10,000 cheering and jeering spectators.


**Decontextualization of Features of Identity**

To attempt to describe a dynamic captured in the concept of "hate crime" precisely because the processes are difficult to describe seems like folly. But these processes are at the heart of the concept of "hate crime," and therefore they are the foundation of the genealogy. So an attempt to provide a basic sketch of the dynamics underlying the concept of "hate crime" is necessary at the outset.

Context is important to the dynamic that underpins the concept of "hate crime." Young describes late modernity as a condition. In the vertigo of this landscape, people are perpetually
moving, lurching from home to work, from downstairs to upstairs and back, in single-purpose machinery for which the means of propulsion are mysterious to its riders, with little certainty of their location in the topography of their surroundings, even with the help of GoogleMaps to pictorialize one's placement on a cartoon image. The intense detail coupled with the breadth of information required to maneuver through one's corner of the global village makes the chore of information processing overwhelms an individual's capacity to manage a sense of Self in relation to others. In this social environment, old markers of Self and indicia about the meaning of "identity" begin fall away. Sociologists are familiar with the idea of collapsing meanings as precursors to new derivative meanings, often harnessed by social movements. But the phenomenon that is represented in the concept of "hate crime" does not have the logical sequencing of a social movement. The dynamic is more like a building without the organizing principles of floors and rooms, ceilings and stairs. In the concept of "hate crime," identity and Self have lost their fundamental organizing principles. These central principles have become decontextualized—that is, dislodged from their usual place in the constellation of features we typically associate with "identity" and "Self"—and relocated in the Other.

One key principle is that of agency. Briefly stated, my thesis is that, the concept of "hate crime" refers to a scenario in which the personal agency that makes the crime occur—what law enforcement calls "motivation" and prosecutors call "intention"—is not located in the individual who commits the crime. Instead, agency for the criminal act is located in the victim.

To our way of understanding the world, this seems illogical. I won’t fight that point. But it is compatible with the world we live in; examples of this kind of illogic can be seen everywhere: Rachel Dolezal tells us she is Black; Bruce Jenner, it turns out, has been Caitlyn all along; "reality" TV clearly does not conform with reality; a young German woman pieces together passages of classic novels and published her book. Is this a new way of understanding the idea of a "novel"? Or is this just high-end plagiarism? Her creation was not a fraud on readers; the
sentence-weaver did not pretend the passages were her own. But many in literary spheres were uncomfortable with the possibility that being an author did not involve doing any authoring.

Similarly, Dolezal was lambasted and ostracized from the Black community, for which she had been a loyal advocate and from which she had not sought to profit, because identifying as Black has to involve actually being Black. Although Dolezal had elided her White genetic heritage, she does not seem to have attempted to usurp the African-American experience as her own. In another sphere, when (half-Black) Obama identifies as Black, he also does not claim the Black American experience, and that upsets some African-Americans. Is anyone telling the truth here?

Stephen Colbert offers "truthiness" as a helpful term for evidence-free "truth" that is commonplace in everyday life, which is untrue but not necessarily false. When the meaning of "truth" no longer implies the essential feature of not being untrue—when the concept of "truth" loses the logical necessity of being affirmatively connected to facts or objective measures—we are all on notice that society has reached a level of "late-modern vertigo" that appears to be very near collapse.

Journalists and others have referred to this as "context collapse."[405] Apparently borrowing from the term "colony collapse," a term invented by the scientific apiculture community to refer to the mass attrition of worker bees from honeybee hives. The loss of these members so weakened the social structure that mass numbers of colonies collapsed and continue to do so. In "context collapse," the theory is that the context itself collapses, taking down everything that rests on its scaffolding. However, I posit that contexts and meanings are not collapsing. With regard to "identity," Self, and Other, the external structures of these terms remain intact, but in late modernity, their reference points appear either to be illogical or logical only in a metaphysical way. In the cultural milieu in which "hate crime" has emerged, it is as if the

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Tasmanian Devil has gathered everything up and spun it around until meanings have separated from their linguistic signifiers, like platelets dislodged from blood cells in centrifugal apheresis, and the signifiers have paired up with something nearly their opposite. I have referred to these phenomena as "inversions," which I explain in greater detail below.

Why are these inversions important to the emergence of the concept of "hate crime"? The examples given above reflect a radical alteration in the way we understand the concept of "identity," and without these changes, the concept of a "hate crime" would not have emerged in its current form (or perhaps at all). As discussed in Section IV.B, "hate crime" is not simply a redundant idea that describes violent acts previously addressed through criminal law and civil rights laws. The "tool" of a law prohibiting "hate crime" was necessary to capture a new form of criminal violation against the person; while the violation itself ("hate crime in the form of violent prejudice) was not new, what it means to violate a person is new. (See Sections V.D, VI.)

The understanding of what it means to violate a person has taken on dimensions in late modernity that were not possible to contemplate in earlier eras. Violations against persons, for example, can occur remotely, through virtual platforms, in "microaggressions," in denials of human rights, and in other harms in which physical effects take a back seat to violations of dignity. In these contexts, harm need not involve active assault. Modern discourse and Knowledges give us the elements by which we can discuss harm as emanating from a person who represents "harmful" or offensive ideation simply by existing. For the concept of "harm" to expand in this way, ideas about "personhood," "identity," and notions of Self also had to change, as explained below and detailed throughout the genealogy. Beyond Young's idea of blurred boundaries between Self and Other, I posit that the defining characteristic of "identity"--agency--has become dislodged from direct association with the individual actor and conceptualized as emanating from another individual whose role as "actor" is a matter of being not doing. We might say that the Tasmanian Devil has dislodged harm, hate, violation, person, action, and agency from their previous frameworks of meaning and allowed their points of activation to

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blend and overlap. Agency, which is the particular focus in this genealogy, is associated with each of the other terms, but, building on Young's theories, the association between agency and individual has crisscrossed or become intertwined.

How do new meanings about harms and persons align with "hate crime"? Public discourse about and recognition of the concept of "hate crimes" grew up alongside new understandings of what it means to cause harm, and where and how the harm originated. The concept of "hate crime" as a legal "tool" is unique and hard-to-understand because it reflects a new conceptualization of personal agency as not simply what one is doing or decides to enact but what one is being and embodying. More will be said on these points below.

Identity and Emotivity

The problems with the HCPA run deeper than critics have noted, yet the potentialities of the HCPA are more promising than its proponents have grasped. As detailed in the social science literature review above, critics of ABL assert that the uneven implementation of the laws, at the state level and by extension at the federal level, arises in part from the fact that the core of a "hate crime" is the unknowable emotional condition of the offender. They pose the question,


||For hate crimes, it cannot be said there is a commonly understood core meaning for the term...Distinguished by the motive, 'hate crime' does not require any one act, as opposed to some other act. That is to say, any act could be a "hate crime," if listed in the statute and performed with the proscribed motivation. Thus, the term has been applied to a broad range of statutes and regulations from federal civil rights statutes to university speech codes. In the media, the term appears in headlines of stories about criminal attacks on racial minorities and homosexuals, although the acts themselves may vary. Like the label 'hate speech in academia, the media use the adjective 'hate' as synonymous only with 'racist' or 'bigoted.' As illustrated by at least one sociological journal article, however, the term "hate crime" can be applied to a discussion of mass murders such as those depicted in 'Silence of the Lambs' and 'Natural Born Killers.' Given the fuzziness of the term 'hate crime,' mass killings such as those that occurred at Columbine High School in Colorado, legitimately can be termed 'hate crimes,' even as to those who were murdered for reasons which do not fit within some definitions of 'hate crime.'||
( Id. at 1205-06.)
Can we regulate human emotion? Moreover, should we do so? Although these questions overlook the fact that, nowhere in the text or scope of ABL, does the statute rely on proof of an emotion to demonstrate that the offender committed a crime, the questions posed are worth considering.

The centrality of emotion to the American identity was inscribed as far back as the Declaration of Independence. (See Appendix Self-Evident; Sections V.D.3, V.D.4, V.D.7, V.D.8.) Our national motto is "Life, Liberty and the pursuit of Happiness." Other aspects of our identity compel Americans sometimes to treat "happiness" as tantamount to an individual right, glossing over the exertion required in its "pursuit" and the integral nature of pursuit to the goal of "inalienable" rights that sustain that salutary emotion. Jefferson's phrasing suggests that the emphasis is on the freedom to pursue "happiness"—whatever the objective itself might mean to the citizen. To argue otherwise makes no sense, since a government cannot guarantee an emotion to its People. What can be guaranteed are opportunities to pursue self-actualizing goals through the exercise one's rights—an idea so obvious to our post-Civil Rights Era sensibility that the concept of "civil" rights seems redundant. So, the central "emotion" featured in the Declaration of Independence in not emotion-as-feeling. Rather it is describing a state-of-mind, a sensibility—an idea about identity that citizens may define for themselves.

In this sense, it is more accurate to speak about "emotivity" than emotion. American identity is not based on an emotion (happiness) but on a condition of emotivity. American identity arose out of such slogans as, "Life, Liberty, and the pursuit of Happiness"; "Give me liberty or give me..."

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407 It is worth noting that state sentencing enhancements, including those related to "hate crimes," are framed in terms that exemplify the human emotion of disgust. Higher sentences are meted out for criminal conduct that evinces an extreme indifference to human life, heinousness, maliciousness, and similar forms of aggression.

408 The debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, when either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on both sides at once." (Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?, 39 UCLA L. Rev. 333-34 (1991).)
death!" The inspiration is located in the object—namely Liberty or Happiness. American identity is marked by its responsiveness to the emotive words of the Declaration of Independence. This may seem like a pedantic distinction, but the dynamic between subject and object—emotion felt and emotion aroused—is one of the clockgears that moves this dissertation forward. As outlined in the paragraphs below, the difference between emotion felt and emotion aroused is a question of human agency, which is central to the concept of "identity." As a bookmark for these ideas, which are discussed below, we might utilize the examples above to say that Liberty and Happiness are the source of agency that is the core of American identity.

*Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens.*

—George Washington, Farewell Address 1796 (published not spoken)

**Should We Regulate Emotion Felt?**

Before turning to the issue of agency, the question of whether we can or should regulate emotion remains. Specifically, the question is about the emotion of "hate" and, in particular, the uses of "hate" to interfere with the individual rights of others. In the overlap of civil rights and criminality, where actions by some citizens to interfere with the efforts by others to exercise their inalienable rights, "hate" is the correlate of the concept of "happiness." Modern slang offers support for this proposition: The term "haters," for example, refers to people who discourage or interfere with one's objectives or react negatively to one's personal identity or expression or "happiness." To be defined as a "hater" does not require that one feel the emotion of "hate." These are two separate ideas. Similar to the Facebook pledge of thumb’s up or down to indicate "Like" or not, words derived from "hate" have expanded the meaning from an emotion felt to a
general sensibility associated with a lack of support. A "hater" is one whose disapproval is known and felt as a threat or an undermining influence by the individual using the term. A "hater" describes one who interferes with another individual's efforts to achieve a salutary goal. The concept of a "hate crime" refers to a criminal act that interferes with another citizen's efforts to enjoy their Life, Liberty, and pursuit of Happiness. But in both usages—"hater" and "hate crime"—the root term "hate" has been transformed to mean something other than the emotion. Moreover, because the transformed meaning so, to imply the answer "no" by asking whether or not we can or should regulate emotion—specifically emotion felt by the offender—is to misunderstand the modern concept of "hate crime" and the contemporary usages of derivations of "hate." Further discussion of this point is presented later in this dissertation.

Exclaimed Alice... `It's a vegetable. It doesn't look like one, but it is.'

`I quite agree with you,' said the Duchess; `and the moral of that is—"Be what you would seem to be'—or if you'd like it put more simply—"Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise.'"

— Lewis Carroll, Alice in Wonderland (1865)

V.C.2. Defining "Hate" Using Others

A significant thesis in this dissertation is the way that modern derivations of terms relevant to the concept of "hate crime" have inverted the meaning or the sense of the original term. For example, as noted above, "haters" are defined as such not because of their own (presumed) emotional condition. One is not a "hater" necessarily because one feels hatred. (In fact, to feel hatred very likely exceeds what is encapsulated in the term "hater.") Instead, one is called a "hater" based on the emotional condition of the name-caller—the one who feels "hated." This is one example of dynamics I refer to in the analysis as "inversions," by which I mean reversals in a
central tenet or feature of an idea or word that lay down track for novel usages of that idea or word, which reflect a meaning opposite to (or nearly so) the original meaning.

Consider the statement, "I feel hated by you." There is no moment in cultural history when this statement would have been understood to mean that You could be labeled a "hater" of I. Reversing the sentence structure does not result in the same meaning or even the opposite meaning. It changes the meaning altogether. It has a *Game of Thrones* ring to it: *Who is that? She is the Hater of I... of all I's!* The term "hater" has nothing to do with the internal condition of the one so-called. One is not a "hater" because one is busy hating. So, the term "hater" probably did not derive as a shorthand for statements about the character of You as one engaging in the "hate" of I. Moreover, the phrasing makes it sound like You has nothing else to do but hate I, which does not correspond to the way that we understand the process of feeling. Although emotions are understood to have constancy, they are not activities; we do not engage in feeling an emotion the way we go about gardening or making coffee or writing a dissertation. We may feel emotions whether or not we are doing activities, but emotions are not themselves equated with activities in our cultural Knowledge of these things. "Hater" is a label that is not descriptive of one having a feeling.

The label reflects a tricky inversion in subjectivity and objectivity. Let me take apart the dynamic to highlight the inversion. Normally "hate" refers to the extreme human emotion experienced by a person toward someone else or some object. *I hate mud.* The feeling is the internal condition of that person, separate from the object of the feeling. *I (subject) hate you (object).* But a "hater" is described as such because another person feels hated—or, to be more precise, the object of the "hater" feels something like a lack of support or disrespect. Four things (at least) are happening here: One, "hate" alters course and is understood not as an emotion emanating from one person, the subject, toward an object—perhaps another person. Instead, in this context, "hate" is a feeling being "received" by name-caller (the object) without regard (necessarily) to whatever is or is not emanating from the "hater" (the subject). Two, for this to
happen, the name-caller *imagines* that the "hater" has a specific internal condition—a feeling—and that the emotion behind the feeling is directed at the name-caller. The "hater's" imagined feeling is suspended in a narrative manufactured entirely by the name-caller—something similar to the idea of "fake news" but in a personal sense. (See Section VI.) None of this so far necessarily has anything to do with the "hater." Thus, three, the "hater" is conceptualized as a reference point for the experience of the name-caller. The term "hater" is used nonspecifically; a "hater" is a bookmark, one member of a larger group with the shared attribute of being generally negative or unsupportive. There are similar dynamics in what is conceptualized in the term "hate crime": The offender carries a narrative for which the reference point may be skin color or sexuality, etc., and engages in a violent attack on the victim, who is the bookmark for the group sharing these characteristics. Fourth, actions taken by the name-caller are conceived of as arising from the "hater," not the one who feels "hated." I will discuss the fourth part of this dynamic in the concluding section of this dissertation. (See Section VI.)

*Among the authorities it is generally agreed that the Earth is at rest in the middle of the universe, and they regard it as inconceivable and even ridiculous to hold the opposite opinion. However, if we consider it more closely the question will be seen to be still unsettled, and so decidedly not to be despised. For every apparent change in respect of position is due to motion of the object observed, or of the observer, or indeed to an unequal change of both.*

—Nicolaus Copernicus, *On the Revolutions of the Heavenly Spheres*, Bk I Ch. V Whether Circular Motion is Proper to the Earth, and of its Place (1543)
Shifting Conceptualizations of Identity: The Odalisque

The emergence of the concept of "hate crime" depends on narratives that are constructed about people based on shared attributes—on conceptualizations of "identity." In a social environment where one's identity is partly one's ancestral heritage, partly how one identifies, and partly an ebb-and-flow process of expression, "identity" has become an increasingly complicated idea. To smooth the complexities, it might be useful to examine some of the term's developments in a linear progression. As point of departure, the emergence of identity-as-agency can be illustrated in the transition of the gaze of the Odalisque, a familiar trope in art history. The arc shown in Figure 8: Paintings of the Odalisque, Reflecting Development of Female Agency approximates the progression of female agency over history, beginning with her asleep, unaware of being observed and literally unconscious to the world and her place in it. In the painting below (Figure 7: Sleeping Odalisque and Attendants), even the servants, who are alert, look away from the audience, as if unconscious of being observed.
Figure 7: Sleeping Odalisque and Attendants

_Odalisque With a Slave_ by Jean-Auguste-Dominique Ingres

Figure 8: Paintings of the Odalisque, Reflecting Development of Female Agency

The paintings in Figure 8 (progressing row by row) transition through stages of awareness:

- Awake but still unaware of herself as object;
- Aware of herself as objectified by the viewer/painter, passively, looking away;
- Gazing in a mirror to see the viewer/painter reflected behind her, without directly looking at him or even herself in the mirror, and thus participating in her own objectification;
- Peeking at the viewer/painter (Ingres' most famous painting);
- Facing the viewer/painter fully nude and alert, making the viewer/painter the object; and
- In the last painting, inverting the meaning of objectification by replacing a woman's body with a man's body—indeed, a man's body accessorized to look like a female odalisque (mimicking the composition in Manet's famous painting, *Olympia*)—thus mocking the subject-object relationship and calling into question the narratives built upon them.

The emergence of the concept of "hate crime" depends in part on conceptualizations of "identity," which can be tracked along a path toward greater awareness of the dimensions of "Self" and demands for "Self" recognition. Using the Odalisque to illustrate these changes, the transformation can be summarized as moving through stages from one who is objectified to one who has an awareness of being objectified, from one who participates with the audience in Self-objectification to one who presents and thus controls the Self to be objectified, from one who identifies as an object and by doing so objectifies the audience. Of course, for any given individual or group, stages of awareness do not occur in a tidy sequence. But, to the extent that changes in the concept of "identity" can be understood as the wave on which the concept of "hate crime" was carried into modern social thought, the Odalisque is a useful way to illustrate a few general rules: (1) increasing awareness of "Self" is accompanied by increasing awareness of
Other in both general (I think therefore I am a Self; and, ergo, she thinks therefore she is a Self) and specific ways (my Self is defined by my religion, therefore his Self is defined by his religion); (2) objectification, a form of Othering, is unavoidable because people are always in subject-object (Us-Them, In-Group-Out-Group, I-Thou) relationship to each other; (3) increasing consciousness of the dimensions of Self-identity increases the demand for recognition of those dimensions; and (4) demands for recognition of various dimensions of Self is a human skillset that has been honed through history.

When Young points to Freudian projection in the process of Othering, by which an individual projects onto the Other the negative aspects of identity that one senses in one's Self and therefore justifies the Us-Them distinctions that lead to hostility toward the Other, he is describing the first rule. Although this dissertation's focus on "hate crime" might lead readers to assume otherwise, rule (1) does not always lead to negative Othering. For example, humanistic Enlightenment notions of Self, particularly an awareness of one's interior conditions, prompted compassionate insights into the interior conditions of Others. Because Enlightenment thinking was the "recipe" by which the American identity was formulated, this historical era is spotlighted throughout this dissertation.

When Young discusses the interdependence between an individual and an Other in formulating identity, he is drawing from the second rule.

When Jenness and Grattet, among others, describe the processes of identity politics and the identity-claims of social movements, they are describing the third rule. "Identity politics" is grounded in combating certain social constructions, but the process of developing political agendas based on group identity leans on other social constructions, because political agendas are by definition socially constructed.

Animating these processes is the tendency toward greater granularity in aspects of Self that demand recognition and that can be recognized in Others. Throughout this dissertation, when I refer to modern emphasis on curating one's identity—picking and choosing which aspects of Self
will be presented or claimed, and which aspects will be upstaged, denied, or removed (by one's choices or, for example, through medical procedures)—I am referring to rule (4). The tool utilized in rule (4) is especially prevalent in online environments, which makes this phenomenon part of a uniquely modern trend.

Finally, although these rules are described in terms of objectification, in keeping with the trend of the gaze of the Odalisque, the application could be reversed. That is, since the terms objectivity and subjectivity are relative, the same analysis can be similarly articulated in terms of subjectivity.

**Modern "Identity" as the Framework for the Concept of "Hate Crime"**

The modern conceptualization of "identity" is most visible in the final odalisque above, by Morimura. In examining that image, it takes a moment to notice that Morimura's Odalisque is male, and this revelation is aided by the expression of the Black attendant, who is looking at this metrosexual with disbelief or perhaps consternation. The male figure is also turned nearly square with the frame, facing the viewer face-on, and pushing his head slightly forward. His expression is not, however, confrontational. Nor is it curious, coy, seductive, or bored, as the female odalisques have been described. He is not looking back at the viewer; he is staring at the viewer. He is not staring blankly; he is conveying a message. His expression suggests something even more complex than the female odalisque who objectifies the viewer who is objectifying her.

For Morimura's Odalisque, being objectified is beside the point, as is objectifying the viewer. He is not interested in what each is doing to the other. Instead, the figure can be interpreted to be forcing the viewer to experience his own impulse to objectify as a condition of his Self—that is, to experience what he is doing as a matter of being: Put simply, the viewer is an "objectifier." Like the term "hater," this conceptualization of personal identity merges doing and being. Merging these two aspects of identity—one in action and one in embodiment—follows a long
tradition of descriptors for one's occupation: baker, cobbler, firefighter, etc. Or, indeed, one's criminality: rapist, murderer, burglar, etc.

Although the phenomenon of merging doing and being as a way of describing identity is not new, the modern usage of doing-being descriptors is different. For instance, a baker is so-called because he or she actually bakes; a burglar has at least once broken into a home with the intention to steal something. The old-style doing-being descriptors had utility. They were linguistically efficient. But, in modern usages, doing-being descriptors that apply to individual identity (as opposed to occupational identity) may have little or nothing to do with the action—the doing—that describes the person's being. For example, as noted above, a "hater" need not hate. Instead, the definition resides with the name-caller.

In relation to Morimura's image of an odalisque, the condition of objectifying exists before the viewer arrives. The viewer steps into it. In other words, to be an "objectifier," there need not be any intention to do objectifying. The label does not emerge from one's intention. This modern modification to the way that identity is conceptualized is present in the framework of the HCPA. As described above in Section IV.B discussing criminal law traditions, the HCPA has an uncertain relationship to (criminal) intention. Like "hater" and "objectifier," we can imagine that a "hate crime" occurred without the intention of the actor. In this modern formulation, we might say that intention exists and the criminal steps into it. Where does intention reside? In the one "hated," the victim. What we refer to as human agency in this modern Escher-like model of "identity" is not located in the actor, but in the one acted upon. This thesis is the fourth part.

409 A similar efficiency is found in the use of the apostrophe "s" to denote possession: Alice's book; the Rabbit's hole. These English forms of linguistic efficiency are not present in all other languages. (In the French language, for example, the translation would read, the book of Alice; the hole of the rabbit.) There are entire theses of grammatical development that focus on the reason for the emergence of the possessive apostrophe. A summary of the competing theories is copied below, in part, because the explanation also exemplifies the importance of printers and printing as a mechanism by which language and thus Knowledges can be changed by seemingly neutral decisions, and the explanation offers a perfect example of why Wikipedia is one of the mechanisms by which Knowledges are changed for better and for worse. (See The Possessive Apostrophe His Origin, posted by Paul Brians (Aug. 13, 2011), available at http://wmjasco.blogspot.com/2011/08/possessive-apostrophe-his-origin.html.)
of the dynamic I outlined above, which I will describe in greater detail at the conclusion of this dissertation.

Morimura's image reflects other features of modern conceptualizations of "identity." Notably, aspects of identity can be claimed and made real by enacting, embodying, or performing them. A man can claim the title of "odalisque" by enacting it, a fact that challenges the viewer to consider two realities: (1) The word "odalisque" is (or must be) redefined to encompass any figure (female or male) that represents the eroticized body of the "odalisque" genre (18th c. member of a harem; a concubine; an eroticized female figure (typically Eastern) who is displayed on a chaise longue or daybed for the pleasure of the viewer). In this case, our notions about what we are prone to objectify—what is erotic—may in turn change. (2) The word "odalisque" need not be redefined (because the term is already elastic enough to include Morimura's feminized-masculine imagery), but the viewer's impulse to objectify must change. The viewer's impulse to objectify must include an acknowledgement of him or herself as part of the process of objectification. In this case, the gaze of Morimura's Odalisque no less than the figure's metrosexuality calls our attention to what we are doing when we observe the image and in turn what that makes us—what we are being when we are doing objectification. The figure that is objectified and our process of objectification get equal measures of our attention. These two realities are not necessarily mutually exclusive.

The first reality is oriented around to object; the second is oriented around the subject. The first refers to the viewer's understanding of the image (object). Subject interprets object. This reality suggests that the term should be expanded, because, as a representation, the image fits the meaning of an odalisque even as it conflicts with the term's original limited application to certain females. The second reality refers to the viewer interpreting him or herself, as filtered through the figure. Subject becomes object. This reality suggests that the understanding of "objectification" should be expanded. Paradoxically, this reality asks us to include in the
definition of "objectification" one's objectification of oneself in the process of objectifying another. The object of the viewer the view of him or herself as refracted through the gaze of the object-odalisque. In this new meaning of "objectification," subject becomes object but does not thereby lose the role of subject. Thus, Morimura's Odalisque brings us to a delicious inversion: The image asks us to revise the meaning of "objectification" to include "subjectification." In modern social life, to objectify might be to subjectify.

This type of head-spinning illogic seems to push us so far off the plane of traditional meanings, it may feel as if we are headed for context collapse. In the context of "hate crime," an attempt to do a social reboot by eliminating the "objects" that seem to be disrupting the pillars of the social structure—i.e., Others, minorities, foreigners, etc.—is one of the impulses that drives the violence. But context is not collapsing into chaos. Rather, a new order is taking form in the inversion of old meanings related to identity.

To better understand the way that Morimura's image demonstrates an inversion of the meaning of "objectification," it is important to emphasize that the revised meaning does not depend on a reversal of roles. The subject does not reverse places with the object. The new meaning does not make the viewer the one viewed, and the image the one doing the viewing. (As a matter of art history, one might fairly interpret the Morimura image as depicting a reversal of subject and object; that is, the male odalisque objectifying the viewer. This is a playful abstraction of subject-object rules, since grammatically the subject is the one engaging in some action and the object is the one to whom or at which the action is directed, and images in artwork cannot actually engage in any activity, while viewers of art can.) Nor does the inverted meaning of "objectification" now come to mean its opposite, "subjectification." Rather, "objectification" in its late-modern form is understood to include a particular (refracted) process of subjectification that involves multidirectional gazes.
V.D.3. Identity a la Carte

The discussion of "identity" and its development across the genealogy of the concept of "hate crime" will continue later in this dissertation. To support the references to "identity" and inversions in the genealogy that follows, however, it is necessary to offer a few familiar examples out the outset. The deconstruction of gender roles presents a model of the way that perceptions about "identity," especially social constructions, can be challenged and changed to better align with reality. Men can be caregivers; women can be CEOs. Women can fight in war, and men may pierce their ears or wear makeup, without either participating in any other pushback against male-female gender boundaries. The deconstruction can occur a la carte—and may indeed be more effective when entire narratives are unraveled thread by thread. The breakdown of social constructions is often assisted by medical advances. Using medical procedures, for example, external reality can be made to conform with the inner perception of sexuality: men can "be" women, and women can "be" men. But this is not a pairing of perception and conception. This is perception made real, not merely conceived of as real.

Complications arise when one's perception becomes self-conception but not reality. The tussle over gender designations and bathroom access provide an example. A student identifying as boy when he had the biology of a girl is not problematic until the boy has to change for gym class or use the bathroom. What he feels inside, which does not match reality, presents an obstacle for anyone else who is formulating their conceptions based on their perceptual knowledge. In this case, feelings-as-facts are not unreal or fake. Instead, they are a different kind of reality, a different sort of fact. When facts splinter into different types and reality comes in several flavors, one can see the difficulties in encounters among individuals whose knowledge-bases are not apparent.

Other examples of "inversions" might be terms like the "Party of Lincoln," often hubristically claimed by the current GOP, and "Southern Democrat," at last check predominantly Black, and "Silent Majority," which, if Trump's usage in the election season is any indication, no longer
refers to a group that is actually silent or even a majority. Like "hater," Silent Majority is a label, not a descriptor. In late modernity, the uncertainty of what it means to be an American citizen calls into question the meaning of the phrase "We the People"—which, when written by Jefferson, was an explosive proclamation of self-determination that today seems as distant from our current sensibilities as the calligraphic script inscribing the self-evidence of the People's Will. (See Figure 9: We the People.)

Figure 9: We the People

These political references also exemplify the sometimes humorous or ironic nature of "inversions." Even in the context of gravely serious conflict—in this case at a Ferguson-St. Louis rally after the shooting of Michael Brown—one is struck by the oddity of a middle-aged female, a civilian, declaring to the press, "You want my name? My name is Darren Wilson! We are Darren Wilson." This seemed funny-odd in ways that the "We are Charlie Hebdo" t-shirts did not. But both statements are indicative of an inversion in the way we conceptualize identity. In these examples, the clearest inversion is that the meaning of identity as precisely what I am not. The modern concept of "identity" allows one to validly identify oneself in a way that is factually and figuratively impossible—and not be lying. At the same time the woman claimed to be Officer Wilson, she knew—as we all did—that she was not in fact Wilson, and she knew that we knew it.
And we knew she knew we knew it. That's why it was not a lie. The statement was funny-odd but not challenging credulity. Today, we all understand that by claiming the identity of another—particularly some beleaguered individual with whom we sympathize—we are adopting their identity in so far as it represents their side of the current dispute. In this polarized global environment, we even risk inviting the same attacks that have already been directed at the person we claim to be. To so stalwartly identify with the cause of another echoes the cry of the Three Musketeers: *All for one and one for all!* But at the time muskets were used defend one another, neither Aramis nor Athos would have conceived of making the statement, "I am Porthos!" The statement would have seemed loony-odd. Such a claim would have been followed by detaining the imposter in the gaol or delivering him to the local "fool's tower." No one would have understood the statement to mean "I stand with Porthos! Haters, bring it on!"

Inversions sometimes contain historical ironies, some quite damaging, and many inform this dissertation from off-stage. To launch one theme of this dissertation, I present one example here drawn from the nation's founding documents: the inversion of the meaning of "self-evident." If the various items Jefferson so eloquently declared as "self-evident" and inalienable in the Declaration of Independence (1776) (see Appendix Self-Evident) were internalized that way by the Framers and in Supreme Court interpretations, the country would not have needed a civil rights era at all. (See Sections V.D.1, V.D.3, V.D.7.) Self-evidence is like a ribbon around the arguments set forth by Jefferson about the Government's proper relationship to a People, who hold "inalienable" rights. These rights—drawn from the *Magna Carta* (1215) (see Appendix Magna Carta) and from Blackstone’s Treatises (1765-1769)—were life, liberty and property, or, as Jefferson wrote it, "Life Liberty, and the pursuit of Happiness." Given how obvious it was to the Founders that men are created equal and come pre-loaded with certain

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410 Under the Northwest Ordinance (1787), the U.S. formally legislated property ownership in fee simple—in perpetuity with unlimited power to sell or give it away. This provision has been referred to as the "first guarantee of freedom of contract in the United States."
rights, Jefferson tells King George III, the only reason to explain their laments was the "decent respect to the opinions of mankind." Were this latter phrase—"decent respect for the opinions of mankind"—the core of national identity in the U.S. rather than pursing Happiness, how different might be our understanding of the "principles [that] seem most likely to effect [our] Safety and Happiness." (See Section V.D.4.)

The emphasis in modern American has been on the pursuit of "Happiness" as a generalized right tied to one's self-expression. For perspective, consider the varieties of protected expression today—from speech to sexuality, from dress to body piercings, from sermons to protests to Facebook postings—and ask how the Founders would analogized these modern modes of expression to those permissible in their own time. In place of these highly specific, irreligious, and noncommercial expressive forms, the Founders were likely to think of as expressive speech as that found in a formal petition to the ruler, sexuality as limited to procreation and therefore a religious matter, dress as a social norm not a constitutional issue, and public dissent as a new paradoxical form of patriotism (an inversion) that was central to the national identity, not deterring from it. For the Founders, rights of speech actually referred to verbal or written communication. If the Founders could have comprehended the idea of decorative body piercings at all, once they picked themselves up off the floor they would not have viewed piercings as the kind of personal choice that a citizen with protected freedoms would consider integral to their "Happiness" as an American. Their perspective on Happiness rested largely on free religion and a public commercial marketplace free from the arbitrary, usurious interference of the ruler or the ruler's self-dealing. This basic premise explains why early formal categories of persons comprised religion and race, and why later categorizations comprise expressive or performative identities, such as "gender identity." (See Section II.D.)

Moreover, because we have grown accustomed to the Supreme Court standard that speech can be action, nearly all action is expressive and presumed protected until proven otherwise. On this point, the debates about the federal ABL prompted scholarly hand-wringing over the future
of our freedom to enjoy the full fruit of our emotions in the "pursuit of happiness," even a happiness that stems from deeply held racial and other prejudices. Echoing the axiom that a civilization can be judged according to the way the culture treats its elderly and vulnerable, critics of ABL deploy that principle in a test of democratic freedom: the protection afforded to public dissemination of unpopular, undemocratic, even repugnant, viewpoints. To protect hateful thoughts and words is to provide protection for all thoughts and statements.

This interpretation flips the term "hate crime" on its head. Violent acts are never protected under the First Amendment, because violence is not "expression." Being a "deplorable" hater is protected, but doing a deplorable hate-act is not. As discussed throughout this dissertation, developments in the concept of "identity" have blurred the lines around Self as being versus Self as doing, when "doing" is an act of "being." Put differently, modern perspectives on identity emphasize not what we are, but the process: what we are being. In terms of national identity, the shift takes us from a freedom to engage in "Life Liberty, and the pursuit of Happiness"—that is, a single combined freedom that entitles us to those abstract opportunities best studied to a nation of self-starters—to a complex web of freedoms that touch upon "living" (e.g., human rights), releasing our unfiltered Selves (especially through tools of social media), and personal expression as the foundation of "happiness." (See Sections V.B, V.C, VI.)

But that is not the end of the discussion. As "identity" changes, the concept of "harm" also changes. As discussed below, harm is increasingly defined by the experience of the object of the crime. Again, in terms of national identity, targeted attacks an individuals to express "hatred" for the wider social group highlight the nation's conflicting impulses: Hard-won libertarian reflexes to avoid regulating content—of thought, speech, or religious practice—are wrestling with the impulse to defend members of the public who may be especially vulnerable to harm arising from behavior that exceeds the boundaries of content-based protections. Revising the
above axiom: To protect the most vulnerable members of society is to protect all members of society and the democratic principles on which content-based freedoms are based.

Cutting through these free speech and related constitutional considerations, we must acknowledge that ABL applies to violent behavior, without which no "hate crime" prosecution could be operationalized, and that the First Amendment does not protect speech-acts that involve violence or attempts to incite violence. That would conflict with inalienable property-based freedoms that are expanded and enforceable against the government because the People are permitted to dissent. Speech is mechanism by which property rights are protected. The structural problems with the HCPA as a matter of criminal law tradition have been discussed in the legal literature review, above. If there are other fatal critiques to be made of federal ABL or the concept of a "hate crime" more generally, the U.S. Supreme Court has not identified them to date.

Although the language of the law may circumscribe a social problem differently than it is experienced or understood in everyday life, "hate crime" statutes were earmarked for the worst of the worst cases of Out-Group animus, involving violence against Out-Group members that shocks the conscience. Whose conscience? The collective conscience; the shared understandings, roughly corresponding to the social contract, from which "hate crime" acts so far depart that, in such crimes, we are unable to recognize ourselves as a nation. What are these "shared understandings"? The understanding, at minimum, that democratic ideals enjoyed by all groups are eroded by messages intended to intimidate any one social group that is packaged in violence against one member of the group.

A man's character greatly takes its hue and shape from the form and color of things about him. Under the whole heavens there is no relation more unfavorable to the development of honorable character, than that sustained by the slaveholder to the slave. Reason is imprisoned here, and passions run wild. Like the fires of the prairie, once lighted, they are
at the mercy of every wind, and must burn, till they have consumed all that is combustible
within their remorseless grasp.

—Frederick Douglass, *My Bondage and My Freedom* 62 (1855)

**V.D.3. Knowledges as Catalysts and Limitations**

*Federal* ABL, which is the subject of the research in this dissertation, has a rich history not fully explored by critics or supporters of "hate crime" legislation. The rules and boundaries around the ability for Congress to make any criminal law, and for the Supreme Court to uphold such law, offers a window on the way that these two entities have understood civil rights—and civil wrongs—and the development of federal power to create, regulate, and prosecute criminal law. As will be seen, this story is partly one of form as function; that is, codification as a narrative form that limits the function of the text within the code. The text itself embodies the limits of the cultural Knowledges of the era in which the words were drafted.

The relevant legal texts, the ancestors of the HCPA, include criminal civil rights laws going back Reconstruction, as well as the constitutional provisions on which statutory provisions are based and the pre-constitutional principles articulated in declarations and codes from which the U.S. Constitution self-consciously was derived. These texts are analyzed in detail below. (See Section V.D.3.)

The Knowledges relevant to the concept and law of "hate crime" extend even further back in time, in a dynamic process in which Knowledges are leveraged and reified until they collapse under the weight of the varieties of usages or invert into a meaning conceptually opposite (or nearly so) its original meaning. One statement of relevant cultural Knowledges is crystallized in law. In evaluating the meaning and influence of Knowledges, this dissertation gives weight to the *form* of the texts and discourses, which implies certain limitations on the thoughts and ideas underpinning the words and reflects significant information about social structures of power, economy, religions, and more. To understand these dynamics, it is necessary to look closely at
the meaning of the concept of "hate crime" by tracing the origins of the federal law and highlighting the knowledges by which they were limited or influenced.

Before federal law could be drafted to prohibit discriminatory criminal acts that might be described as crimes of "hate," Congress and the general public had to share a common vision of the type of act to which the term "hate crime" referred and a belief that existing law was not already equipped to address discriminatory violence. These two liminal matters were graphically portrayed in the cases for which the federal HCPA was named, the violent attacks in 1998 of James Byrd, Jr., and a few months later, Matthew Shepard. The cases also demonstrated that the common vision was easier to come by than the belief. The cases echoed faint but familiar geographical correlates, established as early as the 1700s in federal policies as the nation transformed from "colonies" to "territories," of prejudice and intolerance.411

411 As the nation shifted from "colonies" to "territories," opinions on policy followed regional resources and economic imperatives. The North-South battles over slavery were the most notorious example of geographic correlates to policy battles. Land use was generally an East-West tension, "with easterners more likely to view the lands as national public property, and westerners more likely to view the lands as necessary for local use and development." (Carol Hardy Vincent, Laura A. Hanson, Jerome P. Bjelopera, "Federal Land Ownership: Overview and Data," Cong. Rsch. Serv. 1 (Dec. 2014).) Land sales and settlements to control territory, pay off soldiers, reduce the national debt, and generally stabilize the nation accelerated with the 1803 Louisiana Purchase, the 1846 Oregon Compromise (with England), and the post-1848 Mexican War treaty.
V.D. Conceptual Bases for Federal "Hate Crime" Legislation

The Byrd and Shepard cases provided the catalyst for the passage—ten years later—of federal ABL. These were the "I know it when I see it" examples of "hate crime." But the language of the HCPA was anchored in American aspirations to achieve something far less grand than a "perfect" or "more perfect" Union. On one level, the HCPA, like civil rights laws, aimed to achieve something as modest as social detente among the various In- and Out-Groups that populate the country. As will be seen below, congressional acts dealing with "hate" in American social life are like bandaids on a centuries-old amputation. The emergence of the concept of "hate crime" in part was introduced into the American legal lexicon as a symptom of a much older, deeper problem.

The following sections cover three pillars in the development the concept of "hate crime" and its legal prohibitions: (1) the experience of Out-Groups; (2) the authority of the federal government to legislate protections for categories of persons; and (3) the unique obligations owed to African-Americans in light of their subjugation in building the nation and thus the national identity. The analysis below is organized around the legislative history in chronological segments, beginning with the entry of the term "hate crime" into public discourse, then turning to the early frameworks of government as they relate to Enlightenment conceptualizations of "identity," and returning to relevant premillennial legislation and the passage of the HCPA. These topic are covered in historical eras with summaries at the end of each segment:

V.D.1. "Ethnic Intimidation" to "Hate Crime";

V.D.2. Summary, Intimidated and "Hated": Identity-as-Experience;

V.D.3. Power, Personhood, National Identity, and the Foundations of Permission to "Hate";

V.D.5. Harnessing the Liberation Discourse for Crime Control;


V.D.7. Criminal Civil Rights to Enhanced Criminal Civil Rights; and

V.D.8. Summary: Permissions to Express "Hate": *Identity as Paradox*.

The chief concern throughout the genealogy presented in this section of the dissertation is laying the foundation for the ideas that undergird the concept of "hate crime." As detailed in the sections covering the research questions and methodology, the question to be answered is, *What historical events and related cultural Knowledges were necessary for the concept of "hate crime" to emerge?* Thus, each subsection in this Part V.D. discusses a piece of legislation relevant to this question and, in turn, asks what was necessary in terms of cultural Knowledges for that legislation to have been enacted. This leads to earlier Knowledges, discourse, and laws, and so on. In brief, the concept of "hate crime" would not have emerged in its current form (as discussed in Sections II, V.A, V.B, V.C, and VI) without cultural attention to identity-as-experiential, identity-as-action, identity-as-being (passive), and finally "identity" as a container for paradoxes in the modern meaning of Self and Other. Note that these various forms and expressions of "identity" are not neatly limited to particular historical eras, as the list above implies. Expressions of "identity" are too varied to delineate hard lines between typologies or historical epochs. The forms are enumerated above in accordance with the timing of specific pieces of relevant legislation that reflect an historically-defined "spin" on the way "identity" is understood. The discussion in the genealogy, particularly in the Summaries that follow the chronological grouping in Section V.D, highlights typologies of "identity" whenever and however relevant to the points to be made.
V.D.1. Ethnic Intimidation to "Hate Crime"

The most obvious differences between the early legal language used to describe ABL and that used in later laws, all of which are outlined below, can be found in the titles. The earliest model law describing "ethnic intimidation" encompassed many more categories of Out-Groups than ethnicity, which may explain why that title did not become permanent. The title ("hate crime") that became permanent in federal ABL—and most familiar to the general public—is remarkable because it refers to one of the most riveting human emotions to define a crime, when the law typically sanitizes itself of emotion in the interest of fairness. But "hate crime" does not appear in the text of the federal HCPA. The prohibited actions—"intimidation," "harassment," "injury"—under the HCPA hew closer to the early model law, discussed below. Moreover, the HCPA omits any reference in its title to the purported focus of the law: the category of persons protected. Instead it is designed to punish the actor's purported objective: to inflict a crime on the hated individual. How did the legislative agenda shift from prohibiting action to regulating emotion—from "intimidation" to "hate"? Did it?

In this first section of the legislative history, the following laws are summarized, with commentary:

- 1981 Ethnic Intimidation Model Law, called the first "hate crime" model law;
- 1984 Crime Victims' Rights Act;
- 1990 Hate Crime Statistics Act;
- 1990 Crime Awareness and Campus Security Act; and

Because these laws are built on civil rights foundations, the Civil Rights Acts and related laws are also mentioned. Sections of the HCPA are set off in the text to illuminate specific links between these early laws and the language of the HCPA. Each of these Acts begins with a bolded
header, which attempts to encapsulate the key contribution of the law to the development of the HCPA. These ideas will be reviewed at the end of this section.

Each section of the legislative history pauses with a debriefing of the laws discussed and their relationship to the emergence of the concept of "hate crime" and the shift in the concept of "identity." The legislative history shows that shifts in legislative attention, reflected in the language and structure of the laws, occurred in tandem with changes in cultural Knowledges associated with "identity." Because the examination of the concept of "identity" reaches back to the founding of the country, the commentary throughout this dissertation ties certain contemporary sociolegal issues to the language of the Framers and the national identity. These issues will be discussed throughout this dissertation.

1981

Ethnic Intimidation

Prior to the emergence of the provocative term "hate" was attached to this type of criminal act, a more moderate label "bias crime" had been used to describe the activity of concern. To address bias crime, the first model law was introduced in 1981 by the Anti-Defamation League of B'nai B'rith (ADL), in the form of a model "ethnic intimidation" statute. The ADL model statute, the language of which has been adopted or adapted in nearly every state, is aimed at defendants who commit crimes "by reason of the actual or perceived race, [color, removed 2004] religion, national origin, ethnicity [added 2004], or sexual orientation, or [disability, added 2004], or gender [added 2004] of another individual or group of individuals." (See

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413 Later iterations of the ADL model law included additional provisions, such as gender, and the law extended to crimes not directly related to "defamation" of minority groups:

||The ADL model also aimed to deter attacks against houses of worship, cemeteries, schools and community centers—common targets of hate-inspired vandalism. Another provision creates a private right-of-action for victims of hate crimes, which allows the victim to sue for money damages and to collect both attorneys' fees and punitive damages [and parental liability for minor children's actions].||
Appendix ADL Model Law.) The model language is used in nearly all state jurisdictions to extend the sentences applicable to convicted defendants if the specified conditions are met.\(^{414}\) In the context of hate crimes laws, the definition of "bias" is the "negative opinion or attitude

\[^{414}\text{The most common form of hate crimes legislation is the penalty enhancement statute, some form of which has been adopted in the majority of states and at the federal level. These statutes simply enhance the penalty for what is already punishable conduct. State hate crime laws passed since the 1980s have adopted some version of the model "ethnic intimidation" legislation drafted by the ADL in 1981. The model statute increases punishment for a crime where the defendant committed the crime "by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals." (Anti-Defamation League, Hate Crimes Laws: A Comprehensive Guide 3 (1994).) Washington and Oregon were the first states to pass hate crime legislation in 1981, followed by Alaska, California, Idaho, Illinois, New York, and Massachusetts. All 49 states and the District of Columbia have passed so-called "hate crime" enhancement statutes, but they vary in their details. The groups protected, the range of criminal acts that support the enhancement, and the extent of the penalties are not uniform. Depending on the way the statutes are analyzed, there may be different results in assessing which laws can be said to address bias crime. In 2001, the ADL found that 49 states plus the District of Columbia had enacted some form of ABL. Using different criteria, a study by Jenness and Grattet found slightly fewer states (41), which increased in subsequent years (to 44) as states adopted or adequately revised their "hate crime" statutes. In their study, the statute must have included:
- Criminal sanctions, enhancement penalties, or amendments to existing statutes that establish hate or bias criteria toward individuals or groups based on particular characteristics;
- An intent standard that contemplated the offender's subjective intent; and
- A list of protected social statuses that identify the traits of the victims.
(Valerie Jenness and Ryken Grattet, Making Hate a Crime 73-101 (2001).) In a later study, Shively focused on the major overlapping provisions of state laws to identify themes common among state laws, including:
  (1) the identification of protected groups, i.e., categories of people identified by a list of traits considered to be the motivating factors in offenders' choice of victims;
  (2) identification of predicate crimes, or conventional offenses eligible to be defined as hate crimes if hate or bias toward victims in protected groups can be determined;
  (3) stipulating that hate or bias motivated the offenses covered by the statutes;
  (4) criminalizing and/or providing for penalty enhancements for offenses determined to be hate or bias crimes;
  (5) providing for civil remedies; and
  (6) stipulations requiring the collection and/or dissemination of hate crime data.||
Another category or provision appearing less frequently in statutory law addresses training of law enforcement personnel to unify the criteria for preventing, responding to, and reporting "hate crimes." (Id. at 12.) The lack of uniformity has led to uneven application of the laws. (See Frederick M. Lawrence, "The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crime Prevention Act of 2007," 19 Stan. L. and Pol'y. Rev. 251, 273-74 (2008) (describing the problem of state default in bias crime prosecution.).) However, greater consistency in applying "hate crime" laws and in reporting under UCR requirements have been developed as major localities have coordinated with federal authorities. (See Nat'l Inst. of Justice, "Hate Crime" (Dec. 22, 2010), available at http://www.nij.gov/topics/crime/hate-crime/Pages/welcome.aspx.) \]
toward a group of persons based on their race, religion, ethnicity/national origin, or sexual orientation." The term "attitude" suggests a process; for victims, a continuation of fear and "unfreedoms" experienced by a targeted group.

Notwithstanding its title, the text of the original law did not include "ethnicity" (added 2004). The ADL did not conceive of the term "ethnic" as different from the various attributes enumerated in the law. In its root form, "ethnic" refers to attributes of groups from which categories can be discerned. "Ethnicity"—Late L. *ethnicus*, early 15th c. "ethnical," meaning "peculiar to a (foreign) people or nation," national"; 14th c. ethnos, meaning "band of people living together, nation, people, tribe, caste," or "people of one's own kind" in the sense of "birds of a feather," used to refer to flocks of animals or swarms of birds; 14th c. ME borrowing from ecclesiastical Gr. *ethnikos*, meaning pagan or heathen, "one who is not a Christian or Jew"; 1935 Am. Engl. "ethnic" referring to (nonreligious) "different cultural groups"; 1945 Am. Engl. "member of an ethnic group" meaning "racial, cultural or national minority group"; mod. deriv. "ethnoviolence"—refers to cultural groupings; it is not itself a characteristic. To be "ethnic" is to be identified as having a characteristic—almost any except White Anglo-Saxon features—that mark one as an Other.

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415 Ventura v. ABM Industries, 212 Cal. App. 4th 258 (Cal. 2012) (interpreting the meaning of statutory language requiring violence "on account of any characteristic" to mean animus or discriminatory intent against a "characteristic" of race, sex, etc.). See also D.C. v. Harvard-Westlake School (2009) (noting that California's hate crime law began in 1976 under the Civil Code section 51.7, the Ralph Civil Rights Act, for which the purpose "is to declare unlawful, and civilly actionable, any acts of violence or intimidation by threats of violence directed against any individual because of his actual or perceived membership in a minority or similarly protected class.").

416 The importance of "hate crime" legislation is that it recognizes: the dynamic of hate that has guided social relationships in America since its earliest days (B. Bowling, Racial Harassment and the Process of Victimization: Conceptual and Methodological Implications for the Local Crime Survey, in Barbara Perry, ed., Hate and Bias Crime 61-76 (2003)); the transcendent attitudes that drive the crimes (Nathan Hall, Hate Crime 64 (2005)); part of a cumulative effect of threatening behavior against minorities for the history of the U.S.: "[C]onceiving of violent racism (and other forms of crime) as processes implies an analysis which is dynamic; includes the social relationships between all the actors in the process; can capture the continuity between the physical violence, threats and intimidation; can capture the dynamic of repeated or systematic victimization; incorporates historical context; and takes account of the social relationships which inform definitions of appropriate and inappropriate behavior."

417 "Ethnic cleansing" in American English is attested from 1991, but earlier roots in Europe can be found in Czech, French, German, and Polish. (Jerry Z. Muller, Us and Them: The Enduring Power of Ethnic Nationalism, Foreign Affairs (Mar./Apr. 2008).)

Contemporary usages of "ethnic" describe vaguely foreign features, an Other who is shadowy in appearance, like "the Arab" in Camus' *The Stranger*, or in behavior, like George Zimmerman's description of Trayvon Martin to the 911 dispatcher, "this guy looks like he's up to no good.," or in practices, like the "turbaned males" worshipping at the Oak Creek (WI) Sikh Temple who were murdered by a gunman in 2012. In the modern sense of ethnicity-as-culture, "ethnic" is not necessarily connected to specific racial attributes.

The ADL model law was not problematizing attacks on vulnerable populations. The "intimidation" of the minority groups named in the model law have been subject to discriminatory social Othering (and institutionalized Othering, including in the law) is so apparent in American history, it is a national theme. The FBI asserts that its investigations of "hate crimes" go back as far as WWI. Instead, the model law expanded protections established in civil rights laws to the penal codes, using "intimidation" to identify criminal acts that are given greater power when coupled with prejudice—such as menacing behavior, threats, vandalism, and other threats of violence that limit the target's freedoms, and sense of safety and belonging. The model law also sought to pull the conversation away from racial tropes, in keeping with a multicultural understanding of the populations to be protected. The emphasis on validating minority narratives to influence the way social issues were understood was part of a larger trend

419 Steven Yaccino, Michael Schwirtz, and Marc Santora, *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, The NY Times at A1, Aug. 6, 2012. A community member told the reporter: "Most people are so ignorant they don't know the difference between religions," said Ravi Chawla, 65, a businesswoman who moved to the region from Pakistan in the 1970s. "Just because they see the turban they think you're Taliban."


421 The FBI’s Training Guide for Hate Crime Data Collection defines intimidation as "to unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack." (Federal Bureau of Investigation, *Training Guide for Hate Crime Data Collection* 19 (1996).)
in the early 1980s in which political (Madisonian) pluralism morphed into a demand for personal recognition. At its best, this trend shifted the relative weight of voices in social discourse to allow for more diversity of views and experiences. At its worst, the demands of multiculturalism eroded social cohesion, upended the "melting pot" and the tolerance associated with moderate forms of assimilation. By identifying a multicultural set of victims in the law, the model law gave their harms legitimacy—in a Durkheimian sense, a harm in need of a remedy. Members Out-Groups have historically been singled out for violence, the model law acknowledges who are likely to be victimized and attempts to do something to protect them, on some level recognizing them as pre-victims. The idea of an ex pre-facto law is more than the law can comprehend. Critics of "hate crime" law inadvertently objected to this latent feature of the federal law on Equal Protection grounds, without articulating the real problem.

The ADL model law also contained provisions covering "houses of worship, cemeteries, schools and community centers—common targets of hate-inspired vandalism," and creating a private right-of-action for victims of hate crimes to sue their offenders in civil court. Although "intimidation" had long been a staple of the criminal law lexicon, the usage of this prohibition in the model law describes both the intentional act of the offender and the harm experienced by the victim. In the development of "identity," a criminal act that moves our

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422 Jacobs and Potter state, "The current anti-hate crime movement is generated not by an epidemic of unprecedented bigotry but by heightened sudden sensitivity to prejudice, and more important, by our society's emphasis on identity politics." (James B. Jacobs and Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 6 (1998).

423 Durkheim's advice in The Rules of Sociological Method is that crime is not viewed as a disease; rather victimization is the harm in need of a remedy. Durkheim points out that discussions about crime is a disease should be directed towards direct determining what punishment will remedy the disease.
attention from the intention of the offender to the experience of the victim is significant.\textsuperscript{424} This trend becomes clearer in the \textit{Victims of Crime Act of 1984}.

\section*{1982-1984}

\textbf{Rights for Vulnerable Populations}

As part of the identity-experience claims coming forward in the 1980s, crime victim advocates noted that "victims have always received secondary consideration within the U.S. judicial process, even though States and the American people by a wide plurality consider victims’ rights to be fundamental."\textsuperscript{425} The 1982 Presidential Task Force on Victims of Crime recommended a constitutional amendment to protect crime victims’ rights in the criminal justice system:

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection. The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the

\textsuperscript{424} In some sense this is an inversion of an equal protection argument, because bias-motivated violence violates the victim’s constitutional right to freedoms that In-Group members enjoy. ABL is in keeping with the constitutional tradition of protecting vulnerable minorities against the whims of powerful In-Groups, and First Amendment protections speech do not extend to "racially-subjugating expressive violence." (A. Taslitz, \textit{Hate Crimes, Free Speech, and the Contract of Mutual Indifference}, 80 B.U. L. Rev. 1283-98, 1379-98 (2000).)

\textsuperscript{425} National Governors Ass’n, Resolution, Policy 23.1.
recommendation of this Task Force that the Sixth Amendment to the Constitution be augmented.\(^{426}\)

A constitutional amendment represented an apex in a movement rooted in "Take Back the Night" vigils of the 1970s and similar protests against generalized fears that create unfreedoms, primarily for women.\(^{427}\) Victims' voices were the centerpiece of these changes—that is, victim identity-experiences. Cultural Knowledges from the Civil Rights era took shape in an emphasis on restoring a sense of power and personal safety in victims' lives. This new perspective boosted restorative justice and related movements, in which victims are the center of the processes and accountability is the goal.\(^{428}\) New terms were coined for old forms of violence against women: "date (or acquaintance) rape," "domestic violence/intimate partner violence," "stalking" and later "cyber-stalking."\(^{429}\) Generally, the terminology gave special regard to the vulnerability of women to violence at the hands of men. The labels implied that victimization was ongoing and often built into relationships. Victimization was understood as a process that extended beyond the initial crime.\(^{430}\) The language of passivity in victimization was self-consciously replaced with the language of agency in "surviving." Many advocates hoped that new orientations to justice, linking the unfreedoms (e.g., of women) to the sensibility of an ongoing harm (e.g., built into patriarchal structures) that required personal accountability from the offender, would lead to a New Birth of Freedom for women.


\(^{427}\) Many CVRA advocates had been lobbyists for the Equal Rights Amendment of 1972. That proposal also failed to pass. Like other civil rights laws, would have prohibited sex discrimination by federal or state governments. Its seven-year ratification clock, extended three-years, ended after 35 states ratified the proposed amendment, leaving it three shy of ratification.


\(^{430}\) Nathan Hall, Hate Crime 63 (2005).
The amendment to the U.S. Constitution never passed, but the taskforce recommendations were implemented over time, first in the states and later in federal law. (See Appendix CVRA.) Federal Crime Victims Rights, under Title 18 of the U.S. Code (U.S.C.), are designed to give victims a voice in the processes affecting their case. These include the right to be reasonably protected from the accused, to confer on matters of prosecutorial discretion (such as plea bargaining), to be notified and present at all proceedings, and to be compensated for the out-of-pocket expenses and personal damage resulting from the crime. Victims are given a "right" to be treated with "respect and dignity." How such a right would be exercised or vindicated is unclear. But the question is mute, since the CVRA explicitly denies victims a cause of action (the right to sue) under the statute.

The CVRA was built on the familiar idea that vulnerable populations need protections and it is the government’s public safety duty to provide those protections. But the taskforce recommendations pointed to the need to protect victims from the government—at least from revictimization in judicial processes. In criminal justice proceedings, victims were Others. The antidote was to humanize victims by personalizing the effects of crime. This was part of a larger trend granting legitimacy to personal narrative.

431 The first federal law focused on monetary remedies. See Appendix VRA 1984.
432 The 1990 ADA provided recognition for disabled persons in the workforce and other areas where civil rights were activated. The ADA was designed chiefly to ensure that "accommodations" were provided within reasonable limits to give disabled persons the same opportunities as others. Hollomotz (2012) emphasizes the dynamic and cumulative nature of hate crimes against people with disabilities. She suggests that violent bigotry is on the same spectrum of social exclusion, derogatory treatment, bullying, and routine intrusions that are part of the everyday social world. (A. Hollomotz, "Disability and the Continuum of Violence," in A. Roulstone and H. Mason-Bish, eds., Disability, Hate Crime and Violence (2012).)
433 A key part of the victims’ rights movement was putting an end to victim blame, a process by which the victim becomes the Other. The impulse to blame people who have suffered misfortunes is explained in the just world hypothesis, by which people engage in a process of victim blame to avoid the terrible truth that we are all vulnerable to crime and that the world is unjust, random, and unsafe. Observers differentiate themselves from the targets of crime to assure themselves that they are safe and in control of their circumstances. The resulting victim blame occurs in all types of crimes: Observers build a narrative that assumes that the victim invited the attack by putting their target status on display. For example, bias crime against a homosexual male victim may be blamed for having worn certain clothing or having behaved in a way that made his sexual orientation "obvious." (See, e.g., Linda Garnets, Gregory M. Herek, and Barrie Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. Interpers. Viol. 366, 374 (1990); Gregory M. Herek, Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy, 44 Am. Psychol. 948 (1989).)
HCPA, 18 U.S.C. 249, Findings

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected. ||

Intangible Harms

The CVRA was credited with reorienting the law to the internal condition of the victim. Her person was not simply as physical evidence but as a participant in the response to her victimization. The CVRA invited experiential victim narratives in formal Victim Impact Statements at sentencing. The Odalisque was released from silence and passivity. Advocates hoped the Titanic justice system would turn gradually toward a Victim Justice System, in which restorative approaches would turn the conversation about justice to accountability, as distinguished from penalties.

The narratives also changed the way harm was understood generally. Harm bifurcated into tangible (physical) and intangible (emotional, psychological, trauma). Lasting psychological effects of IPV and rape were increasingly woven into criminal prosecutions. The term for "gross stress reaction" (c. 1952) reemerged as PTSD, post-traumatic stress disorder (c. 1980) to describe the complexity of intangible harms manifesting in a specific set of symptoms.

Identity-Experience as Possessor

That the law formally introduced victims’ voices and harm-as-experiential into its frame of reference reflected changes in the conceptualization of "identity": victim-as-survivor inverted victim status by objectifying and making meaning of victimization. The victim-experience was hers, to narrate and redefine as she saw fit. Also, the nature of the relationship between victim

434 Legal intervention still requires measurable (tangible) harms (in other words, you cannot go to court for hurt feelings).
435 Diagnostic and Statistical Manual of Mental Disorders (DSM)-I (1952) (referring to veteran reactions to war); DSM-III (1980).
and offender, increasingly a focus of federal criminal justice statistics and local investigations, made her a specific person: a wife, a girlfriend, a daughter. By humanizing victims, offenders also became human, knowable—both through narratives of their experiences.

One example of the Knowledges reflected in the dynamics surrounding crime victims rights is found in the provision of the Crime Victims Rights statute that permitted victims, or a deceased victims' closest kin, to present victim impact evidence at sentencing in the form of a written statement submitted to the court for the case file and an opportunity to read all or some of the statement in open court before the sentence is handed down. The format is epistolary in the sense that it is directed to the court, and at times directly to the offender, to recount the author's experiences and inner struggles in the aftermath of the crime. Victims and/or surviving family members describe the effects of the crime, including their grief, depression, PTSD, the interminability of the emotional loss, and the social and financial repercussions of these effects, among other things. Victim impact statements are intended to provide a venue for victim recognition in criminal justice proceedings that, while not off-setting the focus on the defendant, serve to counterbalance the one-sidedness of the system. Victim narratives are useful tools to undermine the impulse toward victim-blame that tends to drive social discourse and, for reasons explicated in scholarship on the "just world" hypothesis, also drives socially self-sabotaging resistance to restorative justice models.

As discussed below, by 1994, this type of liberation discourse had transformed into social control or crime control discourse.

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437 Under the "just world" hypothesis, people engage in a process of victim blame to avoid the terrible truth that we are all vulnerable to crime and that the world is unjust, random, and unsafe. Nonvictims search for distinctions between themselves and the targets to maintain the stability of a worldview that depends on order—the logic of cause and effect—in the social world. For further explanation of the complicated dynamics of victim blame, societal preferences for punitive and retributive models of justice, and the Just World hypothesis, see, e.g., Douglas Koski, Victim Blame and the Implications of the Story Model for Juror Decision-making, 3(6) Sex Offender L. Rep. 81 (2002); Douglas D. Koski, Jury Decision-making in Rape Trials: A Review and Empirical Assessment, 38 (1) Crim. L. Bulletin 21 (Jan./Feb. 2002).
Incidents of Bias Crime

The first formal federal use of the term "hate crime" to describe a crime intended to cause harm to a victim because of his or her (perceived) membership in a minority group was related to data collection, not criminal sanctions. The phrase was used in 1985 in the title of a proposed bill that would have instructed the DOJ, coordinating with law enforcement, to collect and publish statistics on the quantity and attributes of certain types of crimes, categorized according to four enumerated prejudices: race, religion, sexual orientation, and ethnicity. Under this precursor to the 1990 Federal Hate Crime Statistics Act (HCSA), law enforcement was

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438 The term was used by U.S. Representatives John Conyers (MI), along with co-sponsors Barbara Kennelly (CT), and Mario Biaggi (NY), who cosponsored the bill that later became the federal Hate Crime Statistics Act, 28 U.S.C. 534 note (2000) (Pub. L. 101-275 (1990)). Conyers introduced several similar bills before the 1990 Act finally passed. (HR 1171; HR 2455 (1985). See also HR 3193 (1988); Res. 443 (1988); S 702 (1988); S 2000 (1988); HR 993 (1987); S 797 (9187); HR 1248 (1987) (amending CAPA and HCSA to include reports on incidence of offenses against persons and property committed to express racial, ethnic, or religious prejudices (homicide, assault, robbery, burglary, theft, arson, vandalism, trespass, and threat)).


The HCSA appears as a note in an existing federal provision titled "Acquisition, Preservation, and Exchange of Identification Records and Information; Appointment of Officials," which had previously authorized the federal government to collect and publish information concerning certain types of crimes. The original data collection statute, passed in 1966, authorized the FBI to collect "identification, criminal identification, crime, and other records" and share them with other officials in federal and state government. The emphasis was not the exchange of information among different agencies of government, and the exchange of information was intended to be kept secret. The FBI was given authority to stop sharing if entities receiving records disseminated the information beyond the designated officials. (Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

In 1982, 28 U.S.C. § 534 was retitled to reflect its wider purview to collect identification data and "information"—a sweeping word that authorizes the FBI to collect any data, and later amendments would specify areas for data collection that serve as a barometer of public concern. The first amendments to 28 U.S.C. § 534 offer an example:

- The data collection and exchange statute was modified in 1982 by the Missing Children Act, which permitted the FBI to exchange records that would help to identify corpses and to locate any missing person, including unemancipated children. (Pub. L. 97-292, §§ 2, 3(a), Oct. 12, 1982, 96 Stat. 1259.) This provision became necessary as the spike in divorces led to custody battles in which one parent would abscond with the children.
- Reflecting public concern with drug use and abuse, the 1988 amendments specified "offenses involving illegal drugs and drug trafficking" as crimes to be included as a separate part of the FBI's crime reports. (102 Stat. 4469.)
- In 1994, 28 U.S.C. § 534, the UCR Act, was revised under Subtitle F of the Violent Crime Control and Law Enforcement Act, the National Stalker and Domestic Violence Reduction Act (s 40601 et seq.), to authorize the exchange of information "for use in domestic violence and stalking cases" under this provision of the Violence Against Women Act of 1994. (s 40601(a), 108 Stat. 1950.)
supposed to tally crimes that appeared to be motivated by prejudice, so that lawmakers could understand the scope of the problem and police officials could anticipate the site of dangerous racial tensions based on the geographic distribution of these crimes and other patterns. (See Appendix HCSA.) Whether a crime "manifested bias or prejudice" was a question that followed an act of violence or attempt to do physical harm to another person or to property.

The reporting vehicle for the data collection was initially the Uniform Crime Reporting system (UCR), a voluntarily collation of crimes submitted by law enforcement agencies about their jurisdictions. When the HCSA passed in 1990, the responsibility for implementing the

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- The Safe and Drug-Free Schools and Communities Act of 1994, passed as part of the Improving America's Schools Act, borrowed the HCSA's definition of "hate crime" to offer grants to reduce "the incidence of crimes and conflicts motivated by hate in localities most directly affected by hate crimes." Pub. L. 103-382, Subpart 3, § 4131.

- The 2006 amendments to 28 U.S.C. § 534, defining "protection orders," reflect the public's concern with stalking and other forms of dating violence, fostered by "computer interactive service[s]" that offered plentiful resources to locate and track individuals to "harass or intimidate, or cause [them] substantial emotional distress." (119 Stat. 2987 § 2261A.)

- In 2009, as part of the Hate Crime Prevention Act, the categories of crimes encompassed in the HCSA were expanded to include "gender" and "gender identity." The UCR requirements were also amended to include crimes committed by or against juveniles. (123 Stat. 2841.)


The 1988 Uniform Federal Crime Reporting Act, perhaps the most important amendments to 28 U.S.C. 534, formalized the collection and dissemination of national crime statistics "for use in law enforcement administration, operation, and management, and to assess the nature of and type of crime"—now known as the UCR. (102 Stat. 4468.)
law was placed in the hands of the U.S. Attorney General, who delegated the work of establishing the nuts and bolts of the law to the FBI.

HCPA, 18 U.S.C. 249(a) (4) Guidelines.-All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be included in the United States Attorneys' Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person. ||

The federal UCR was founded upon the work of the Committee on Uniform Crime Records or the International Association of Chief's of Police (IACP), which was established in the 1920s to set uniform national systems for gathering crime statistics, including crime classifications and reporting procedures. Because they were likely to be reliably reported, the seven most serious offenses in the Crime Index served as the first official list of reports sought by the IACP's UCR: murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft. (Arson was added in 1979.) To approximate national uniformity in the reports, the IACP standardized crime definitions and required state and local agencies to interpret criminal acts according to the UCR definitions before submitting their reports. In 1930, approximately 400 police agencies across 43 states participated in data collection for the IACP's committee. The FBI served as a clearinghouse for the data. (See Uniform Crime Reports, available at http://www.dps.texas.gov/administration/crime_records/pages/ucr.htm.)

The 1990 HCSA amended 28 U.S.C. § 534 to add several types of crimes and victims to the UCR's list of data to be collected.

The 1994 amendments to 28 U.S.C. § 534 also for the first time refer to the National Crime Information Center of the FBI, which comprises "the criminal history databases [and] the Interstate Identification Index." (108 Stat. 1951 § 40601(a).)

In 2010, 28 U.S.C. § 534 was amended to authorize information exchange with Native American Indian officials.

In 2011, 28 U.S.C. § 534 was amended under the self-explanatory Access to Criminal History for State Sentencing Commissions Act of 2010. The rapid increase in arrests and rise of mass incarceration fed the growth of sentencing commissions, which relied heavily on crime data.
Criminal Manifestations of Prejudice

The FBI definition of "hate crime" for data collection purposes under the HCSA has evolved as related laws have joined the thicket of bias-crime legislation. Currently, using FBI-defined


Definitions used by nongovernmental organizations and governmental agencies tend to be broader than the definitions used by state and federal authorities. The National Education Association (NEA), for example, which provides training and education meant to combat "hate crime" in schools, operates with the following definition:

"Hate crimes and violent acts are defined as offenses motivated by hatred against a victim based on his or her beliefs or mental or physical characteristics, including race, ethnicity, and sexual orientation." (NEA, Hate Motivated Crime and Violence: Information for Schools, Communities, and Families (1998).)


See also Lu-in Wang, The Complexities of "Hate," 60 Ohio St. L.J. 799, 815-30 (1999) (describing law enforcement officers' approaches to classifying hate crimes); Elizabeth A. Boyd et al., "Motivated by Hatred or Prejudice": Categorization of Hate-Motivated Crimes in Two Police Divisions, 30 L. and Soc'y Rev. 819, 827-28, 832-35 (1996) (describing study of hate crime classification methods in one large urban police department, where officers tallied "only those incidents which could be shown to be motivated solely and unambiguously by hatred"). See e.g., FBI, Uniform Crime Reporting, Hate Crime Data Collection Guidelines 6-7, examples 2 and 5 (1991) (advising that cases involving robbery, even when accompanied by assault and racial or homophobic epithets, are "ambiguous" and are not to be reported as bias-motivated crimes).

Hate crime reporting has been uneven and inconsistent. As late as 2007, 85% of participating agencies reported no hate crimes in their jurisdictions:

|| Over the last two decades significant efforts have been made to enhance the quality of information about the existence and prevalence hate crimes in the United States. With the passage of the Hate Crime Statistics Act (HCSA) in 1990, the Attorney General charged the FBI to establish the first national hate crime data collection and reporting program. Utilizing the FBI's existing Uniform Crime Reporting (UCR) Program, local, county, and state law enforcement agencies began to submit information about hate crime incidents to the FBI.

[Of the 13,000 law enforcement agencies] submitting statistics on the number of hate motivated crimes... only three-fourths of those agencies...participated in the national bias crime data collection program. As a result, the national statistics on hate crime are missing information from many police agencies across the country.
categories, the HCSA requires state UCR reports to include information about "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, or gender\footnote{In 2003, the proposed Hate Crime Statistics Improvement Act (H.R. 374) amending the HCSA to include "gender" as a data collection category, was subsumed into a provision of the Local Law Enforcement HCPA of 2004 that did not pass.} and gender identity \footnote{The results of a three-year review by the Department of Justice suggests that the real number of hate crimes is between 19 and 31 times higher than reported by FBI statistics. (Southern Poverty Law Ctr., \textit{FBI Hate Crime Statistics Vastly Understate Problem}, Intelligence Rep. (Wint. 2005), \url{http://www.SPLCenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hatecrime}; \textit{see also} Bureau of Justice Statistics, U.S. Dep't of Justice, Hate Crimes Reported by Victims and Police (2005), \url{http://BJS.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf} (indicating that actual hate crimes are more numerous than annual FBI reports). For a detailed explanation of the findings under the HCSA, \textit{see} Statement of the ADL on Bias-Motivated Crime and H.R. 1082 -The HCPA, Aug. 4, 1999, 21 Chicano-Latino L. Rev. 53, 62-64 (2000).)\footnote{Subsequent amendments to the 1990 Crime Awareness and Campus Security Act strengthened the language to require colleges to develop safety and crime prevention policies (34 CFR 668.46-b-11). The 2003 amendment (34 CFR 668.46) required institutions to report to local police agencies or to a campus security authority crimes involving bodily injury that "manifest evidence that the victim was intentionally selected because of the victim's actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability." (Id.)} and disability \footnote{In 2003, the proposed Hate Crime Statistics Improvement Act (H.R. 374) amending the HCSA to include "gender" as a data collection category, was subsumed into a provision of the Local Law Enforcement HCPA of 2004 that did not pass.} and gender identity \footnote{The results of a three-year review by the Department of Justice suggests that the real number of hate crimes is between 19 and 31 times higher than reported by FBI statistics. (Southern Poverty Law Ctr., \textit{FBI Hate Crime Statistics Vastly Understate Problem}, Intelligence Rep. (Wint. 2005), \url{http://www.SPLCenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hatecrime}; \textit{see also} Bureau of Justice Statistics, U.S. Dep't of Justice, Hate Crimes Reported by Victims and Police (2005), \url{http://BJS.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf} (indicating that actual hate crimes are more numerous than annual FBI reports). For a detailed explanation of the findings under the HCSA, \textit{see} Statement of the ADL on Bias-Motivated Crime and H.R. 1082 -The HCPA, Aug. 4, 1999, 21 Chicano-Latino L. Rev. 53, 62-64 (2000).)\footnote{Subsequent amendments to the 1990 Crime Awareness and Campus Security Act strengthened the language to require colleges to develop safety and crime prevention policies (34 CFR 668.46-b-11). The 2003 amendment (34 CFR 668.46) required institutions to report to local police agencies or to a campus security authority crimes involving bodily injury that "manifest evidence that the victim was intentionally selected because of the victim's actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability." (Id.)} and juveniles \footnote{In 2003, the proposed Hate Crime Statistics Improvement Act (H.R. 374) amending the HCSA to include "gender" as a data collection category, was subsumed into a provision of the Local Law Enforcement HCPA of 2004 that did not pass.} (added in 2009), including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage, or vandalism of property, as well as robbery, burglary, and motor vehicle theft.\footnote{The results of a three-year review by the Department of Justice suggests that the real number of hate crimes is between 19 and 31 times higher than reported by FBI statistics. (Southern Poverty Law Ctr., \textit{FBI Hate Crime Statistics Vastly Understate Problem}, Intelligence Rep. (Wint. 2005), \url{http://www.SPLCenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hatecrime}; \textit{see also} Bureau of Justice Statistics, U.S. Dep't of Justice, Hate Crimes Reported by Victims and Police (2005), \url{http://BJS.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf} (indicating that actual hate crimes are more numerous than annual FBI reports). For a detailed explanation of the findings under the HCSA, \textit{see} Statement of the ADL on Bias-Motivated Crime and H.R. 1082 -The HCPA, Aug. 4, 1999, 21 Chicano-Latino L. Rev. 53, 62-64 (2000).)\footnote{Subsequent amendments to the 1990 Crime Awareness and Campus Security Act strengthened the language to require colleges to develop safety and crime prevention policies (34 CFR 668.46-b-11). The 2003 amendment (34 CFR 668.46) required institutions to report to local police agencies or to a campus security authority crimes involving bodily injury that "manifest evidence that the victim was intentionally selected because of the victim's actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability." (Id.)} This reporting requirement was extended to college campuses under the 1990 Crime Awareness and Campus Security Act, which required institutions of higher education receiving federal aid to report annual campus crime statistics, including hate crimes (consistent with the HSCA definition), disclose campus safety policies, and provide timely warnings of crime threats.\footnote{The results of a three-year review by the Department of Justice suggests that the real number of hate crimes is between 19 and 31 times higher than reported by FBI statistics. (Southern Poverty Law Ctr., \textit{FBI Hate Crime Statistics Vastly Understate Problem}, Intelligence Rep. (Wint. 2005), \url{http://www.SPLCenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hatecrime}; \textit{see also} Bureau of Justice Statistics, U.S. Dep't of Justice, Hate Crimes Reported by Victims and Police (2005), \url{http://BJS.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf} (indicating that actual hate crimes are more numerous than annual FBI reports). For a detailed explanation of the findings under the HCSA, \textit{see} Statement of the ADL on Bias-Motivated Crime and H.R. 1082 -The HCPA, Aug. 4, 1999, 21 Chicano-Latino L. Rev. 53, 62-64 (2000).)\footnote{Subsequent amendments to the 1990 Crime Awareness and Campus Security Act strengthened the language to require colleges to develop safety and crime prevention policies (34 CFR 668.46-b-11). The 2003 amendment (34 CFR 668.46) required institutions to report to local police agencies or to a campus security authority crimes involving bodily injury that "manifest evidence that the victim was intentionally selected because of the victim's actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability." (Id.)}
A survey of news sources showed that in 1984 there was one newspaper article on the topic of "hate crime." After the bill was introduced in 1985, there were 21 newspaper articles. Scholars began analyzing the term and the laws in the late 1980s, and "bias crime" was officially added to the Index to Legal Periodicals subject headings in the 1991-1992 volume (with nine articles).

Although "hate crimes" were viewed as the "the criminal manifestation of prejudice," such crimes were not conceived by the FBI as a "separate, distinct crimes, but rather traditional offenses motivated by the offender's bias." In their earliest origins, the operationalization of "hate crimes" in law was descriptive, not proscriptive. Like other data collection statutes, the HCSA was a nonremedial law styled on actuarial predictions of crimes, which would be used to develop policies that manage risk for the inevitable threats to societal safety and strive to optimize collective security. The prejudicial motivation was to be discerned by state law enforcement, and included in their annual UCR reports. Not only the detection but also the

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446 Although state "hate crime" statutes existed since the California law in 1976, the adoption of the Hate Crimes Statistics Act in 1990 officially dubbed "hate crime" as an area of law to be regulated. Before this federal data collection statute, three private groups were involved in collecting national data: (1) the Anti-Defamation League; (2) the National Gay and Lesbian Task Force Policy Institute; and (3) the Southern Poverty Law Center.


449 Statistics collected in the UCR have been criticized as "inconsistent and incomplete." (Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 20 (1999).) The information so obtained has thus far been inconclusive about whether bias crime incidents are on the rise because "methodologies are both too new and too badly flawed to give us an accurate picture of changes over time." (Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* 11 (2001).) While the number of reported bias crimes continues to grow, so too does the number of agencies reporting to the FBI. Further, the lack of reporting conformity marginalizes the importance of the yearly report.

State statutes regarding "hate crimes" do not always align with the UCR. For example, in Hawaii, a "hate crime" would not be recorded or reported to the UCR unless it reached the prosecutorial level—a level that exceeds the UCR threshold for reporting. The most restrictive state statutes, such as the Georgia Official Code § 16-7-26 or Indiana Burns Code § 35-43-1-2, mention only one crime—institutional vandalism—as the basis for "hate crime" charges.
punishment of "hate crimes" was placed on state mantles. In 1998, the International Association of Chiefs of Police (IACP) defined a hate crime as "a criminal offense committed against persons, property or society that is motivated, in whole or in part, by an offender's bias against an individual's or a group's race, religion, ethnic/national origin, gender, age, disability or sexual orientation. The IACP also distinguished a "hate crime" from a "hate incident":

Hate incidents involve behaviors that, though motivated by bias against [enumerated categories of persons], are not criminal acts. Hostile or hateful speech, or other disrespectful/discriminatory behavior may be motivated by bias but is not illegal. They become crimes only when they directly incite perpetrators to commit violence against persons or property, or if they place a potential victim in reasonable fear of physical injury.

An example of the types of crimes that the HCPA data collection was designed to quantify were attacks on religious property. Experts suggest that it is easier to target a particular religion by its temple, and such attacks are more effective at causing widespread terror than attacks on individuals. A history of such attacks supported the general belief that the prototypical

Because the foundation of "hate crime" are the protected categories, the UCR depends on a link between protected person and type of crime. State laws may complicate reporting by failing to make that connection. For example, South Carolina statutes do not specify particular victim groups when criminalizing damage to places of religious worship (S.C. Code Ann. §16-11-535; S.C. Code Ann. §16-11-110) or the deprivation of the civil rights of others (S.C. Code Ann. §16-5-10).

Reporting accuracy is further flawed because not all states require law enforcement training in identifying and reporting hate crimes statistics, and those that do train officers seldom open the content for review to ensure they meet federal standards.

As the state laws have multiplied, so too have the definitions. Among current state laws, the range of crimes that serve as predicates for a charge of "hate crime" range from a limited list of crimes and misdemeanors to virtually any type of crime. For example, Florida Statute § 775.085 (2004) states that "any felony or misdemeanor" can serve as a predicate crime. Similarly, Rhode Island’s Hate Crimes Sentencing Act (RI Gen. Laws §12-19-38) discusses procedures for addressing both misdemeanor and felony offenses, which seems to indicate that virtually all offenses can serve as predicate offenses for hate crime.

This definition was developed at the IACP Summit on Hate Crime in America (1998), available at http://www.iacp.org/ViewResult?SearchID=123; http://www.theiacp.org/ViewResult?SearchID=140.

offender was a member of a racist hate group and the prototypical victim was defined in the
categories of persons granted civil rights protections.453

|| 1988-1996 ||

**Obstruction of Free Exercise of Beliefs**

In 1988, Congress enacted a federal criminal civil rights statutes under Title 18 of the U.S.
Code, Section 247, prohibiting vandalism or destruction of places of worship or threats of force

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453 See Hate Crimes and the Threat of Domestic Extremism, Senate Judiciary Comm., Subcomm. on
Constitution, Civil Rights, and Human Rights, Congressional Q., Cong. Testimony, Sept. 19, 2012, Policy
and Legislative Considerations (stating that new strategies for law enforcement and courts "to better deal
with problems associated with domestic extremism," such as a domestic terrorist group list (like the State
Department's list of foreign terrorist organizations); a methodology to determine what ideologies, groups
or movements constitute "extremism"; and uniform state penalty enhancements mimicking "hate crime"
enhancements, or FACE Act or the Animal Enterprise and Terrorism Act applicable to any criminal who
has renounced U.S. citizenship, similar to treason or sedition).

Commentators have pushed back on this one-dimensional offender "caricature":
||The prototypical hate crime is one in which the perpetrator and victim are strangers.
The perpetrator selects the victim not because of any personal hostility between them or because of
any provocative behavior on the part of the victim, but solely because the perpetrator sees the victim
as a "fungible" or "interchangeable" member of a social group that the perpetrator hates. The
perpetrator commonly utters derogatory group-based epithets before, during, or after the crime, but
even if he does not, the act itself is typically characterized by extreme, gratuitous violence or the
destruction of property. The fear, injury, and damage inflicted appear to be the perpetrator's only
goals, for in the prototypical crime nothing of value is taken. While one-on-one and group-on-group
crimes could fit the pattern, the prototypical crime more commonly is committed by multiple
perpetrators on a single victim.||

(Catherine Pugh, Comment: What Do You Get When You Add Megan Williams to Matthew
Shepard and Victim-Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want to
Use, 45 Cal. W. L. Rev. 179, at 215 (2008), citing Lu-in Wang, The Transforming Power of "Hate": Social

This "narrow model of hate crime" acknowledges no motivations other than pure animus and the
perpetrator is examined "in isolation from the social context, [leading observers to characterize] the
perpetrator as a deviant, hate-filled extremist who acts on his own deeply-held hostilities toward the
victim's social group." (Pugh, supra, at 215-16.) The narrow model "[magnifies the perpetrators' hostility
and] masks the range of other motivations that propel bias crimes, some of which are quite mundane and
opportunistic." (Id.) This conventional narrow view is based on three false assumptions:
- that the perpetrator's bias is personal, based in his own negative opinions or attitudes
toward the targeted social group, rather than being a reaction to external forces or stemming from the
desire to attain a tangible goal.
- that the perpetrator's bias is deviant and irrational, making the offender an extremist, a
lunatic and a freak: someone whose views are not shared by members of mainstream society and
whose actions are neither sensible nor rational, but instead are "driven by" his overpowering hatred
for the victim's group.
- that the perpetrator's bias is so irrational that it drives him to commit crimes for no
other reason than to inflict harm on a member of the target group, rather than for a more easily
understandable reason, such as to obtain personal gain. (Id. These three assumptions are discussed
more fully in Lu-in Wang, The Complexities of "Hate," 60 Ohio St. L.J. 799, 815-30 (1999).)
against congregants intended to "obstruct [others in] the free exercise of religious beliefs." The original text was designed with such narrow jurisdictional parameters, it was virtually useless. In 1994, as part of the Crime Bill (see below), the penalties were increased, but the limited uses of the law and the lack of a coordinated federal effort to deal with attacks on houses of worship and their members remained. Section 247 did not take full form until 1996, when it was substantially revised under its new short title, the **Church Arsons Prevention Act (CAPA)** (see Appendix CAPA).

Senator Conyers, the chief proponent of the HCPA and related laws, reinvigorated CAPA by restructuring its jurisdictional bases, opening the door to greater investigatory power of vandalism and arson of churches. In conjunction with CAPA, Congress established the National Church Arson Task Force (NCATF), a coalition of about 200 officers from state and local law enforcement agencies and prosecutors from the FBI, the Department of Alcohol, Tobacco, and Firearms (ATF), and the DOJ, to oversee the investigation and prosecution of crimes carried out on church property because of the ethnic or racial composition of the congregation. Congress also established a fund to aid in the rebuilding of churches damaged under CAPA. More

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18 U.S.C. § 247 (1988), originally bearing the header, "Damage to religious property; obstruction of persons in the free exercise of religious beliefs."


CAPA was passed in response to a series of arsons occurring at churches with predominantly African-American membership. The NCATF, in conjunction with FEMA and HUD, coordinates resources, such as loan guarantee recovery funds, for churches damaged by relevant criminal offenses.

"The disturbing series of attacks against houses of worship in recent years has had a searing impact on the nation and served as another graphic reminder that America's long struggle against racial and religious intolerance is far from over. Although law enforcement investigators and private watchdog groups, like ADL, have seen no indication that these attacks are part of a national conspiracy of domestic terrorism directed by organized hate groups, we should not be comforted by this fact. If it is not a conspiracy, it only means that individuals in different parts of the country at different times, often inspired by hate, are acting independently to commit these crimes."

According to Justice Department officials, from January 1, 1995, to August 18, 1998, DOJ has opened 658 investigations of suspicious fires, bombings, and attempted bombings, and has made arrests in 225 of these incidents -- involving 301 subjects. Of the 658 attacks directed against houses of worship, 220 were predominately African-American institutions. Of the 301 persons arrested for these crimes, 44 have been African Americans, and 117 have been juveniles.
important than expanded federal reach, Conyers inserted a new provision containing the clause that later became the defining feature of laws referred to as "hate crime" legislation: "Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished [under this provision]." For the power to regulate, investigate, and prosecute private individuals (as opposed to state government officials) under this new provision, Congress relied on the Thirteenth Amendment.

\[\text{HCPA, 18 U.S.C. 249(a) (1), (2) ...through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device...} \]

The CAPA amendments also extended the life of the HCSA another six years. Once statistical measures of crimes by private individuals against members of certain minority groups established a trend, Congress leveraged this "serious national problem" to further hone related laws. In 2009, CAPA was amended by the HCPA.

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459 Pub. L. 104-155, 110 Stat. 13954 § 2(6) (1996). The 1996 amendments included congressional Findings, which read in part: "(6) Congress has authority, pursuant to section 2 of the 13th amendment to the Constitution, to make actions of private citizens motivated by race, color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, violations of Federal criminal law." (Id.)
461 Pub. L. 104-155, § 2(1)-(4) (1996). The 1996 congressional Findings, read in part:
(1) The incidence of arson or other destruction or vandalism of places of religious worship, and the incidence of violent interference with an individual's lawful exercise or attempted exercise of the right of religious freedom at a place of religious worship pose a serious national problem.
(2) The incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominantly African-American congregations.
(3) Changes in Federal law are necessary to deal properly with this problem.
(4) Although local jurisdictions have attempted to respond to the challenges posed by such acts of destruction or damage to religious property, the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions.
(Id.)
462 The HCPA removed the sunset clause from CAPA as applicable to the HCSA, making data collection on "hate crimes" permanent.
The fact that Section 247 originated in 1988 strikes one as a quarter-century too late for its intended uses. To understand the relevance of CAPA to the HCPA, it is necessary to step back in time to the civil rights era, when religious sites were the symbols where racialized hatred was frequently expressed. Two bombings in particular reflect specific elements that were woven into the concept of "hate crime." 

**1958-1963**

**Orthodoxies of Hatred**

In the movie *Driving Miss Daisy* (1989), the key moments, as with so much of American life since the 1950s, take place in a moving automobile. One Saturday in 1958, the elderly Miss Daisy is surprised by the news from her African-American driver that she cannot attend shul because the Atlanta Temple, the oldest and wealthiest in the area, had been bombed in the early morning hours. She tells her driver, "Well, it's a mistake! I'm sure they meant to bomb one of the conservative synagogues or the orthodox one. The Temple is reform! Everybody knows that."

Her driver responds, "It doan' matter to them people. A Jew is a Jew to them folks. Jes like light or dark we all the same nigger."

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(C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

This exchange captures several important features of what we now understand about the concept of "hate crime." First, the Atlanta Temple bombing itself—"the last empty building we will bomb"—was one prodrome of anti-civil-rights violence directed at places of worship that lasted into the 1960s. The vast majority were directed at African-American institutions, but the large scale conspiracy to attack several sites in a short period of time was aimed at Jewish institutions. In "Bombingham," the 1963 explosion that killed four congregants of the Sixteenth Street Baptist Church in Birmingham (AL) was only one of 21 bombings targeting Black populations between 1955 and 1963, none of them solved by local police, and beyond Birmingham, the majority of reported incidents of violence between 1955 and 1958, totaling more than 100, were bombings. The spark was attributed to the well-known U.S. Supreme Court decision in Brown v. Board of Education, 347 U.S. 483 (1954), integrating schools, celebrated by African-Americans as "the greatest victory for the Negro people since the Emancipation Proclamation" and derided by Klansmen in literal terms as "a situation loaded with dynamite." The "insurrectionary" extremism of mobs and politicians alike was portrayed on the black-and-white screens in homes across the country. Extensive and graphic media exposure showed the White protestors to be "bestial, filthy, and degenerate," "a racist rabble" with "faces contorted by hate, spitting, snarling and yelling obscenities—such as 'kill them

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niggers". Media exposure brought attention to the destructive impulses of racism in imagery that had movement and immediacy, an "appalling sight and sound" that made viewers "almost physically ill." The increase in television set ownership dramatically increased after 1950, making the early civil rights era a bloody christening of America's obsession with TV. "To the extent that Americans formed their opinions on school desegregation and Jim Crow from watching televised scenes of mob violence," the public condemned the negligence of local officials and the impotence of federal officials to deal with the "mobsters," "demoniac humans," and Klansmen whose rallies drew thousands even in areas where the KKK had been declared defunct.

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Second, by 1963, when the Sixteenth Street Baptist Church in Birmingham (AL) was bombed, killing four young female congregants, that the segregationists could not be viewed as mere "crackpots" or "madmen." Their strategy, which played out in the southeast corner of the nation, was undeniable: the bombings were intended to intimidate civil rights organizations, particularly the Southern Christian Leadership Conference (SCLC) and the Congress on Racial

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Equality (CORE), from campaigning to register African-American voters. The Civil Rights Acts securing access to the instruments and processes of voting (chiefly in 1957 and later in 1965) emboldened activists as much as segregationists.

Third, the Atlanta Temple was not attacked chiefly because it was a Jewish institution, but because the rabbi, Jacob M. Rothschild, and the congregants were publicly sympathetic to Black
integration. A voice calling to claim responsibility for the bombing, calling himself "General Gordon of the Confederate Underground," told the UPI that the bombing signaled that "Negroes and Jews" were "aliens." Twinning Black and Jewish people in the context of civil rights

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476 Jewish institutions assisted the Black leadership in civil rights litigation, fund-raising, political organizing, and opposition to biological bases of racial discrimination that was not rejected in all academic circles, was differences. Many "laws were actually written in the offices of Jewish agencies by Jewish staff people, introduced by Jewish legislators and pressured into being by Jewish voters." (Stuart Svonkin, Jews Against Prejudice: American Jews and the Fight for Civil Liberties (1997).) Post-World War II, the ADL, the AJCommittee, and the AJCongress deployed their resources on behalf of civil rights causes and cases, and the ADL began more systematized monitoring of racial violence, lobbying for federal intervention. Jewish support for what were viewed as primarily Black cases was widely known. The Atlanta Temple Rabbi Rothschild, viewed by many as more Northern than Southern in his political leanings, attracted national attention for a sermon he delivered at the influential New York Central Synagogue describing southern racism as comparable to Nazi persecution of Jews and other minorities. Rothschild was an author of the 1957 Atlanta Manifesto, urging city officials to resist segregationists, especially those who would opt to close schools than integrate them. In the aftermath of the Temple bombing, the AME Church in Atlanta issued a public resolution condemning the bombing (Atlanta Baptist Ass’n, resolution of October 14, 1958, box 4, folder 1, Rothschild Papers; Atlanta Daily World, October 18, 19, 23, 1958), and Black inmates from a local prison gave a collective contribution to the Temple’s rebuilding fund.

The support raised conflict in the Black community, however. A distinction was drawn between the federal intervention in the Temple bombing, and the federal refusal to step in when the Florida NAACP director, Harry T. Moore, was killed along with his wife in Miami over Christmas.

The scholarship on Jewish civil rights activities focuses chiefly on Northern Jews, whose emigration history and economic interests were often distinct from Southern Jews. Blacks experienced Southern Jews as part of the repressive Southern White structure. Nevertheless, this latter group had experienced scapegoating—sometimes leading to lynching or other forms of mob violence—since the Civil War era, through the late nineteenth century agricultural depression, and the transition from a rural to an urban and industrialized economy. In the years leading up to the Atlanta Temple bombing, the Christian Anti-Jewish Party had been circulating discriminatory pamphlets throughout Atlanta, and three months before the bombing, protesters outside the offices of the Atlanta Constitution marched with placards that read, "Free America from Jewish Domination." (Arthur Jack Levin, Anti-Defamation League of B’nai B’rith, Atlanta office, circular, August 15, 1952, box 46, folder 15, Series 5, Ralph McGill Papers, 1853-1971, Manuscript, Archives, and Rare Book Library, Emory University, Atlanta.)


A 1958 indictment was brought against Wallace Allen, Robert Bowling, George Bright, Luther Corley and Kenneth Griffin, all of whom had some links to the Underground Confederate, the National States' Rights Party, and the Knights of the White Camellia. The prosecution of the defendants rested largely on the testimony of an FBI informant who was present at a meeting earlier in the year when the group planned the attack. The jury deadlocked nine to three in favor of conviction, and the judge declared a mistrial. The second trial, against Bright in 1959, ended in his acquittal. (Chicago Defender, Nov. 22, 1958. See also the description of George Bright, one of the suspects in the Atlanta Temple bombing case, as a "brilliant architect" in SCR ID # 1-8-0-16-5-1-1, Sovereignty Commission Online, Mississippi Department of Archives and History Digital Collections, available at http://mdah.state.ms.us/bugle/soccom/.) Despite the declaration of Mayor William B. Hartsfield after the bombing that Atlanta was "a city too busy to hate," the criminal cases suggested Atlanta jurors was too busy to punish the bombers.

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protests is indicative of later processes in the emergence of the concept of "hate crime" in which the meanings attributed to identities may blur or merge. (As an example, Figure 11: Jews Behind Race Mixing.)

Figure 11: Jews Behind Race Mixing

Source: Fields Edward Reed, Jews Behind Race Mixing (1957)
Members of other White Supremacist groups, notably the National States Rights Party (NSRP), took an interest in the Temple bombing. In a letter to FBI Director J. Edgar Hoover, whose personal bigotry was equal to his dislike of criminal conspiracies,\(^{478}\) the NSRP leader asserted that Jews had staged the incident themselves. He wrote that Jews were attempting to turn public opinion against Jim Crow laws and invite federal intervention in the South over matters that belonged in the hands of state and local policymakers.\(^{479}\) One unsuccessful strategy of groups like the NSRP (recently repeated by Dylan Roof, the shooter at the Emanuel African Methodist Episcopal Church, Charleston (SC), in June 2015\(^ {480}\)) was its hope to trigger a race war between Jewish and Black people in the South. The NSRP was eager to then join the fight against both "alien" groups.

The resentment between Jewish and Black communities was complicated by the racial and social ambiguity of Jewish people. They were as different from Black groups as they were from Christians. But, more importantly, to be Jewish was to be distinct from what it meant to be a

\(^{478}\) A 1980 Justice Department report concludes Hoover had blocked prosecution of the Klansmen in 1965.

\(^{479}\) John G. Crommelin to J. Edgar Hoover, November 1, 1958, John Crommelin Federal Bureau of Investigation File.

\(^{480}\) In his 2000-word statement, read aloud in court during his trial, Roof described the White Supremacist views he holds:

||Negroes have lower IQs, lower impulse control, and higher testosterone levels in generals. These three things alone are a recipe for violent behavior...I don't pretend to understand why Jews do what they do. They are enigma...Hispanics are obviously a huge problem for Americans. But there are good Hispanics and bad Hispanics...I hate the sight of the American flag. Modern American patriotism is an absolute joke. People pretending like they have something to be proud while White people are being murdered daily in the streets.||

Roof pleaded not guilty to 33 federal charges, including:

-- Nine counts of violating the Hate Crime Act resulting in death
-- Nine counts of use of a firearm to commit murder during and in relation to a crime of violence
-- Three counts of violating the Hate Crime Act involving an attempt to kill
-- Nine counts of obstruction of exercise of religion resulting in death
-- Three counts of obstruction of exercise of religion involving an attempt to kill and use of a dangerous weapon.

Southern xenophobes had rejected Jewish "whiteness" as far back as the 1880s, when an influx of Eastern European Jewish émigrés made their presence in southern cities noticeable enough to stir up hostility. Southern racist myths about African-Americans were easily transferred to Jewish people. For example, special mythology about male Others "lusting" after southern White women was recycled from imagination to discourse, and reaffirmed regularly in southern newspapers—nearly everyday in fact during the pre-Civil Rights Era, if one consumed a range of news sources. Criminal cases presented defendants as "brutes" guilty of rape, molestation, lewd conduct, and other acts of sexual impropriety against White southern "wives and daughters." The same descriptors were used in the well-documented trial of Leo Frank in 1913, followed two years later by his notorious lynching. In such cases, guilty verdicts were imposed not because the jurors believed the charges were proved or even accurate, but because the defendant was guilty of being an Other. An Alabama deputy sheriff, commenting on the 1933 Scottsboro case, explained the broader truth: "There'd be a lynching all right if [the defendants] was acquitted, but they ain't goin' to be no acquittals." The Old South

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482 "The lynching Leo Frank is one of the most shocking outbursts of anti-Semitism in American history, was still within the living memory of older congregants. On April 13, 1913, Atlanta police arrested Frank for the murder of Mary Phagan, a thirteen-year-old employee at the pencil factory he managed. A court found Frank guilty and sentenced him to death. When Governor John Slaton commuted his sentence to life imprisonment, a mob seized him from the state prison and hanged him near Mary Phagan's birthplace in Marietta. The incident had encouraged a generation of Atlanta Jews that the security of their community was still precarious and that they should refrain from public involvement in controversial issues or suffer violent recrimination."


483 Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 118 (2004) (stating, "White supremacy norms did not permit White jurors to believe a Black man over a White woman.").

484 "Literature Under Pressure" From the Sixteenth Century to Our Own Time, A Treasury of Great Reporting, eds. Louis L. Snyder and Richard B. Morris, 761 (1949), quoting F. Raymond Daniell, a reporter covering the Scottsboro trial for the N.Y. Times (1933), in Three Reporters Find Malice Toward Some in the Deep South [1941-1948].

still existed in the imagination of many mid-century Confederate wannabes, in a kind of Plantation to Prison pipeline.

Among the voluminous examples of southern racism expressed about Frank's case were letters written to the Georgia Prison Commission during Frank's incarceration. In one, Frank's Jewishness sparked an impassioned denigration of him as "the dirtiest most lowdown [wretch] of them all [whose] lowdown dirty deeds...were too dirty to besmirch the human mind with."485 In a letter of support from a teenage girl who asked the Commission how to the State of Georgia could hang a man who had not been proven guilty, the language of Othering was subtler. Referring to the testimony of the African-American janitor (who later was widely believed to have committed the murder), the girl wrote, "You have no evidence but that of a Black Negro, and that [Frank] is a Jew." The implication is obvious: It was not just that Black and Jewish people do "lowdown deeds" and lust to do "dirty" things; they embody criminality. Therefore, although not dispositive of his guilt, even a country girl from Georgia knew that Leo Frank's Judaism was evidence of something.

Still, in southern racial hierarchies, Jews were a step up from Blacks. The teenage girl had asked the Commission, "[W]ould you rather believe a Negro than a Jew?" In the words, 25 years later, of Annie Moore, daughter of murdered NAACP leader Henry Moore: "The Jew, while hated, is nevertheless White."486 Over time, the Jewish population had assimilated sufficiently to be viewed as an Other but not a foreigner—and Annie Moore's point was that they could, because their complexion permitted it. As discussed later in this dissertation, the problem of complexion in the U.S. goes back to the earliest decisions among colonists to organize economic structures around slavery and later laws around the convenient "badge" of dark skin. In a modern context, Moore might have offered a reverse truism: African-Americans, even if

embraced, nevertheless will always be Black.\textsuperscript{487} Nowhere in American culture are the meanings associated with being Other more intransigent than they are for skin color.\textsuperscript{488}

\textit{The White race deems itself to be the dominant race in this country...in prestige, in achievements, in education, in wealth and power...But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.}

—Plessy v. Ferguson, 163 U.S. 537 (1896) (Justice Harlan)

Fourth, the end of World War II left Americans with a confusing array of hypocrisies to sort out. "[T]he cognitive dissonance created by a Jim Crow army fighting Aryan supremacists" in a "democratic war in which Blacks were dying on the battlefield" left many Americans unable to avoid the conclusion that Black people were also "good enough to vote" and "good enough for organized baseball.\textsuperscript{489} While African-American soldiers found inspiration in military service to refuse the indignities of Jim Crow laws when they returned home from the war, southern White Supremacists found inspiration in the nationalistic genocidal project of Nazism. These groups borrowed Nazi symbols, slogans, and uniforms—"khaki shirts [and] the red thunderbolt patches suggestive of the runic insignia of the late Heinrich Himmler's SS bullies...something like...the beer-hall Putsch." They were described as "admirers of Hitler and his racial phobias" and "juvenile delinquents of the KKK... moving in on...Hate Street."\textsuperscript{490} White Supremacist group

\textsuperscript{488} Moore's comment followed the views on races at the time, which divided peoples according to their geographic roots. See Section V.D.3.
\textsuperscript{489} Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 176 (2004).
\textsuperscript{490} Edward R. Folliard, \textit{Hate With the Wind}, Wash. Post Nov. 30-Dec. 5, 1946 (reporting on Columbians, Inc., an "anti-Semitic, anti-Negro...patriotic order" that sought to "create voting solidarity among all white American citizens" and to set up a Nazi-like government in Georgia).
adopted the idea of using "mass tactics" to eliminate social discord by eliminating the groups that "caused" discord. They targeted the trinity of discord, "Negroes, Jews, and Communists," i.e., the embodiments of race, ancestry, and a political philosophy that represented an antireligion.

The close association between Jews and Communist groups added a new dimension to political overtones in bigotry. A 1956 Editorial from the Mansfield (TX) News, September 20, 1956, titled, "Precious American Heritage at Stake" was preserved in an ADL pamphlet recording incidents of discrimination during the early civil rights era. Swirling these themes together, the editorial read:

We, the American people, are right back where our forefathers were when they left England to escape oppression. They wanted religious freedom and were willing to work untold hardships to gain that freedom.

Today we are facing oppression of a different kind. Our personal freedom is at stake, our racial freedom is being violated...Hatreds are being promoted between races which have got along together for lo, these many years. Why can't the whites of this land, as well as the Negroes, see that they are both being used as pawns in a communistic game to disrupt our nation? [F]anatical preachers...shout, "The Negro is your brother, the Bible says so, you must have him in your home, in your church and in your school." And, he might add, in your family. The Bible does not say anything about accepting the Negro as an equal. 491

Thus, as detailed above, the "orthodoxies" of White Supremacist Bible-based fanaticism, African-American complexion, the position of Jewish persons straddling In- and Out-Group status, and the conflicts around American democratic identity came together in the bombings of religious sites over more than a decade, drawing national attention to the unresolved issues left

491 ADL, Precious American Heritage at Stake (Sept. 20, 1956).
over from before the Civil War. Like the pre-Reconstruction era in U.S. history, in desegregation suffered from a strategic failure of official action to enforce the law or diffuse racial tensions. Moreover, the most vocal officials spoke out against removing barriers between races.

|| HCPA, 18 U.S.C. 249(a) (1) (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and (B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if- (i) death results from the offense; or (ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) (ii) ...shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if- (I) death results from the offense; or (II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill. ||

|| 1956 ||

State Support for Discrimination

Borrowing from separate-but-equal Supreme Court decisions, specifically Brown v. Board of Education (1954), a broad swath of Southern politicians signed a congressional resolution against integration in 1956, known as the Southern Manifesto. (See Appendix Manifesto.) They drew on prior high court interpretations that severely limited the reach of the Fourteenth Amendment to bring their opposition to desegregation within the "color of law." When violent opposition to integration was widespread and mobs did not require conspiratorial preplanning to form and protest the policies, Supreme Court decisions had little local effect. Even important Due Process decisions overturning convictions of Black defendants when mob violence dominated the trial atmosphere and unfairly influenced the outcome were ignored in the
Segregationists could deduce from the Southern Manifesto that they had permission to join together to intimidate and injure Black people (and Jewish people) with impunity. A reporter wrote, "[W]hen leadership in high places in any degree fails to support constituted authority, it opens the gates to all those who wish to take law into their hands."493

The lackluster prosecutions in state courts for the series of bombings during this era demonstrated the gap in federal law to investigate and prosecute crimes of racial violence. States set up legal battlegrounds over the reach of the Fourteenth Amendment, which had been extended in the 1920s and 1930s to federal judicial review of state prosecutions in which the outcome appeared to be influenced by threats of mob violence.494 The 1960 Civil Rights Act gave the federal government jurisdiction (under the Commerce Clause, discussed below) to investigate the bombing of schools, churches, and other buildings. These powers applied only if officials could demonstrate that the offenders had fled across state lines, and the language did not include special protections for categories of persons. The federal government largely stood by until it was clear that racialized dysfunctions in local law enforcement entities—including membership in KKK-styled organizations—prevented official action. Later Civil Rights Acts in 1964 and 1968, discussed below, filled other gaps in federal authority to prosecute the type of crimes now referred to as "hate crimes."

_Southern trees bear a strange fruit, Blood on the leaves and blood at the root, Black bodies swinging in the Southern breeze, Strange fruit hanging from the poplar trees. Pastoral scene of the gallant south, the bulging eyes and the twisted mouth, scent of magnolia, sweet and fresh, then the sudden smell of burning flesh. Here is a fruit for the crows to pluck for_
the rain to gather for the wind to suck for the sun to rot for the tree to drop
Here is a strange and bitter crop.

—Stranger Fruit, lyrics by Abel Meerpol (1939)

Even with the glut of academic and other literature examining the civil rights era, it is hard to assess the relative weights of the factors that shifted support away from separate-but-equal toward integration. The alchemy of bias and equality is obscure and imprecise. Newspaper reporters with a capacity for self-reflection who could write deprecatingly of themselves as "just another lousy compromiser" on the topic of the "Great Dream" of equality and, when faced with a story of systemic racial bias, a whimperer who meekly asks, "What the hell can I do?," were also writing editorials congratulating the local sheriff "for preserving Alabama's proud record of not having had a lynching in three years." The bar might have been low for racial tolerance, but the most troubling factor was the lack of perspective even in progressive minds.

After World War II, "fundamental shifts in U.S. racial attitudes and practices [began] transforming the constitutional jurisprudence of race." By 1963, even some segregationist politicians decried the Birmingham bombing as a "heartless criminal atrocity," and members of the public who had been equivocating about civil rights joined one side or the other.

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Ku Klux Klan member Robert Chambliss was identified as the person who left a box of 122 sticks of dynamite under the steps of the Sixteenth Street Baptist Church, but his prosecution was viewed as a sham. He had been charged with murder and possessing explosives without a permit, but he was found not guilty of murder in 1963. He was fined $100 and jailed for six months on the explosives charge.

After the Civil Rights Acts were passed, in 1977, the U.S. Attorney General brought charges against Chambliss (73) based on new evidence in FBI files again, and he was found guilty and sentenced to life imprisonment. Chambliss died in an Alabama prison in 1985.
Segregationists clung to the rhetoric of the Manifesto and Alabama Governor Wallace, who had become the most strident voice of racism in the South; Northerners wrote letters to the NAACP offering their help and apologizing "for being Caucasian." The manpower bussed in from the northern states during the Freedom Summer in 1964 was predominantly Jews, and it didn’t help consolidation of Jewish and Black interests that federal intervention in the South—the largest federal investigation ever conducted in Mississippi—was triggered by the 1964 murder of Michael Schwerner, Andrew Goodman, both Jewish, and African-American James Chaney. In discourse, the blending of "hatreds" against social and demographic groups, such as the "communist-inspired, anti-Christ, sex-perverted group of tennis short beatniks" at the NAACP, remained strong. But, by the late 1960s, protests against desegregation faded into protests against the Vietnam war, and the 1968 assassination of Martin Luther King, Jr., flipped a switch on civil rights protest from civil disobedience to organized militancy in Black Power

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movements. The 1968 Civil Rights Act, discussed in detail below, was the last major civil rights legislation to come out of the end of separate-but-equal.

|| HCPA, 18 U.S.C. 249 Rules of Construction

(3) Construction and application.-Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association. ||

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**Political Sanctity of Religious Sanctity**

In 1996, when CAPA became CAPA (instead of Section 247), the primary acts of manifesting bias against religious sites were acts of vandalism not arson. Given that the great protests and bombing sprees of the post-*Brown* era had long passed in 1996, what was the impetus to overhaul Section 247? HCSA statistics that had been collected over several years demonstrated a need to protect places of worship against "hate crime" violence, because the data showed that the majority of antireligious violent crimes target property. HCSA statistics made it easier to lobby for Section 247's expansion, which became CAPA. In addition to simplifying its jurisdictional requirement, Rep. Conyers, the rudder guiding the effort, also transformed CAPA's language into a "hate crime" formula. Conyers probably understood that religious protections are more easily digestible to U.S. politicians and the American public than protections for categories of persons, especially to those in the Bible Belt. Whether this was strategic legislation to lay track for later "hate crime" law or opportunistic happenstance, the structure of CAPA as revised established a workable framework for the HCPA.
V.D.2. Summary, Intimidated and "Hated": Identity-as-Experience

Before turning to the next segment of the genealogy, it will be helpful to review the material presented and get oriented to the forthcoming material. First, a review of the Knowledges relevant to the HCPA: Up to this point in this legislative history, several building blocks of federal ABL are present in the sociolegal landscape. Table 6: HCPA-Related Knowledges Taking Shape by the 1990s summarizes these elements, which roughly correspond to the bold headers of the subsections in the previous pages.
Table 6: HCPA-Related Knowledges Taking Shape by the 1990s

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<tr>
<td>Ethnic Intimidation</td>
<td>Categories of persons left open, anticipated further additions; &quot;intimidation&quot; equalizes focus on offender's intention and victim's experience of the crime.</td>
<td>Harm of fear generalized. Intimidation reduces freedom.</td>
</tr>
<tr>
<td>Rights for Vulnerable Persons</td>
<td>Survivor &quot;agency&quot; reconnects victims to &quot;liberty.&quot; In some sense, to be female (or other minority) is to be victimized (by men).</td>
<td>Victimization is source of rights, rights empower identity. To be Other is to be a victim.</td>
</tr>
<tr>
<td>Harms as Tangible and Intangible</td>
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<td>Bias Crime Statistics</td>
<td>Measurable problem requires federal attention. Foreshadows federal jurisdiction over &quot;hate crimes.&quot;</td>
<td>Federal intervention is necessary to address problem. Reminder of state inaction in racialized violence.</td>
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<td>Manifesting Prejudice</td>
<td>Definitions of &quot;hate crime&quot; and &quot;bias crime&quot; take shape in real cases.</td>
<td>Manifesting bias is harm; harm is crime. Manifesting prejudice is &quot;hate.&quot;</td>
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<tr>
<td>Religious Sites Free Exercise of Rights</td>
<td>Racists blur lines between categories of targeted Out-Groups. TV heightened national &quot;reading&quot; of narratives and attention to Out-Group experiences.</td>
<td>Targeting church property is targeting persons; is criminal prejudice. Exercising freedom of religion is central to national identity. &quot;Freedom&quot; requires preventing attack.</td>
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<tr>
<td>Intransigence of &quot;Hatred&quot; /Prejudice</td>
<td>&quot;Hatred&quot; directed at same targets across arc of history. Violence targeted primarily &quot;race&quot; and related categories. Discord conceptualized as &quot;stemming from&quot; targeted victims. Eliminating identities removes discord.</td>
<td>American orthodoxies of &quot;hate&quot; are rooted to skin color. Categories of protected persons modernized.</td>
</tr>
<tr>
<td>State Support of Discrimination</td>
<td>State actors opposed antidiscrimination laws; neglect permitted racialized attacks.</td>
<td>Federal intervention once needed in South now needed to respond to &quot;Southern&quot; crime.</td>
</tr>
<tr>
<td>Deference to Religion in Politics</td>
<td>Protections for religion and religious institutions typically get wide support.</td>
<td>Religion appears in both sections of HCPA.</td>
</tr>
</tbody>
</table>
The legislation examined in the previous section suggests that drafting ABL as a straightforward prohibition against *incitement to imminent violence* would have quashed some of the later First Amendment objections to the HCPA. Prohibiting *intimidation through violence or threats*—dissuading every category of person from exercising his or her civil rights—might have served federal officials by freeing the law from the entanglements of victim claims. But victims and rights-claims were part of the worldview of the era—perhaps an inevitable outcome of the combined maturation of the Civil Rights era and the 1970s "Me Generation" of Baby Boomers. New laws, like the 1980s and 1990s Crime Victims Rights Acts, rode the coattails of civil rights inspired rights-claims, and the language of victim "identity-experience" became part of the national lexicon. In post-World War II America, when civil rights were at the core of the national battles, the idea that intimidation of people scarred by prejudicial policies could be debated or legislated as *category-neutral* made no sense. Also, without victim categories, there would have been no object of the prohibited conduct, risking that the law would be overbroad (like the Texas law, mentioned above, that was held unconstitutional). Protected categories provided the gravitational center for anti-intimidation law.

For this reason, I had expected the categories of persons to be the focus of the emergence of the concept of "hate crime." A relatively wide array of categories were injected into the language of the law from approximately the 1980s forward, although not necessarily because they were victimized by "hate crime." Some categories reflected interesting developments in the extent to which identity could be chosen, either by medical procedures (e.g., Bruce/Caitlyn Jenner; Chastity/Chaz Bono) or by bringing forward certain habits or mannerisms that became part of identity-as-performance. This idea is discussed elsewhere in this dissertation.

With further analysis, however, most categories singly did not map well with the concept of "hate crime." Categories such as "gender identity" and "sexual orientation" offered interesting diversions into the experiences of specific Out-Groups, but the trajectory of categories added after 1968, as detailed below, did not emanate from the same events and dynamics that gave rise
to the concept of "hate crime." Many if not all of them have a distinct genealogy of their own (many laborious attempts to trace these genealogies ended up in the scrap pile), and it became clear that the larger phenomenon related to changed in the concept of "identity." The only categories that map with "hate crime" are skin color and "race"—which is placed in quotes in this dissertation to signify its social construction. The term "race" is generally coincident with skin color in its historical meaning, and it is that usage that is present in the concept of "hate crime."

**Honing Down Categories of Persons Animating Concept of "Hate Crime"**

Table 7: Honing Down Categories of Persons summarizes the decision-making processes of honing down the categories. The fact that these categories are excluded from this genealogy does not mean that the members of the Out-Group are not legitimate victims of bias crime.
### Table 7: Honing Down Categories of Persons

<table>
<thead>
<tr>
<th>Category</th>
<th>Lack of &quot;Fit&quot; to Concept of &quot;Hate Crime&quot;</th>
<th>Implications for Definition of &quot;Hate Crime&quot;</th>
<th>Data Color code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disability</td>
<td>Physical differences between abled and disabled persons are not socially constructed. Science of medicine, engineering, functional morphology, pharmacology, etc., can close gap on perception of differences. Closing gap on differences through objective practices of science creates greater equality.</td>
<td>Identity trait that stirs &quot;hate&quot; must be social construction. Science must be unable to close gap on perceptions of differences between those with and without the trait.</td>
<td>Green</td>
</tr>
<tr>
<td>Gender</td>
<td>Construction of &quot;gender&quot; can be altered through choices of individual. Since &quot;gender&quot; is performative, anyone can &quot;be&quot; this trait. To the extent that feminine gender is a proxy for female sex, biological &quot;imperatives&quot; of procreation seem to mitigate &quot;hate&quot; against trait.</td>
<td>Identity trait cannot be (nearly) eliminated through individual choices in behavior. Identity trait cannot be universally accessible to all.</td>
<td>Pink</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Archival documentation for LGBTQ+ traits is all but nonexistent during era when patterns of Othering in &quot;hate crime&quot; were laid. [Heterosexuality is so ingrained in history of US (and most modern countries) that alternatives are not even mentioned, making archival research of this trait fruitless.]</td>
<td>Identity trait must be part of narrative of national identity to trigger &quot;hate crime.&quot; [While homosexuality most resembles &quot;skin color&quot; and &quot;race&quot; in the virulence of contemporary &quot;hate&quot; toward victims, the development of LGBTQ+ does not fit the institutionalized exploitation that goes to the heart of the founding of the nation.]</td>
<td>Pink</td>
</tr>
<tr>
<td>Religion</td>
<td>Religion can largely be &quot;worn&quot; or not, chosen or not. Protections, not persecution, for religion are built into American identity.</td>
<td>Identity trait must be reminiscent of dissonance in national identity to trigger &quot;hate crime,&quot; which is attack on that part of national identity that presents conflict.</td>
<td>Red</td>
</tr>
<tr>
<td>National Origin</td>
<td>Specific &quot;hate&quot; for certain national origins has changed over history, e.g., terrorism-Arab countries.</td>
<td>Identity trait requires narrative that is triggered by appearance of victim. To that extent, national origin is included in discussion of &quot;race&quot; and skin color.</td>
<td>Brown</td>
</tr>
<tr>
<td>Gender Identity</td>
<td>Construction of &quot;gender identity&quot; can be altered through choices by individual. &quot;Gender identity&quot; is performative, anyone can &quot;be&quot; a version of this trait.</td>
<td>Identity trait cannot be (nearly) eliminated through individual choices in behavior. Identity trait cannot be universally accessible to all.</td>
<td>Coral</td>
</tr>
</tbody>
</table>
The remaining categories are "race" and skin color, which fit the criteria outlined in Table 7. Related categories such as ancestry or national origin, are incorporated into the analysis as alternates for "race" and skin color. The previous section demonstrates the blurring of lines between these categories, and the section to follow suggests that distinctions among these four are not significant to the emergence of the concept of "hate crime."

Within this category of "race" and skin color, I focus on African-Americans, referred to in the dissertation using any of the variants that were common during a given era, many of which are offensive today. I do not include Native American Indians (NAI) in this analysis, although they are present to a significant degree in the data, or various other Out-Groups subject to the same early form of "hate crimes" (lynching, enslavement, near-genocidal destruction). One reason is that the trajectory of NAI abuses is distinct from that of imported Africans. The attempt to include NAI and other groups would diminish their story and would add little to the analysis.

As discussed in the next section of this dissertation, the relevant categories of persons are reflected in legal antecedents to the HCPA in the nation's early history. For example, one of the most significant antecedent laws is a criminal prohibition against conspiracy to "go in disguise on the highway" and intimidate or injure another person. This law was not designed for any of the categories listed in Table 7. Also, the Thirteenth Amendment, which is specifically listed as one source of federal power to enact the HCPA, was not debated or designed for the categories above. The laws directly referenced in the HCPA or related to a core feature within the HCPA serve as a way to triangulate and confirm the exclusion of categories.

Because I began by focusing on categories of persons, I also thought that an examination of a history of patterns of Othering would bring revelations about the concept of "hate crime." I had expected to find that there were meaningful differences in the object (target) of Othering at different points in history; or differences in the reasons for Othering (i.e., the circumstances surrounding violence against an Other); or differences in some other identifiable aspect of the patterns.
For this reason, I exerted some research effort tracking the origins of human rights, which seemed to be a global declaration against many types of patterned Othering. I did not find an overlap with the genealogy of the concept of "hate crime." Human rights maps well with the evolution of the category of disability, which makes sense given the origins of the UN Declaration of Human Rights (UNDHR) with Eleanor Roosevelt, whose husband President Roosevelt (FDR) famously hid the disabling effects of polio while presiding over New Deal policies. In my opinion, links between modern usages of "human rights" and early texts also using that term are optimistic overreach. I found no texts referring to "human rights" outside the context of enslaved African Americans. (Nor did I find references to any in texts that do link the term from modern to colonial usages; of course that does not mean there aren't any.) The more suitable term, according to my research, is "natural rights," with appears to be better aligned with the modern meaning of "human rights."

To explore patterns of Othering, I also briefly examined international "hate crime" laws. But the section following will demonstrate that exploring international sources to better understand the distinct genealogy of American "hate crime" concepts would require in depth knowledge of the country's jurisprudence, which would be well beyond the scope of this project. Nevertheless, some research going back to ancient cultures provided invaluable insights that informed the direction of this dissertation. A cross-border comparison of "hate crime" laws would be an important topic for future research, possibly to test the applicability of my findings.

Instead, of finding differences in patterns of Othering, my research has shown that American patterns of establishing In- and Out-groups appear stunningly consistent over time and thus do not offer much in the way of insight. As discussed throughout this dissertation, the stubborn facts about "hate crime" and Othering in America revolve chiefly around "race" and skin color, as well as the impulse to categorize people that was built into the nation's founding. Therefore, these topics form the central focus of the genealogy.
In hindsight, it is worth asking, could we have abandoned category-based thinking or at least legislation in protecting persons vulnerable to "hate crime"?

**Could We Eliminate Categorical Knowledges?**

To omit categories of persons from the law entirely—and even the inquiry into identity attributes like racial composition or sexual orientation—seems a more effective place to begin eliminating categorical thinking from civic life. But that idea would not have occurred to legislators or the populace during the era when "ethnic intimidation" transformed into "hate crime" proposals in Congress. In an "identity-claims" environment, omitting or outlawing categories—especially race—would have been dangerously close to eliminating the identity and the associated rights. But the recognition of categories of persons has been the engine of violence that Justice Stewart would deem "obscene," and continuing to legislate as if categories at all have meaning may be perpetuating their divisive effects.

Crafting federal ABL without specifying "race" and other categories would therefore have been antithetical to the general trend toward emphasizing personal experience as the basis of identity—not passively accepted, but actively claimed. Personal narratives gained prominence in shaping meaning. Memoirs became a publishing phenomenon. Personal experience served as the basis to legitimize claims to particular aspects of one's identity. Personal identity would be affirmed in the narratives of others, such as those popularized in novels, film, or Oprah's Book Club. Thus, at this point in the legislative history, rights-claims were less about rights than they were about identity-claims.

Contrasted with the rights-claims of the 1950s to 1970s, these "identity-claims" of the 1980s and 1990s demanded recognition beyond mere "tolerance"; celebration was expected of multicultural identity experiences. Those who failed to celebrate would eventually be the "haters" discussed above. The impulse to claim personal identity attributes and receive
validation for doing so became part of a larger dynamic about self-determination or Self-formulation. The emergence of the Black Lives Matter movement is an example of this dynamic.

Also, the transition from civil rights formulations of identity as rights-claims to post-CVRA emphases on identity-as-experiential, in the 1990s, confronted new conceptualizations of identity free from physical reality. Technological advances in computers, and later the Internet, created virtual "spaces" where people could present personae distinct from their everyday Selves. MySpace and online chat rooms offered everyone an opportunity to experiment with new identities without the experiences necessary to form them or the consequences attendant to them. Poseur identities had a brief heyday. Cyberspace was compared to the Wild West because it was largely unregulated, until the intangible harms identified with the crime victims movement became tangible online.

Like identity, virtual "reality" shaped cultural Knowledges about the intangible aspects of "harm." Phenomena such as cyberstalking and cyberbullying demonstrated that harm in the virtual world was as powerful as harm in the real world. This point was demonstrated in a spate of teen suicides between the 1990s into 2010s arising from cyber-bullying. In particular, the Megan Meier case outraged the public, because the bully was not another teen, but the middle-aged mother (Laurie Drew) of Megan's friend pretending to be a teenage boy. Unlike other teen victims of cyberbullying, Meier's virtual "assailant" was not real. The law lagged behind these cases; Drew did not face federal or state criminal charges. The lesson was that "virtual reality" was "reality": Nothing is more real than death.

Aside from categories of persons, early versions of the HCPA proposed in the late 1980s might have received more support if they had been titled in civil rights terms: Civil Rights Protection Act or Violent Bias Prevention Act. But in the post-Reagan era, as the next decade

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501 See Roslyn Myers, "Stick and Stones and Words Can Kill: The Victimology of Teen Cyberbullying That Leads to Suicide," unpublished, on file with the author (May 17, 2010).
developed its own distinctive hallmarks, it was clear that the country was not in a civil rights era. In fact, a subtle political inversion emerged: Political discourse harnessed civil rights narratives of the struggle for liberation and equality and transformed them into the groundwork for a crime control narrative. This inversion seems to have set the nation on a path toward greater and bolder "untruths" in politics and social life, where "truthiness" (Stephen Colbert's term) and "the truth as I see it" became adequate alternatives to reality.

Before turning to these phenomena, the section following examines the foundations of identity in law. These early models conceptualizing identity are relevant to the ideas on which criminal civil rights laws were formulated and to the emergence of the concept of "hate crime." Without a shift in the concept of "identity," the transformation from a civil rights narrative to a crime control narrative would not have happened.

V.D.3. Power, Personhood, National Identity, and the Foundations of Permission to "Hate"

The most comprehensive changes to federal criminal law and specifically federal attention to "hate crime" came packaged in the Violent Crime Control Act and Law Enforcement of 1994. The Act, colloquially known as the Crime Bill, was a behemoth legislative mongrel that touched on an array public concerns ranging from petty crime and civil penalties for

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Among other funding initiatives, the Violent Crime Control Act established the Family Unity Demonstration Project (§ 31901 et seq.), the Ounce of Prevention Council (§ 30101 et seq.), numerous incentives for at-risk youth programs, including "gang resistance" training (§ 32401) and support for community policing programs (§ 10003) to better interface with marginalized communities, and enhanced penalties for drug offenses (§ 90101 et seq.). The widely lauded Title IV of the Crime Bill, addressing Violence Against Women, included the Safe Streets for Women Act (§ 40001 et seq.), revisions to federal rules of evidence related to a victim's sexual history (§ 40141), confidentiality rules for communications between victims and counselors or therapists (§ 40153), the Safe Homes for Women Act (§ 40201 et seq.), the Civil Rights for Women Act (§ 40301 et seq.), the Equal Justice for Women in the Courts Act (§ 40401 et seq.), the National Stalker and Domestic Violence Reduction Act (§ 40601 et seq.), protections for immigrant women who are victims of domestic violence (§ 450701 et seq.), and Violence Against Women Act Improvements (§ 40501 et seq.), which included orders for reports on battered women's syndrome, confidentiality of victims of domestic violence, and recordkeeping related to domestic violence crimes.
hunting to the "epidemics" plaguing society, including primarily drug crime and addiction, criminal street gang violence, sex crimes and child pornography, stalking and intimate partner violence ("domestic violence"), terrorism and weapons of mass destruction, and piracy. The overall thrust of the law was harsher penalties; for example, for many of the crimes it addressed, the Crime Bill added capital punishment provisions allowing prosecutors, under certain circumstances, to seek the death penalty. The sheer size and expanse of the law demands our attention. What social circumstances spurred the legislative branch to flex its anticrime muscle at this time in history? How was the federal government able to exert its control in so many areas of social life? This is a question of jurisdiction—the power to "control" through legislation—which is one of the central features of the HCPA and the concept of "hate crime" and implicates complex ideas about "identity." Before examining the relevance of the 1994 Crime Bill to the HCPA, it is necessary to take a substantial digression back to the earliest documents on which the United States was founded, to link them to the present discussions about "identity" and the concept of "hate crime."

503 Once used as a cry for "tough on crime" policies, usages of terms like "epidemic" took on a sarcastic tenor to emphasize their lack of substantiation. (See, e.g., John S., Baker, Jr., U.S. v. Morrison and Other Arguments Against "Hate Crime" Legislation, 80 B.U. L. Rev. 1191, 1195 (2000) (using "epidemic" to trivialize advocacy for "hate crime" law as overinflation of the violation groups experience without supporting empirical evidence); James B. Jacobs and Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 63-64 (1998) (referring negatively to "epidemic" of violence asserted by groups in favor of "hate crime" law to demand that attention, remediation, reparations, etc., for victims and potential victims of minority groups).)

Jacobs and Potter state: "This pessimistic and alarmist portrayal of a fractured warring community [in the throes of an epidemic] is likely to exacerbate societal divisions and contribute to a self-fulfilling prophecy. It distorts the discourse about crime in America, turning a social problem that used to unite Americans into one that divides us." (Id.).

See also John S. Baker, Jr., U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation, 80 B.U. L. Rev. 1191, 1195 (2000) (showing lack of statistical support for "epidemic," including 1992 report of only 6,623 hate crime incidents nationwide (0.05% of total crimes) with 74% of jurisdictions finding no hate crimes and a high of 8,759 between 1996 and 1998, when the number of jurisdictions reporting nearly doubled to 11,354.).

In this section segment of the genealogy, the following laws are analyzed and discussed for their relevance to the concepts underlying processes of Othering and their official support:

- 1787 U.S. Constitution, particularly the Commerce Clause and other bases of federal power;
- 1776 Declaration of Independence;
- 1215 Magna Carta;
- 1620 Mayflower Compact;
- 1787 Northwest Ordinance;
- 1870 Reconstruction Era Civil and Criminal Civil Rights Laws; and
- 1865-1870 Reconstruction Amendments to the U.S. Constitution.

a. Federal Power to Regulate That Which Affects the "Overall Health of the Nation"

Although the 1994 Crime Bill appears to indicate otherwise, the federal government has no general police powers.\(^{505}\) Every federal criminal statute must identify its underlying

\(^{505}\) "The Constitution...withholds from Congress a plenary police power." (Morrison, 120 S. Ct. at 1754 (quoting U.S. v. Lopez, 514 U.S. 549, 566 (1995).) Police powers of the federal government do not derive from English commonlaw, as do most State laws and many judicial precedents. Federal penal law must be specifically legislated, by Congress, in the U.S. penal code."

"[A] crime committed within any area acquired under [2 Mason 60] must be punished by the United States or it cannot be punished at all. It is now well-established that there are no common law crimes against the United States, and it follows that every offense must be defined and the penalty prescribed by law." (Report of the Commission to revise and codify the criminal and penal laws of the United States, 1901.) In other words, Congress must "identify some particular constitutional power in order to enact any piece of criminal legislation...Although Morrison reaffirmed the Court's 1995 decision in U.S. v. Lopez, lower courts and commentators were not previously convinced the Court was serious about constitutional limits on Congress' power to enact criminal laws." (John S. Baker, Jr., U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation, 80 B.U. L. Rev. 1191, 1191-92 (2000) (referring to Lopez, 120 S. Ct. 1740, 1754-55, 1759 (2000) (holding that the Violence Against Women Act was not a valid exercise of Congress' commerce clause power because it did not regulate economic activity).)
constitutional authority, and the prohibited action must be specifically described in accordance with that provision. The limitations on legislative power helped to shape the language of the HCPA. The relevant "rules of the game" of congressional powers involve police powers, powers over commerce, powers over states and state actors, and the authority to enact "appropriate legislation" to fulfill constitutional objectives. Congress also has authority over individuals, but the development of that authority is not straightforward.

|| HCPA, 18 U.S.C. 249(b) Certification Requirement.-

(1) In general.-No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that-

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

State powers were once exclusive with regard to local issues and the authority to define criminal law and to protect the health, safety, and welfare of their citizens. (See Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city). See also City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976); Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); Whalen v. Roe, 429 U.S. 589, n.30 (1977).) In 1837, "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State [were] complete, unqualified and exclusive." (New York v. Miln, 36 U.S. (11 Pet.) 102, at 139 (1837).) The States' core police powers are "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government." (Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). See e.g., Calif. Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. and Q. Ry. v. Drainage Comm'r's, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. City of Richmond, 226 U.S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58-59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. and St. L. Ry. v. Walters, 294 U.S. 405 (1935).)

By the early 20th century, the Supreme Court had officially recognized that "the extent of the power may vary based on the subject matter over which it is exercised." (Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914), citing Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58-59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Co. v. Highway Comm'n, 294 U.S. 613 (1935).) "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." (Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914).)
(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice. ||

In the first instance, federal police powers are restricted by geography. Because the authority to regulate is generally coextensive with physical possession, for a period of time the

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506 Congress has authority to regulate its own territorial regions, such as the seat of government, the District of Columbia. U.S. Const. Art. I, Section. 8, "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."

The question of the balance of powers was one of the great concerns of the authors, James Madison and Alexander Hamilton, of the Federalist Papers in 1787 and 1788. Essay No. 43 of The Federalist Papers remarks:

||The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.||

The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment.||

(Id.)
strength of the federal government, after the transition from the Articles of Confederation to the U.S. Constitution, grew in tandem with its land possessions.\textsuperscript{508} Even after the U.S. Government relinquished vast areas of land in its possession in the 19th century,\textsuperscript{509} its legislative authority

\textsuperscript{507} 18 U.S.C § 5, 7 (defining U.S. territorial jurisdiction, where federal government has authority to criminally prosecute). To avoid confusion about the extent of authority of each, states must provide to the federal government a formal statement ceding jurisdiction. See U.S. v. Bevans, 16 U.S. (3 Wheat.) 336 (1818) (in case attempting to prosecute a murder on the Warship Independence, while anchored in Boston harbor, arguably within the federal government’s admiralty jurisdiction, holding that “the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power,” and “Congress has power to exercise exclusive jurisdiction...over all places purchased by [state] consent...for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings....[Thus] exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states.”).)

Federal government land acquisition between 1787 and approximately 1900 "gave rise to a distinction in the laws between public domain lands, which essentially are those ceded by the original states or obtained from a foreign sovereign (via purchase, treaty, or other means), and acquired lands, which are those obtained from a state or individual by exchange, purchase, or gift. (About 90% of all federal lands are public domain lands, while the other 10% are acquired lands)." (Carol Hardy Vincent, Laura A. Hanson, Jerome P. Bjelopera, "Federal Land Ownership: Overview and Data," Cong. Rsch. Serv. 2 (Dec. 2014.).) This distinction has mostly lost practical significance.

Under the influence of Teddy Roosevelt, the focus of federal land policy shifted to retention, preservation, and management under a national park system. But not until the 1976 Federal Land Policy and Management Act of (FLPMA) did Congress openly declare its intention to retain remaining public domain lands for federal ownership. (Pub. L. 94-579; 43 U.S.C. §§ 1701, et seq.) “This declaration of permanent federal land ownership was a significant factor in what became known as the Sagebrush Rebellion, an effort that started in the late 1970s to provide state or local control over federal land and management decisions.” (Carol Hardy Vincent, Laura A. Hanson, Jerome P. Bjelopera, "Federal Land Ownership: Overview and Data," Cong. Rsch. Serv. 3 (Dec. 2014.).) Concerns about costs of federal land ownership has renewed interest in state management of the public domain lands.

\textsuperscript{508} Carol Hardy Vincent, Laura A. Hanson, Jerome P. Bjelopera, "Federal Land Ownership: Overview and Data," Cong. Rsch. Serv. 1 (Dec. 2014).

The amount of land owned by the federal government is not precisely known. In 2014, it was estimated to be approximately 640 million acres—amounting to 28% of the 2.27 billion total acres of land in the nation. (Digital maps of federal lands and Indian Reservations are accessible at http://nationalmap.gov/small_scale/printable/fedlands.html#list.)

"The formation of the U.S. federal government was particularly influenced by the struggle for control over what were then known as the ‘western’ lands—the lands between the Appalachian Mountains and the Mississippi River that were claimed by the original colonies. The original states reluctantly ceded the lands to the developing new government. This cession, together with granting constitutional powers to the new federal government, including the authority to regulate federal property and to create new states, played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the U.S. Constitution.” (Id.)


"In the mid to late 1800s, Congress enacted numerous laws to encourage and accelerate the settlement of the West by disposing of federal lands. Examples include the Homestead Act of 1862 and the Desert Lands Entry Act of 1877. Approximately 1.29 billion acres of public domain land was transferred out of federal ownership between 1781 and 2013. The total included transfers of 816 million acres to private ownership (individuals, railroads, etc.), 328 million acres to states generally, and 143 million acres in Alaska under state and Native selection laws. Most transfers to private ownership (97%) occurred before 1940; homestead entries, for example, peaked in 1910 at 18.3 million acres but dropped below 200,000 acres annually after 1935, until being fully eliminated in 1986." (Id.)
had proven vibrant under other constitutional provisions—most notably, the Commerce Clause, discussed below—and the framework of state-federal concurrent jurisdiction, mentioned above with regard to civil rights laws and church bombings.510

Under the principle of federalism, the relationship between state and federal governments was envisioned as weighted in favor of the former to prevent the oppression of the latter. The Constitution therefore tethers Congress to the States in determining their respective ranges of power: Federal power to regulate for public safety is tempered by the "fundamental postulate" of deference to the "dignity" of State sovereignty.511 Accordingly, states retain powers not ceded to

510 Because the determination of what are "territorial" matters subject to federal police powers is supported by Commerce Clause power as well, federal authority has expanded to reach topics not, at first glance, obviously associated with "territory." (See, e.g., U.S. v. Cotoni, 527 F.2d 708, 711 (2d Cir. 1975) (holding federal wiretap laws as territorial); Stowe v. Devoy, 588 F.2d 336, 341 (2nd Cir. 1978); Cleary v. U.S. Lines, Inc., 728 F.2d 607, 609 (3rd Cir. 1984) (holding federal age discrimination laws as territorial); Thomas v. Brown and Root, Inc., 745 F.2d 279, 281 (4th Cir. 1984) (holding same as Cleary, supra); U.S. v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977) (holding marine mammals protection act as territorial); Pfeiffer v. William Wrigley, Jr., Co., 755 F.2d 554, 557 (7th Cir. 1985) (holding age discrimination laws as territorial); Airline Stewards and Stewardesses Assn. v. Northwest Airlines, Inc., 267 F.2d 170, 175 (8th Cir. 1959) (holding Railway Labor Act as territorial); Zahourek v. Arthur Young and Co., 750 F.2d 827, 829 (10th Cir. 1984) (holding age discrimination laws as territorial); Commodities Futures Trading Comm. v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984) (holding commission's subpoena power under federal law as territorial); Reyes v. Secretary of H.E.W., 476 F.2d 910, 915 (D.C.Cir. 1973) (holding administration of Social Security Act as territorial); and Schoenbaum v. Firstbrook, 268 F. Supp. 385, 392 (S.D.N.Y. 1967) (holding securities act as territorial.).


The court explained the history of one area of state-federal division of powers:

||[E]ach State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by 'the supreme Law of the Land' as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies...Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system.||

(Id. at 3.)

Certain areas of state control are obvious. For example, in 1793, Congress enacted a law stating that, in federal courts, "a writ of injunction [shall not] be granted to stay proceedings in any court of a state." (Act of March 2, 1793, § 5, 1 Stat. 335.) With certain exceptions developed since then, the principle that state courts remain free from interference by federal courts continues under an amended version of the statute, which states:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. (28 U.S.C. § 2283).
the federal government or exclusively occupied by the federal government under the Constitution or claimed as an extension of a power so granted.\textsuperscript{512} In the first formal codification of U.S. Laws, federal penal law made itself dependent on state law to define crimes not preempted by federal jurisdiction.\textsuperscript{513} The weakness of this approach was outweighed by the impossibility of instantaneously building a framework of federal criminal law, and the similarity of prohibited conduct seemed to make a code of federal criminal law redundant. Thus, federal criminal law in many instances simply imposed penalties for violations of the state law within which the federal region sat.

As the federal government asserted authority while refining its statutory framework, state authority to act was limited to circumstances "neither protected nor prohibited" by federal law.\textsuperscript{514} The range of issues unclaimed by federal authority gradually shrunk.\textsuperscript{515} Between these

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512 "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition [to its power.]" Charleston and Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).


514 In state courts, there is no federal pre-emption if the conduct is neither protected nor prohibited by federal law. (See Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1957). See also Allen-Bradley Local, etc. v. Wisc. Employment Rel. Bd., 336 U.S. 245 (1949); Bethlehem Steel Co. v. N.Y. State Labor Relations Board, 330 U.S. 767, 773 (1947); Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949).)
For an explanation of the relationship between state and federal powers, see, e.g., Southern R. Co. v. Reid, 222 U.S. 424 (1911). See also Chi., Rock Isl., and Pac. Railway Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 433 (1913) (stating that, "even if [the subject of this case] was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow... that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme....[T]he state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so;... action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power.").

555 "The volume of interstate commerce and the range of commonly accepted objects of government regulation have...expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." (New York v. U.S., 505 U.S. 144, 158 (1992)) For an analysis of the expansion of congressional authority in criminal law, see John S. Baker, Jr., U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation, 80 B.U. L. Rev. 1191 (2000). The author's discussion of Congress' police power offers an informative historical perspective:

||Morrison rested fundamentally on the principle that the federal government has no general police power. Congress, which has long acted as if it does have such a power, could be excused for thinking so because the Supreme Court, prior to Lopez, had given Congress little reason to think otherwise.||


||Until about 1970, at least, the Supreme Court had maintained in practice, even if it did not clearly articulate, a distinction between Congress creating crimes and regulating commercial activity under the Commerce Power.||

||The Supreme Court's 1970 decision in Perez v. U.S., [(upholding Congress' creation of a loan-sharking statute with no link between the defendant's actions and interstate commerce, reasoning that loan-sharking was linked indirectly to commerce through its practice by organized crime syndicates)] however, applied the post-1937 Commerce Clause jurisprudence through reasoning that appeared to eliminate any distinction between criminal and non-criminal cases...Since 1970, Congress has accelerated the pace of federalizing criminal law...Any argument that Morrison sub silentio implies that Congress lacks any power whatever under the Commerce Clause to regulate violent crime (or that Congress may do so only where each violation by itself "substantially affects" interstate or foreign commerce) is unwarranted.||

||The] jurisdictional element materially distinguishes a statute such as proposed § 249(a) (2) from the statutes at issue in Lopez and in Morrison. The Court in Morrison explained that such an element helps to ensure that the statute will reach only "a discrete set" of offenses, and will not extend to conduct that lacks an "explicit connection with or effect on interstate commerce." 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 562). [T]he findings in [§ 249(a) (2) (6)-(9)] reflect Congress's conclusion that the [HCPA] is appropriate legislation under each of the three Commerce Clause "categories" identified in Lopez and in Morrison...While such findings might not in and of themselves be "sufficient" to justify Congress's assertion of its Commerce Clause authority, (see Morrison, 120 S. Ct. at 1752), nevertheless they would provide important support for Congress's authority under the Commerce Clause to enact [§ 249(a) (2)], (see 120 S. Ct. at 1751 (citing Lopez, 514 U.S. at 563)).||

||Prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of "dual federalism." Under this doctrine, states' police power to impose regulations on commerce is restricted by the dormant Commerce Clause, while Congress' power to regulate was limited to where it had a "direct" rather than an "indirect" effect on interstate commerce. When this latter restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot.||
two (occasionally nebulous) areas of regulatory control, there remain many patches of concurrent jurisdiction, agreements to secede jurisdiction, and matters about which, so far, there is silence. Confederalism, as articulated in the Articles of Confederation, proved to be
"more conducive to maintaining the cohesiveness and dominance of particular groups formed along racial, ethnic, or religious lines. Accordingly, it is no accident that segregationists have routinely given a confederal or anti-Federalist interpretation to the Constitution."\textsuperscript{517} The classic southern racist adheres to ideals and symbols of the Confederacy, whether or not he or she claims to intend it, which are anchored in plantation ideology. The compromises made to constitute the nation permitted racist ideologies to become embedded in the very identity of the U.S. As discussed in greater detail below, racism, economics, and power are intertwined and remain strong in the South—at least stronger in former plantation states than any other part of the country—and the impression lingers in cultural Knowledges that the concept of "hate crime" has justification.

In the country's early history, confederalism transformed into federalism, with greater federal power to oversee the ligaments binding the nation together. To promote unity, primarily as an economic matter, "the federal Constitution provides local communities a certain degree of autonomy, but does not permit separatism or secession. [Therefore,] police powers—subject to

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In the early years of the nation, the Tenth Amendment was treated mostly as declaratory, and therefore not of much substantive value on its own. This was supported by the decision in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819), in which the Supreme Court (Justice Marshall) rejected a Tenth Amendment objection to congressional action, leaving the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument." One of the primary functions of the U.S. Supreme Court has been to interpret this division of power. Determinations have rested upon other provisions of the Constitution to understand the applicability of this amendment. Launching its holistic perspective on congressional power, the \textit{McCulloch} Court based its decision on an expansive interpretation the Necessary and Proper Clause (also known as the "Elastic Clause"). Generally, Tenth Amendment cases have employed the provision to limit congressional powers, not affirm or expand them. (\textit{See New York v. U.S.}, 505 U.S. 144 (1992); \textit{Printz v. U.S.}, 521 U.S. 898 (1997).) But the Tenth Amendment has at least inspired a "carrot and stick" tradition by which the federal government conditions grants upon the implementation at the state level of a federal law or standard or, with regard to specific subject matter, coaxes states to implement their own regulatory structures to avoid federal intervention in the absence of state law.

Federal authority to prosecute crimes is activated only within its jurisdiction. (\textit{See 18 U.S.C §§ 5 and 7} (defining jurisdiction).) U.S. District Courts have jurisdiction of offenses occurring within the "United States." (\textit{See 18 U.S.C. § 3231}.) Because of statutory language, certain federal drug laws operate extra-territorially (\textit{See, e.g., U.S. v. King}, 552 F.2d 833, 851 (9th Cir. 1976).)

The least recognized powers under the Tenth Amendment are those reserved to the People. This authority has found little expression outside that permitted by federal and state gatekeeping, and current elections in the U.S. and popular movements elsewhere in the world reflect the need for these powers to be more fully acknowledged.

constitutional restrictions—remain in the states.\footnote{John S. Baker, Jr., \textit{U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation}, 80 B.U. L. Rev. 1191, 1222-23 (2000). "As a result of the different ways in which various states exercise those police powers, one can choose between living in a state that favors 'old-fashioned virtues' like Iowa or one that elects to "new values" such as Vermont where same-sex unions have been approved. The division of police powers within states, where the substantive criminal law is generally uniform, but its enforcement is not, allows cities like San Francisco, Las Vegas, and New Orleans to co-exist with smaller, rural communities in the same state. Culturally, most states are not actually that much different from one another, at least within the same region." (Id.)} But state powers are still subordinate to federal powers.

\textit{The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.}

—Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring)

The most entrenched source of Congress' jurisdiction is the Commerce Clause. The Commerce Clause offers the best reflection of the notion of federalism as an economic abstraction—a unifying ubiquitous web that is virtual, invisible but manifested in interstate transactions. The bonds of commerce that unite the states are the economic analog of the "bands" of political connection that Jefferson so stylishly cut in the Declaration of Independence in 1776 and the "bonds of affection" that Lincoln so elegantly tied to "the better angels of our nature" in his first inaugural address in 1861. If the mark of liberal democracy is regulating conduct rather than reforming human nature, then the Commerce Clause power is a quintessential example of this Madisonian view of self-governance.

Commerce Clause powers are bolstered by Congress' authority to regulate the postal system.\footnote{John S. Baker, Jr., \textit{U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation}, 80 B.U. L. Rev. 1191, 1222-23 (2000). "As a result of the different ways in which various states exercise those police powers, one can choose between living in a state that favors 'old-fashioned virtues' like Iowa or one that elects to "new values" such as Vermont where same-sex unions have been approved. The division of police powers within states, where the substantive criminal law is generally uniform, but its enforcement is not, allows cities like San Francisco, Las Vegas, and New Orleans to co-exist with smaller, rural communities in the same state. Culturally, most states are not actually that much different from one another, at least within the same region." (Id.)} Combined, these powers are wide-ranging. To put it succinctly, Congress has power
literally over anything that moves. Although Commerce Clause power is not police power, Congress has leveraged this authority to accomplish equivalent ends.520 Virtually everything in an economic union that remotely does—or hypothetically might—touch anything that crosses state borders can be encompassed within this source of congressional power.521 In theory, the fundamental character of the U.S. as a commercial enterprise by which citizens "pursue

519 Art. I, Sec. 8 U.S. Const.
Federal criminal jurisdiction based on commerce power combined with the postal power was originally viewed as an auxiliary criminal jurisdiction. Congress found its jurisdictional sea-legs in crimes that would otherwise constitute state crimes by finding some tangential contact with a matter within postal or commerce regulatory power, however minimal the federal interest in acts "claimed." (E.g., Barrett v. U.S., 423 U.S. 212 (1976); Scarborough v. U.S., 431 U.S. 563 (1977); Lewis v. U.S., 445 U.S. 55 (1980); McElroy v. U.S., 455 U.S. 642 (1982).)
Examples include the Mann Act, 18 U.S.C. § 242, designed to outlaw interstate white slavery the Dyer Act, 18 U.S.C. § 2312, punishing interstate transportation of stolen automobiles, and the Lindbergh Law, 18 U.S.C. § 1201, punishing interstate transportation of kidnapped persons. In the criminal law area, Congress passed a statute making it a federal offense to "in any way or degree obstruct...delay...or affect...commerce...by robbery or extortion" under 18 U.S.C. § 151. (See also 18 U.S.C. § 152.)

Congress’ power reaches not only transactions or actions that occasion the crossing of state or national boundaries but extends as well to activities that, though local, "affect" commerce, a combination of the commerce power enhanced by the necessary and proper clause. (Wickard v. Filburn, 317 U.S. 111 (1942) (sustaining federal regulation of wheat intended solely for the farmer's consumption, because (1) it filled a need otherwise met in the marketplace; (2) the crop might be induced onto the market).) Federal labor and wage-and-hour laws, especially after the 1930s, utilized this doctrine. (See Maryland v. Wirtz, 392 U.S. 183, 188-93 (1968).)
Congress’ power to regulate under the Commerce Clause extends to almost any conduct and has provided the basis for prohibitions on racial discrimination that implicates any channels of commerce. (Boynton v. Virginia, 364 U.S. 454 (1960); Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946).) The Supreme Court unanimously upheld Congress’s power to enact the Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq. Any facility involved in travel or transportation were found to "affect commerce," such has lodging, restaurants, cafeterias, diners, theaters, among other businesses, even if privately owned and operated. (42 U.S.C. § 2000a(b). See also Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).) "T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." (Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 301-04 (1964).) Congress successfully argued that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove. (See Katzenbach v. McClung, 379 U.S. 294, 252-53, 299-301 (1964); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Collins v. Hardyman, 341 U.S. 651 (1951).)
The greatest congressional reach sustained by the Court was a loan-sharking prohibition in the Consumer Credit Protection Act, Title II, 82 Stat. 159 (1968), 18 U.S.C. §§ 891 et seq. (prohibiting extortionate credit transactions as affecting interstate commerce because control of loan sharks is largely controlled by organized crime syndicates). The Supreme Court held that it was within Congress’ power to determine that loan sharking was an activity negatively affecting interstate commerce, justifying its power to regulate the entire class of these crimes. (Perez v. United States, 402 U.S. 146 (1971). See also Russell v. United States, 471 U.S. 858 (1985).)
happiness” has come to mean that the reach of federal authority under the Commerce Clause alone may be limitless.

|| HCPA, 18 U.S.C. 249(2) (B)

Circumstances described.-For purposes of subparagraph (A), the circumstances described in this subparagraph are that-(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim-(I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)-(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce. ||

Consider the implications of technological advancements: As technology has transformed the concept of "things" from physical materials to virtual representations, our experience of social life has changed and in turn federal government has transformed its regulatory scheme.\(^{522}\)

\(^{522}\) Under New Deal initiatives and well into the 1970s, the Supreme Court acquiesced to Congress’ expansion of federal penal law. That expansion has only increased, given the changes in society and modes of communication and commercial exchanges. Although the expansion of federal authority is disfavored by small-government proponents, commerce as a source of regulatory power and policy has been comparatively uncontroversial in the broader scope of Congressional power. The difference reflects the view of government, at the time the nation was formed, that oversight of commercial enterprise benefited the republic (through taxes and fair regulation, etc.), as well as citizens engaged in endeavors from which they might profit. But personal freedom dictates a much smaller role for government—more so at the federal level than the state level.
Governmental power reaches products and their movement, purchases and transportation, brands and the symbols representing brands (logogram c. 1937 sign or character representing a word; simple symbol or graphic meant to represent something), uses of the product and, in the case of consumer goods containing certain toxins, the way products get to their final resting place. Pony Express is now Amazon's delivery drones; documents, like stock certificates and personal checks, have been reduced to bytes, invisible except through their digital representations and untouchable except through wire transfers; wire transfers are now wireless; in modern life, nothing actually must be a "thing." Bitcoins are virtual representations of money, and their only link to actual "coins" is the belief of the people handing over Greenbacks—(issued by Congress in 1862 and themselves a representation of items of value, like oxen, cattle, or a house)—that the "bits" do operate as currency. Also, as interstate borders have faded amid increasing mobility—which is as often an online (at-home) experience as it is one involving a "Welcome to North Carolina!" sign.\footnote{On the development of virtual communities see Jock Young, "Identity, Community and Social Exclusion," in R. Matthews and J. Pitts (eds.) Crime, Disorder and Community (2001).} As these symbols of social order have become less prominent, and some even shunned like the Confederate flags in the Carolinas,\footnote{North Carolina took down their Confederate flag in 2013; South Carolina removed the flag from the state capitol building in 2015, after much unabashed protest by White Supremacists, among others. The Confederate Flag represented ideals opposite to the Constitution: ||Our new government is founded upon...the great truth that the Negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.|| (Alexander H. Stephens, "Corner Stone" Speech (March 21, 1861).)} insignia of (Southern) state identity have taken on a latent urgency. Additionally, if smartphones are computerized extensions of our brains, then we really are able to effect a commercial transaction by merely "thinking" about it. Do the instruments of modern life place our thoughts within the scope of Commerce Clause power? That far-fetched notion is taking shape in present-day congressional power under such laws as the PATRIOT Act, for example. Federal power to monitor information is separate from the power to suppress discussion, which should stop at speech, thought, and expression protected under the First Amendment, however. All of these
examples reflect the schismatic nature of social life, enacted through commercial transactions, communication, and transportation, which the law shadows relentlessly.

The HCPA clarifies, in four separate provisions of the Public Law, its intention to steer clear of First Amendment violations.

|| HCPA, Rules of Construction:

(3) Construction and application.-Nothing in this division...shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States...unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to- (A) plan or prepare for an act of physical violence; or (B) incite an imminent act of physical violence against another.

(4) Free expression.-Nothing in this division shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

(5) First amendment.-Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

(6) Constitutional protections.-Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence." ||
Within Commerce Clause authority, the emphasis originally was on property: products and materials that move among states. During Reconstruction, the Amendments that restored rights to former slaves interpreted "liberty" chiefly to mean liberty of contract.\footnote{Later, Supreme Court decisions in Fourteenth Amendment jurisprudence interpreted "liberty" to include personal, political, and social rights and privileges. \cite{Hampton v. Mow Sun Wong, 426 U.S. 88, 102 and n.23 (1976) (expanding "liberty" within meaning of Fifth Amendment Due Process and necessarily therefore the Fourteenth).} Codifications of law going back to ancient Rome, with which the Framers were familiar, focus predominantly on property rights.\footnote{Blackstone’s Treaty on English Common Law 1765-1769 (referring to Cicero and Bracton); Duodecim Tabularum 451-449 BCE, a code drafted by a commission of 12 men, ratified by the Roman Centuriate Assembly, engraved on 12 tablets, and attached to the Rostra before the Curia in the Forum of Rome; Acilian Law on the Right to Recovery of Property Officially Extorted 122 B.C.} The Framers did not use the term "commerce" thinking that the categories of things that would fall into this area of Congress' power would be categories of people. Yet, one basis for the HCPA, which regulates conduct toward enumerated categories of people, is Commerce Clause authority. The interrelatedness of property and personal rights originated at the same time as the concept of "race," at a remote time in history, from ideas that remain familiar to us today. Nor does their interrelatedness necessarily stem from the definition of slaves as property, although slavery made "race" (skin color) an economic matter. As detailed below, the Constitution does not name slaves as property, despite the attempt to reify Enlightenment abstractions in terms of physical things. In an assertion that strikes one as oddly regressive, even progressive academics have claimed that the "framers of the Fourteenth Amendment were radical redistributionists. The Thirteenth Amendment [freed] the slaves without compensation in the biggest redistribution of property in history."\footnote{See Akhil Reed Amar, \textit{Foreword: The Document and the Doctrine}, 114 Harv. L. Rev. 26, 85 (2000).} How can we understand this statement in both historical and jurisdictional terms, and where does that leave us in the development of the concept of "hate crime"? To answer this question, we look back further in history.
b. Laws, Bodies, Persons, and the Body Politic

The following subsections provide the groundwork for governmental powers over categories of persons, along with a summary of early conceptualizations of personhood and agency, the antecedents to contemporary notions about "identity." The documents spotlighted below are either directly mentioned in the text of the HCPA and related congressional findings, or indirectly linked to ABL because they contain seeds of the same content.

First, the ancient concepts of "property," "person," and "law" explain the pillars on which U.S. constitutional principles were based. Second, the identification and explication of these sources leads to the earliest known documents on American soil to speak of people in the familiar categories befit into the concept of "hate crime." One document in particular is believed to be the first written petition in the colonies to formally publicly protest enslaving Africans. This petition, presented in 1688, is the earliest document I was able to find in my archival research that groups "race," skin color, and ancestry as populations vulnerable to these abuses by officials. State action (and inaction), as demonstrated in the previous subsection reviewing desegregation, is central to emergence of the concept of "hate crime." Thus, third, the following section highlights the origins of categories of persons, originating the meanings of "race," and the uses of categories to justify state action, which gives permission to "hate" Others. Fourth, throughout this subsection, the developments of identity—notably identity-as-agency, identity-as-experience, and performative identity—are highlighted, to track the path to modern meanings of the term. Fifth, the material summarizes the role and meaning of the Reconstruction Amendments in the context of the concept of "hate crime." Finally, in total, this subsection describes the Knowledges that form the keystones of identity, power, rights, etc., that form the underpinnings of the concept "hate crime."
The material following is broken down into these historical topical progressions:

Subsection (i) Laws and Persons:

- Property and Identity;
- Laws of (arising from and imposed on) Land;
- People as (Royal) Subjects;
- Saints, Strangers, and Authority;
- Authority, Action, and Agency;
- Saints, Agency, and Writings;
- Property and Self-as-Agent;
- Self-awakening and conceptualizations of "humanity";
- Law of People; and
- Imagining Sovereignty and Self.

Subsection (ii) Politics and Races:

- *Res*, Race and Social Control;
- Performative Identity and Suspension of Disbelief;
- Codifying Skin Color;
- Political "Bodies";
- Protesting Slavery;
- Logical Consistency in Liberty and Humanity; and
- Logic of Othering.
Subsection (iii) Agency of Others:

- Law of Letters;
- Emotivity and Identity;
- Limits on Reason;
- Identity Dislodged;
- Law of Citizens;
- Reconstructing Rights of Others; and
- "Badges and Incidents" and the Thirteenth Amendment.

i. Laws and Persons

I learned by degrees the sad fact, that the "little hut," and the lot on which it stood,
belonged not to my dear old grandparents, but to some person who lived a great distance
off, and who was called, by grandmother, "Old Master." I further learned the sadder fact,
that not only the house and lot, but that grandmother herself, (grandfather was free,) and
all the little children around her, belonged to this mysterious personage, called by
grandmother, with every mark of reverence, "Old Master."

—Frederick Douglass, My Bondage and My Freedom (1855)

Res, Realis, Estates, and Persons

Personal rights and freedoms are less mature in every measure of legal development than
laws contemplating "real" things—res, a "matter" or a "thing,"; Late L. 3rd c. realis meaning
"actual"; ME mid-15th c. "relating to things"; Old Fr. reel (compare Old Fr. 15th c. roialte,
royalte, "office or position of sovereignty"; L. regalis). To the degree that persons had rights,
their rights were generally related to land ownership. The surviving detail of the Code of Hammurabi (1750 BCE) offers examples of the link between personal rights and land: The most extensive civil rights were granted to patricians ("amelu") whose ancestral estates were registered, along with other significant biographical information. The least extensive were granted to indentured servants ("ardu"), who were considered the chattel of their masters (unless they bought their own freedom), but who might acquire property, "own" servants, and marry a freewoman, whose dower then belonged to the servant-husband and not the master, even upon the servant's death, when half his estate passed to master as heir. As chattel, servants were branded with identification marks, usually the master's name tattooed or branded on the arm, which could only be removed by surgical procedures. The mid-range of rights were granted to the landless ("muskinu," sometimes incorrectly translated "beggar"), who were free but not connected with the king's court, lived in a designate area of the city, and were granted certain financial subsidies for fines or medical care.\(^{528}\) Aside from agriculture, land ownership was the source of income, ancestry, royal titles, even the ability to own human chattel, and these defining features of persons could be passed down to one's heirs, accumulated over time, and exploited as a source of influence or power.

What was "real" could be either movable or immovable. "Real estate" (c. 1660s, derived from Medieval L. "belonging to the thing itself") came to refer to immovable property—land—as distinguished from personal property or "movables." The quality of being "real" or connected to land implied permanence, which imbued with authority ideas like ownership, contractual transactions, and rights.

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the townes and Hamletts, villages, fields and grounds of Stratford upon Avon,
Oldstratford, Bushopton and Welcombe... countie of warr...and [in the backfriers in
London] all other my lands tenementes and hereditamentes whatsoever [and] my goods
Chattels, Leases, plate, jewels and Household stuff whatsoever... I gyve unto my wief my
second best bed with the furniture.

—William Shakespeare, Last Will and Testament (1616)

1600s

Law of Land

The "law of the land" refers to a jurisdiction—e.g., the United States or England—where the People who populate the land are governed uniformly by its laws, which apply even to the ruler(s). In the phrase, "law" arises as much from land as it applies throughout the land. This reflected the early realities of land as the subject of legal claims, taxes, and a Marxist-style means of (agricultural) production. "Land" was real property, and only from something real, something "evident," could law be given effect. The Magna Carta (1215), for example, contemplated only the King and the Barons. Notwithstanding the nuances of the phrase "law of the land," none of the signatories thought that peasants, who did not own land, effectively had a part in the agreement.

Later, the 1689 English Bill of Rights—the "Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown"—presented by the English Lords to William and Mary, prince and princess of Orange, stated that the authors were "fully and freely representing all the estates of the people of this realm." Their indictment of King James for enumerated grievances—policies designed to "subvert and extirpate the Protestant religion, and

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529 The language draws from Magna Carta for inspiration, and emulated its "law of the land" language. Versions of it can be found in the Virginia Constitution of 1776, the North Carolina Constitution of 1776, the Delaware Constitution of 1776, the Maryland Constitution of 1776, the New York Constitution of 1777, the South Carolina Constitution of 1778, the Massachusetts Constitution of 1780, and the New Hampshire Constitution of 1784.
the laws and liberties of this kingdom”—demonstrate the need for law to "arise from" land (landownership), since decrees issued by a single self-interested ruler could be easily abused. Early objections to "rule of man"—a single person claiming divine or ancestral right to rule a people, presumably, in despotic or capricious ways—could be resolved with a uniform "law of the land" that applied even to the ruler.

Built into the idea of uniform and fair laws applicable to all, with limited liberty for citizens, was a recognition of human dignity and moral worth. Under the Code of Hammurabi, even the members of the lowest caste were treated with dignity, because they were mentioned in the Code at all.

The modern conceptualization of "law of the land"—or "supreme law of the land," distinguishing Supreme Court rulings from rulings of localities—refers to jurisdiction. But it need not be limited by geography. In theory, because the phrase as a whole has shed its literal roots, the "law of the land" could describe the rule of law of a People connected by something other than geography. If, for example, WWIII one day collapsed national boundaries either through environmental destruction or by dislodging national identity from is land-based conceits, "law of the land" could apply to people linked only by their consent to a particular set of laws—fairness and uniformity being implied in the both the democratic nature of "consent" and in the essential characteristic of "law" as rule or formula. Individuals cannot issue "consent" that admits larger or smaller quantities of applicability of whatever they consented to. I can consent to some terms and not others, but I cannot, to borrow a Trump expression, consent "big league" (or "bigly") to some terms and "little league" to others, or consent to terms applying more to some individuals and less to me. In this way, "law of the land" may be along some arc of

530 "Rule of law" meaning "supremacy of impartial and well-defined laws to any individual's power" is from 1883.

531 Greg Russell, "Democracy Papers: Constitutionalism: America and Beyond," Series Editor Melvin I. Urofsky, https://www.AIT.org.tw/InfoUSA/zhtw/DOCS/Demopaper/dmpaper2.html (noting that "the English Revolution was fought not just to protect the rights of property (in the narrow sense) but to establish those liberties" such as "rule of law" and "rights of man," which are echoed in the American Declaration of Independence of 1776 and in the French Declaration of the Rights of Man in 1789).
inversion, since the essential feature of actual "land" is no longer embedded in the meaning of the phrase. For this model of "law of the land," we might look to Star Trek where there is nothing but space. The phrase may one day refer to governance "free" of the hindrance or "tyranny" of land-based frameworks. If reality can be "virtual," then we can imagine a "land" unanchored to *terra firma*.

A national identity transcending land comes with related changes in personal identity, Self-conception, and "Other-conception." Consent as the central feature of law implies agency: the consenting individual participates in his or her own governance within the jurisdiction of a certain nation, thereby adopting the national identity of the jurisdiction coupled with the supreme law of its "land." Thus, personal identity emphasized personal agency. But the fact that individuals have the inherent agency to consent does not mean they have the physical ability to exercise that agency.

> And now, think you, we have no souls to fire, no brains to weigh your arguments; that, after education such as this, we can stand silent witnesses while you sell our birthright of liberty to save from a timely death an effete political organization? No, as we respect womanhood, we must protest against this desecration of the magna charta of American liberties...[and] our demand must ever be, "No compromise of human rights"—"No admission to the Constitution of inequality of rights or disfranchisement on account of color or sex."

—Elizabeth Cady Stanton, Susan B. Anthony

### People as Subjects

The question of person-as-property was an inconvenient one from the start of the New World. As a practical matter, the imperatives of sustaining their outposts and fulfilling their
charter to the king fully occupied the colonists' thinking. In the tiny compounds of the colonies and later as commercial interests burgeoned at ports and on plantations, the colonists understood servitude as another organizing principle that fit their place as a subject of their king and "master." Freedom of religion was the primary, if not the only, clear form of freedom the settlers understood. Limited freedoms on property and the necessity to prosper to survive—as opposed to the opportunity to do so (e.g., to pursue happiness)—was built into their perspective on everything else, especially the narrow application of liberty and the inherent inequalities among persons. Because colonial cultural Knowledges were framed by higher powers of god and ancestral claims to property, tradition governed their communities. Even freedom of religion did not involve freedom from one's "legeance" to the king. Under early legal precepts, "derived to us from our Gothic ancestors," a subject's loyalty is "the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject." Without the king's protection, there was only god.

Because social communities tend toward hierarchies and hierarchies breed dissenting competition, the need for a figurehead, a physical presence who would satisfy as concrete representation of "god" or "authority," was necessary to colonial social order and Othering. Until Jefferson declared that men were "created equal," social Othering, with the nod of an imagined god, was the total social order. Hierarchies imposed by some other force may have determined one's fate, but one was at least able to be secure in having a fate, with the king's protection. Without Life, Liberty did not matter. Equality was the mechanism by which the authority for maintaining mutual safety and social order was redistributed to citizens—who would no longer conceive of themselves as "subjects." When we all share authority over the social order, we do not need an omnipotent ruler. That much of the ruler's authority is relocated in "the People."

This was one of the innovations of independence from England.

532 Blackstone’s Treatise, The Rights Of Persons, Book I, Chapter The Tenth, Of The People, Whether Aliens, Denizens, Or Natives” At 534 (1765).
533 Blackstone’s Treatise, The Rights Of Persons, Book I, Chapter The Tenth, ”Of The People, Whether Aliens, Denizens, Or Natives” At 534 (1765).
Rousseau’s ephemeral social contract flattened hierarchical ordering and placed mutual responsibilities in each individual to participate in the social order. Public safety, peace, orderly social structures formed the sober foundations for "pursuing Happiness." Modern conceptualizations of identity-as-expression, in which "happiness" hovers in the background, have created a crisis of the social contract, leaving its delicate mutuality unbalanced and probably unsustainable in its current form. Today, ties that bind are perceived negatively, as restrictions on freedom, rather than the firmaments of a structure that theoretically can secure freedom for everyone. When one person stretches the bonds between us, other people, their latent authority, and the bonds themselves are realigned. In this way, conceptualizations of authority (king or god), individuality, and social order are deeply interconnected. To reimagine one create crises in the others. Patterns of reconceptualization followed by a domino effect of change form the path by which the U.S. stitched together its national identity—at times in usurpations of god-like authority that looked like a nation drunk on the Declaration of Independence.

Enthusiasm for the nationalist expansionist policies—encapsulated in the term "Manifest Destiny" in 1845,\textsuperscript{534} nearly 200 years after the first commercial venture inland from the bay-bound colonies\textsuperscript{535}—were built on the idea that, between the Christian god and the men of other nations, the American people enjoyed special blessings of "exceptionalism." Individual allegiance thus shifted to the Destiny of new independent nation. But the blueprint of American


\textsuperscript{535} Jack E. Maxfield, A Comprehensive Outline of World History 601-05 (2009), available at \url{http://cnx.org/content/col10595/1.3/}:

\begin{itemize}
  \item The first commercial venture into the Hudson Bay area was in 1668 when Fort Charles was built by Scottish entrepreneurs. Two years later the Hudson Bay Company was chartered with title to nearly 1.5 million square miles of territory. French and Scotch-English fought minor skirmishes in this region over control of the land and its furs for the next 100 years. (Ref. 212 ([285])).
  \item Expansion inland was not taken up with any zeal until after at least 1680, because the region contained mortal dangers that the new settlers were unprepared to fend off. For colonists, the American frontier was foreboding, deathly, full of mortal challenges, and did not extend much further inland from the Atlantic coast than was necessary to subsist. This was the European perspective on American expansion until at least 1680.]
\end{itemize}

(Id.)
freedom was very narrow. Only some were part of the Destiny. Although the manual labor of everyone—even those excluded from the benefits—would be required, it was not difficult for the colonists, facing daily threats to personal security and economic pressures, to disregard the various conflicts within high-minded Enlightenment ideals that were sprouting in the very acts of taming and tilling American soil.

The first 19 or so Africans brought to the Jamestown (VA) colony in 1619 were "stolen property." They had been shipped to the colony by Dutch traders who had captured a Spanish slave ship. The colonists deemed the Africans indentured servants and folded them into the approximately 1,000 English (light-skinned, "Mulatto" or White) indentured servants already in the colony, many of whom were criminals working off their sentence. But granting them debtor-slave status, one step above permanent enslavement, did not arise from a sense of equality of man or imperative of freedom. Rather, the English colonists were familiar with the Spaniard practice of baptizing their captives, including Africans before embarking from the "dark" continent, and English law exempted baptized Christians from being slaves.

In this early Charter Generation, skin color was not viewed as definitive of status or personhood. Dark-skinned and mixed-race former debtor-slaves became farmers, typically with material assistance from their former masters. Generally, early records suggest that southern and eastern Europeans were accustomed to diversity in racial hue, while northern Europeans

536 Indentured servants of every color were freed after the prescribed period and given the use of land and supplies by their former masters. Thus, this "charter generation" of colonists had a small population of mixed-race men (Atlantic Creoles who were African and Iberian), who were descendants of African women and Portuguese or Spanish men who worked in African ports as traders or facilitators in the slave trade. Twenty years later, in 1641, Massachusetts became the first colony to authorize slavery through enacted law.

European slave traders met with African villagers, who sold their fellow Africans to them. The slaves were predominantly—though not exclusively—black, as were the Africans who sold them, and the slave owners were predominantly white. One cornerstone in the legitimization of their subjugation was that Africans sold their own people as slaves; southerners asked, what better evidence was there that Africans "belonged" to the slave caste? Slaves were considered little more than any other type of tool, such as a plow or a tractor. The British, French, and Spanish who settled in the New World thought of slaves as an investment, the "Golden Goose" that (not "who," since indigenous people of any kind were not thought of as people) would confer free labor for generations to come. The more children they had, the more descendants could be used or sold for a profit as slaves.
were less familiar with dark-completed persons, but did not associate skin color with status. When Mulattoes were mentioned in texts, it did not connote denigration.

But the punctilious attention to religious barriers to slavery gradually eroded. Roughly 20 years after the first Africans were recorded in the New World, the Massachusetts colony enacted the Body of Liberties in 1641, which provided legal authority for the ongoing practice of coerced labor, as well as permanently enslaving captives of war and criminals whose sentence was severe enough. Slaves of this sort were generally not white-skinned English subjects. The Body of Liberties referred to them as "Strangers."

1620

Saints, Strangers, and Authority

The earliest record of "Strangers" on American shores (literally) was found in the 1620 Mayflower Compact. The Compact was drafted quickly while still aboard the Mayflower ship, which had at Plymouth (MA) not its intended destination (VA), to avoid stepping on land not encompassed in their charter and risk a mutiny. The drafters, separatists from the Church of England who called themselves "Saints," feared that the other English passengers who were not separatists—the "Strangers"—would threaten their necessary collective "Ends" of forming a colony under their charter. The authority of the signatories was already established on the vessel, so the leaders signed for all the passengers. The "Saints" wrote:

We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James...Having undertaken for the Glory of God, and Advancement of the Christian Faith...a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick.⁵³⁷

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⁵³⁷ Mayflower Compact (1620).
The drafters of the Compact explicitly derived authority from two sources: King James, to whom they professed loyalty as subjects, and their own actions of venturing to the New World. They link "God, Glory, and Faith" to both the king and their own voyage "undertaken for the Glory of God and Advancement of the Christian Faith." These sources of authority reflect the two ages between which this document sits: the Middle Ages, when one's life depended on fealty to the monarch, and the Age of Discovery (which bled into Enlightenment thinking), when independent authority could derive from human agency, which was strongly associated with voyages, colonization, and discovery. The root meanings of these words overlap: "royal," "regle," "rule," "real"; "real," "actual," "action."

**Authority, Action, and Agency**

Fleeing to the New World, an act of religious protest, imbued the colonists with authority. Courageous acts, enduring risk and uncertainty, contrasted starkly with the old way of wielding royal authority inherited passively. "Kinghood" derives merely from being born into the right slot of the first born son, the heir; it is passive. Colonists and the later Framers, deploying Enlightenment thinking, imbued certain actions as constituting authority, which provided the authority to engage in more action and exert authority over the fruits of that action, and so on.

A century-and-a-half later, the **U.S. Constitution** derives its authority from the act of constituting. For the Framers, their worldview leavened by enlightened ideals, the authority of the nation was a given; it had already been declared. What the delegates had to do was inscribe the "bricks and mortar" of nation that defined itself as always constituting, always in action—expanding its territory, reelecting new leaders, progressing in its "just dispensations of the disputes of men" by continuous judicial reinterpretation, striving for a "more perfect Union,"—ever in the process of becoming. (The only remnant of governance built on tradition is the legal concept of precedent to guide new decisions, encapsulated in the term *stare decisis* (L. "things decided are fixed").) The challenges of putting in writing the "terms" of the Union that was so
deeply divided became clear in the transcripts of the debates. Fifty-five delegates, working in essentially one room, subject to the extremes of weather, wearing the customary itchy wigs of Old World and continental Europe, sleep-deprived, unshowered, with bad teeth and worries about the spread of chicken pox in the colonies, etc., debated the best formula by which to construct a government aspiring to the inalienable equality of all men (while denying itself that aspiration). The delegates bet on constitutional compromises on the belief that failing to do so would ruin the nation. Their perspective of the nation as processual echoes in the terms they chose, including the interrelated functions and powers of the branches of the government, like clockworks, and the backdoor, in the form of amendments, in case their best guesses about Self-governance turned out to be wrong.

Saints, Agency, and Writings

In contrast the high-flying Enlightened thinking of the Framers, the authors of the Compact communicated the limitations of their worldview. The Compact was backward-looking in form and function: In it, passengers "covenant" to a social contract that is governed by general principles of "just and equal Laws" for the "general Good of the Colony" as a whole. But the thrust of the Mayflower document was to protect the authority of the drafters—White, English landowners—when their ship's arrival at an unintended destination called into question the grant of the king. This document was the bulwark against the mutiny of the Strangers and an extension of the authority of the Saints. As its name implies, the Compact was hard, hardened by the overlapping interests and fixed allegiances of the parties. No one on board the Mayflower conceived of him- or herself as having agency or equality, let alone such advanced ideas as dignity as a human or inherent moral worth.

In establishing authority, the Mayflower Saints referred to "Laws, Ordinances, Acts, Constitutions, and Offices." These five items—four of which are legal documents and one which is an embodiment of law—share the attribute that they are imbued with authority by virtue of
their issuance or enactment: "author," "authority." Although they were among the first of the "Charter Generation," the "Saints" do not mention charters, which were temporary, and they do not mention declarations, which, for reasons implied in the name, reached full bloom of the Enlightenment period. The Saints merged the idea of the authority to act (in written documents) with the authority derived from acting.

1700s

Property and Self-as-Agent

By the early 18th century in Europe, the understanding of individual agency was taking shape in law. The distinction between property and person crystallized in unremarkable contract laws. In particular, laws governing the assignability of a "chose in action" (Fr. "chose" meaning thing or object)—a lawsuit—were beginning to be modified to permit the transfer of such rights.538 Courts were given jurisdiction over suits by individuals who held an interest in the cause of another, and individuals were recognized as having standing to sue as owners of a right that stemmed from the circumstances of another person. This small shift in law represents the crystallization of a major change in the conceptualization of "identity." Looking backwards in history, identity is connected to, even defined by, one's connection to property. Ownership interests in physical (real) property are determinative of one's rights. Rights and interests are the only thing that offered one legal protections. If protections were violated, one had access to the courts—to the extent that formal proceedings were geographically or politically possible. So identity, property, rights, and legal actions were (and still are) bound together. This new law reflected a profound shift in the concept of "Self": Recognizing legal actions as "choses" that could be separated from the individuals whose rights were directly affected by circumstances affecting their ownership interests indicated a crimp in the direct link between identity and property (and all that came with title and physical ownership). Circumstances that violated an

individual's right and interests created a new item of value—a new *intangible piece of property*—and that intangible property (an abstraction) with an unknown value (another abstraction) could legally be transferred to another person (this process, a third abstraction) as if it were a "chose" (a thing), even though the precise shape or measure of the intangible "chose" could not be known until the lawsuit was over. All of this took imagination; not simply the imagination of an individual making rights claims, but the imagination of the collective to institutionalize these abstractions—these imaginings—in the legal system.

All of these changes demonstrate shifts in the concepts of "Self" and "identity": (1) identity need not be directly linked to property; (2) property need not be tangible; (3) rights need not be directly linked to tangible or intangible property but could be formed in indirect (abstract) links; (4) abstractions transform the property into a "movable," whether or not the property itself is movable or immovable; (5) documents reflect the abstract and intangible elements of the transaction; and (6) abstractions have value to the extent the property holder takes action to realize their value. When property need not be associated with a particular person, the concept of "identity" need not be built on property or other tangible items. But intangibility requires the person to take action to obtain the property's value. Hypothetical value has only potentiality.

When Jefferson wrote about "inalienable rights" in the **Declaration of Independence (1776)**, he was demonstrating that rights granted to all men by their Creator remained hypothetical, and therefore essentially valueless, until exercised. And, between the colonies and King George, declaring these rights was tantamount to exercising them. Both the law and the Declaration reflect the emergence of the imperative and formalization of Self-as-agent, or identity-agency. As a point of comparison, the 1689 English Declaration of Rights was drafted without the immediacy of agency. The document does not in fact declare rights; it declares *wrongs*—the wrongs of the king. The language enumerates "rights" implicitly, by identifying actions taken by King James II as illegal and listing what "ought to be": election of members of
Parliament ought to be free; Parliaments ought to be held frequently; excessive bail ought not to be required; etc.

Enlightenment Era narratives are rife with examples of newly discovered agency: declaring independence, holding truths to be "self-evident," constituting a sovereign nation, rights of citizenship include voting, marrying, traveling, contracting; the nation didn't "have" a destiny, the nation manifested its destiny. Agency itself expressed something about the identity of the person acting. As discussed earlier in this dissertation, American identity is imbued with the emotivity of self-actualizing pursuits. Thus, by the time the law regarding "choses in action" was passed, personal agency was understood to operate on property, not necessarily the other way around.

The authority and proof for abstract property interests were found in documentation, the physical manifestation of the circumstances surrounding the property. Consider the example of an IOU. An "I owe you" is documentation representing You's ownership interests in money or goods from I because of work or goods already transferred from You to I. The document was linked to property, actions, or services exchanged between individuals. Depending on the sophistication of the commercial and legal systems in a given region at some point in history, debts were extinguished with the death of either party. When formal debts to landlords or other business creditors were treated as owing upon death, they were extracted to the extent possible from the individual's estate. Nothing provides clearer evidence of the separation between property and individual identity than the survival of debt after death.

Among lower (non-propertiied) classes, debts would very likely not be supported by documentation. People relied on each other's credibility, i.e., reputation for honesty, one's credit (trust that one will pay later; L. creditum meaning "a loan, thing entrusted to another"; credere, "to trust, entrust, believe"; mid-1500s Engl. "creditor" in commercial context; compare 1600s credit meaning "honor, acknowledgment of merit"; creditable meaning "deserving of recognition in moderated quantity consistent with what one has shown"). Credibility emerged from and was
integral to the parties’ connections to each other and to the community. Over time, supported by the development of formal court systems, documentation gradually eclipsed reputation. Under the law described above, the (intangible) value of the IOU (or in a reverse example, the debt it represents) could be transferred to another person—regardless of that person’s ancestry or other attributes. Property is thus dislodged from the concept of "identity." The individual's identity becomes irrelevant to the ownership or potentiality of the property, and the property not necessarily relevant to the concept of "identity." We are accustomed to this way of thinking, but prior to this development, a baron without property would have been an oxymoron.

Furthermore, until the holder takes action to realize its value, the IOU represents merely a hypothetical value. The owner's action is what creates its value. In a commerce-based society, the key role of civil law has been to reduce property-related abstractions to physical form. If people's imaginings are cannot be documented as realistic valuations, society may reach a crisis. Modern monetary collapses exemplify these crises. The dot-com bubble at the turn of the millennium, the housing market crash in 2007, and the resulting implosion of Bernard Madoff’s financial house-of-cards in 2008 are familiar examples of the meltdown that can occur when financial imaginings do not, in the end, correspond to actual value. An implicit example can be found in the trail of Trump bankruptcies—six in total—which suggest that his capacity to linger in his imaginings is more intransigent than most. Trump readily shares in the media and in social media his exaggerated imaginings about his wealth, which seem to conflate the value of the Trump holdings with the much larger value of everything emblazoned with the Trump logo—a category of which a significant proportion are business concerns and real property to which the Trump brand has been leased. So, in addition to ascribing wildly excessive hypothetical

539 The Madoff example is extraordinary in the trust invested in Madoff’s reputation and the longevity of that trust. Officials and customers alike sustained a belief in the hypothetical value of Madoff’s fund with no serious attempt to check that it could be reduced to real dollars. The Madoff case also exemplifies the strength of belief when it rests on the reputation of a respected debtor and the way that the failure of one IOU can bring down a nation of IOUs.

540 Although facts about the Trump holdings are hard to come by, his abstract imaginings often spotlight his wealth in exaggerated terms. Reliable commentators have estimated Trump’s net worth at
values to his net worth, Trump also exemplifies the hypermodern practice of branding, which adds a layer of abstraction in the practice of valuation by treating as concrete and reducible an identity-symbol that relies on public "imaginings" associated with the brandname.

With regard to the transition from reputation to documentation in transactions, the emphasis in modern eras has been on the documented IOU. Why? First, modern transactions are undertaken nearly entirely through documentation, because we encounter more strangers than we do familiar people in our daily lives. To transact solely or primarily with individuals whose reputation we know would not be feasible; markets and trade would grind to a halt. Second, increasingly, the ability to know another's reputation in his or her community (in our example, the reputation of I) is a challenge. Social media offers a window on what one is reputed to do, think, like, or profess, but this information is typically used to filter out individuals with negative strikes against them, not to "filter in" individuals who have a positive reputation. Third, in the modern era when identity is splintered, even a "worthy" stranger may present unforeseen risks that arise from other aspects of his or her identity. For example, Michael Vick was a good risk—even a great risk, depending on the IOU—until he invited a dog fighting ring to set up on his property. Fourth, the default position today has flipped: Conducting transactions with people one knows is generally considered ill-advised—for ethical and personal reasons. Transactions among family or friends, documented or not, put pressure on relationships, and if something goes wrong, legal action can destroy relationships with stakeholders. Fifth, unless a transaction is backed up by the potential for legal action—which requires documentation—people often take their obligations less seriously.

significantly less than Trump himself claims. See, e.g., Erin Carlyle, Trump Exaggerating His Net Worth (By 100%) in Presidential Bid, Forbes.com (analyzing Trump valuation claims, comparing to documentation and industry customs, and highlighting the distinction between Trump properties/businesses and "Trump" brands, which are licensed; also noting that Trump's six bankruptcies were businesses, not affecting his personal fortune), available at https://www.Forbes.com/sites/erin Carlyle/2015/06/16/trump-exaggerating-his-net-worth-by-100-in-presidential-bid/#4701100c2a97.
Thus, knowing the identity of another individual does not necessarily provide the reliable foundation for You to accept an IOU from I. Documents were supposed to be more secure than reputation, because the possibility of a legal action meant an individual's reputation was mostly irrelevant. But documentation has not entirely replaced reputation, because the signatures, which are representations of the commitment of signatories to the terms of the contract, are often only as good as the credibility of the parties.

"Self" Awakening

The separation of property from identity not only freed the concept of "Self" from traditions that fixed commerce to person, thus limiting commercial transactions, the separation took away presumptions about identity based on one's relationship to land and chattel. Social relationships changed as self-concept changed. The distinction thus formed one cornerstone in emerging ideas about equality. That anyone could theoretically acquire ownership rights in any property equalized that much of the concept of "identity." Similarly, the direct Self-God relationship, leading to a mass migration away from church-governed religions, buoyed the emergence of "Self"-concept. The potential for equality of identity among individuals in turn altered expectations about one's moral worth. To say that "all men are created equal" is to say that all men are created with equal moral worth and dignity.

The concept of "human dignity" is a relatively recent development. For most of human history, the concepts of "human" and "dignity" were not readily associated with one another. In fact, the earliest variants of "human" reflect organic qualities that contrast with "dignity": "humble" (13th c. ME); "adam" or "adamah" meaning "ground" (Heb. 10th c. BCE); "ghomon" meaning "earth being" (PIE). The terms distinguished humans from gods. ("Homunculus" meaning "a tiny man; little person" previously used to refer to "one, person, anyone, people" (L. Vulg. 300 BCE.) Usages of "human" that correlate with dignity or related ideas do not appear until just prior to the Enlightenment (e.g., "humane"; "humanity"; "humanities" meaning "polite
learning” (16th c.)). The transformation reflected in Enlightenment thinking can be seen in the lofty meanings attributed to words that had, in previous centuries, served chiefly as descriptors. Words like "human" became ideas like "humane." A person might be described as "dignified," but the idea of "dignity" was not conceptualized as a separate quality within persons. As with property rights discussed above, conceptualizing individual qualities as separable from a person—as ideas—made them equally accessible to all persons; equally demonstrable through action.

[My old master], when it suited him, appear to be literally insensible to the claims of humanity, when appealed to by the helpless against an aggressor, and he could himself commit outrages, deep, dark and nameless. Yet he was not by nature worse than other men. Had he been brought up in a free state, surrounded by the just restraints of free society—restraints which are necessary to the freedom of all its members, alike and equally—[my Master] might have been as humane a man, and every way as respectable, as many who now oppose the slave system; certainly as humane and respectable as are members of society generally.

—Frederick Douglass, My Bondage and My Freedom 61 (1855)

The chief accomplishment during the transition out of the Middle Ages was to throw off traditions and seek guidance for rules, laws, authority, etc., in ideas. Thus, the concept of "Self" transitioned from England’s 17th century "Self" as part of a community of worshippers, each with a direct connection to god, to an 18th century Revolutionary "Self" as part of a people, each with a direct connection to their own destiny, i.e., the agency to self-govern. National identities thus emerged from collectivity of individuals joined together in a unified goal. This is the early version of the "collective individuality" described in earlier in this dissertation. How did the colonists transfer the intensity of personal connection to god to one another? How did they
come to a Dumasian understanding of unity—"All for one and one for all!"—that was necessary for a successful system of self-governance? "Self"-conception lurched through a century of foundational changes in which features of "identity," such as authority, agency, and emotivity, were dislodged from their former traditional meanings. Through these changes, as the qualities once embedded in one's identity became distinct from the concept of "identity," the importance of "Self" became clear. With "Self" came "Other."

_Capable of high attainments as an intellectual and moral being—needing nothing but a comparatively small amount of cultivation to make him an ornament to society and a blessing to his race—by the law of the land, by the voice of the people, by the terms of the slave code, he was only a piece of property, a beast of burden, a chattel personal, nevertheless!_

—Wm. Lloyd Garrison Boston

Preface, _Narrative of the Life of Frederick Douglass An American Slave_ (May 1, 1845)

|| 1770s - 1880s ||

**Law of People**

Law of People is law that regulates human agency by consent. Whereas Land is passive, subject to the effects of man and nature, People do not endure the effect of man and nature passively. Conceptualizing governance as arising _from People_—usurping the role that Land once played—had profound ramifications for "identity." When the meanings that were once fixed to Land were transferred to People, the understanding of human agency radically changed. For the Founders, identity-agency was not merely the authority to fix power in governmental structures of the Charter Generation. They understood identity-agency as the authority to _pursue_ and expand power. Westward Expansion was an outgrowth of this development. Once the People
shook off Old World associations between law and physical geographical boundaries, they were free to envision boundless possibilities.

Declarations were the expression for this radical alteration in the daisy chain of identity-agency-authority-power. Formal Declarations place the declarer in a particular stance of independence and equality to the reader. They take the form of private letters, often directed at an individual, but they have profound public consequences. The Declaration of Independence (1776) was epistolary, styled as a letter to King George, enumerating the intolerable grievances endured by "the People" under the King's rule and declaring a profound change in the way the colonists conceptualized their status. Their "disavowal" of the "usurpations" of the British officers in their "correspondence, connections, and consanguinity" was not simply a change in their relationship to the King, it declared a change in their relationship to power itself. Jefferson wrote:

[A]s Free and Independent States, [we] have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.\(^541\)

By an intention to "solemnly publish and declare" a new status, individuals with collective power may themselves usurp the power to rule. Declarations are a statement of the way things are now, from now on.

Once the traditions associated with physical limitation could be dissolved, the only restrictions were man him (or her) self. Identity-as-agency could take full form. As an example,

\(^541\) The Declaration of Independence (1776).
the evolution of the word "rape" pulls together these connections between property, law, and human agency. The legal "rape"—L. 14th c., to seize (property), abduct by force—originally primarily applied to stealing property. At a time when women were the property of the husbands, "rape" described the scenario exactly, although this usage was not common. The theft was understood separately from the defilement (L. 15th c. "stuprare," to defile, ravish) and personal disgrace (L. 15th c. "stuprum," disgrace; therefore, Yid. "schtup"). Shifting our attention once again between medieval and present times, the modern legal term "rape" before the reforms in the 1970s was still weighted by these ancient meanings. Among other things, the law required corroboration—either by a witness or evidenced in genital bruising or defensive marks—making the victim's own statements about her experience of the crime all but useless as an evidentiary matter. Moreover, focusing the area of inquiry on her body was a relic of woman-as-chattel or woman-as-object. In a process made more humiliating because of its public nature, the victim was forced, through trial processes, to participate in the objectification of her Self—part of the "revictimization" by the justice system that the Crime Victims Rights Act was intended to minimize. (See Appendix CVRA.) At the same time that women were treated as lacking agency in the proof that would support a judgment about whether a crime had happened to them, the cross-examination process was (and is, to a somewhat more limited degree) permitted to treat her as an agent in her own victimization. It took multiple Waves of Feminism for rape law reforms nationwide to focus the legal question on her "consent." Like "law of the land," proof of rape lost its necessary link to the physical body. The reference point for "rape" was relocated in internal processes, her state-of-mind. Her consent or lack thereof.

This illustrated a radical shift in cultural knowledges about female agency taking place in other areas of social life. The agency to give or withhold consent—to participate in sexual relations; to own, inherit, contract for and otherwise control property; to be governed—is the essence of "Liberty." A res from which agency can emerge is no longer an object; she is a person.

542 See Kelly Oliver, Witnessing: Beyond Recognition (2001).
A person who exercises her agency has liberty; she has the "Life" and "Liberty" necessary to be free to pursue "Happiness."

*Should I keep back my opinions at such a time, through fear of giving offense, I should consider myself as guilty of treason towards my country, and of an act of disloyalty toward the Majesty of Heaven, which I revere above all earthly kings.*

—Patrick Henry, "Give Me Liberty or Give Me Death" (1775)

Jefferson left the nation's trinity of freedoms open-ended and sufficiently undefined to accommodate unknown developments and attitudes of future generations of citizens and policymakers. This was the genius of Enlightenment thinking. The agency of women was among the open questions. Enlightenment feminists' in the U.S. and abroad fervently pursued equality, especially suffrage: Olympia de Gouges, retrospectively accepted as a significant French stateswoman, declared publicly, "Woman, wake up; the tocsin [sic] of reason is resounding throughout the universe: acknowledge your rights!" Although not inconceivable, equal treatment for women would have unknown consequences for male populations, and American state delegates were already scrambling for position amid the infighting that would determine whether the U.S. would steer toward Northeastern commercial import/export interests or Southern slave-plantation commodities. Citizenship (and agency) for women was not a priority.

At the same time the U.S. Bill of Rights was drafted in 1791, de Gouges sent to the French Queen a *Declaration of the Rights of Women and the Female Citizen (1791).* The Declaration sought equality in employment, inheritance, marriage rights, and equal opportunities to serve in "public dignities, offices and employments, according to their capacity, and with no other distinction [between men and women] than that of their virtues and talents" (Art. VI.). For this "treason," de Gouges was imprisoned, disowned by her son, and later guillotined. Given the communication and shared spirit of France and the States as they
formally united, this example may have strengthened the commitment of observers on American soil to the protection of free speech and formal venues for citizens' dissent.

**Imagining Sovereignty and Self**

Notwithstanding the recoiling "conceivability or thinkability scale"\(^{543}\) of the Founders with regard to the rights of women and people of color, these White men were learned, well-traveled, and curious. They were tinkerers in a world-lab, imagining applications of ideas in non-native contexts. Long before "Houston," they were the first to take "one small step for man, one giant leap for mankind": throwing off centuries of monarchical rule, and finding firm footing for a nation of self-rulers—"sixteen centuries of impossible things before breakfast." Their endeavor was metaphysical. Yet their aspirations were as "real" as land or chattel. They built a country on nothing more certain than the imagined unity of a "body politik." Formulating the first government wholly "of, by, and for the People" drew on pent up restlessness that overwhelmed the mortal risks of independence. Their aspiration was to continue the project of creating "more perfect Union," of enjoying life, liberty and prosperity—an unending processual task of *tikkun olam*. A visceral understanding of their own personal struggles made it possible to represent the People, to "body forth"\(^{544}\) as delegates in the determinations about self-governance. Although the "genius" of the Enlightenment mind harnessed science, political thought, religious ideals of the godliness of man and transcendence on Earth, and the language of empathy, the ingredient that gave these areas of knowledge their power was imagination.

The ability to comprehend one's Self as having the power of agency—as much as a king limited only by the identity-agency-power of others—allowed the Founders to imagine the agency existing in others. But it also allowed them to conceive of their own Self-interest in ruling the agency of others, especially a vulnerable population whose foreignness provided a

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justification for exempting them from identity-agency and whose dark complexion marked them as "Strangers." In some sense, imagination led the Founders away from Enlightened thinking.

*Naturalists tell us that a full grown man is a resultant or representative of all animated nature on this globe; beginning with the early embryo state, then representing the lowest forms of organic life, and passing through every subordinate grade or type, until he reaches the last and highest--manhood. (The German physiologists have even discovered vegetable matter--starch--in the human body.)*

—James McCune Smith,

Introduction, *My Bondage and My Freedom* by Frederick Douglass (1855)

For better of worse, the restless, boundless thinking of the Founding Era is visible in modern linguistic and legal acrobatics, for example, defining a "life" to begin before its cell structure has fully organized and marinated into a "life" that on any level can actually be lived, let alone pursue "happiness."545 Here we have a modern inversion of meaning: "Life," whatever it does mean, does not have to mean the ability to be biologically self-sustaining. (And, this peculiar Frankenstein of scientific advancement, which plugged into religious conservatism to bring us that funny-loony-odd artifact of modern life, if such a bastardized dynamic could be named,

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545 *See, e.g.*, Unborn Victims of Violence Act, 18 U.S.C. s 1841 (2004),
would itself be an inversion.) The dynamic I have called "inversions" is baked into the American identity.

ii. Politics and Races

Res, Race, and Social Control

That "race" is a social construction has become obvious. But intellectualizations of the concept of "race" sanitize its bloody birth as a system of categorization in the United States. To varying degrees, the historical record shows that "race" has been associated with inferiority, lasciviousness, bestiality, and barbarism, among other negative characteristics. Along with

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546 Concepts like "race" are easily dispensed with, given contemporary Knowledges. In fact, to not dispense with them would, in light of the information now available, seem to have colonialist implications. Historians like Felipe Fernández-Armesto articulate "partially new sensitivities" as a symptom of modernity within the larger history of humankind in which being human confronts the perplexing idea of what it means to "be" at all. Armesto sees such concepts as the life of an unborn child as problematic, since the "threshold" means the definition of unborn humankind is incomplete. Similarly, he contemplates the "frontier between humans and animals [and] arguments about the human status of Neanderthals," which he describes as "startlingly reminiscent of 19th century controversies over Blacks." (Felipe Fernández-Armesto, So You Think You're Human: A Brief History of Humankind 4 (2004). For a discussion this problem, see Arcangeli, supra, at 57.) Focusing on "sensitivities" rather than concepts of "culture" or "humankind," Jacobs and Potter take a slightly more disdainful view: "The current anti-hate crime movement is generated not by an epidemic of unprecedented bigotry but by heightened sudden sensitivity to prejudice, and more important, by our society's emphasis on identity politics." (Jacobs and Potter, supra, at 6 (1998).)

547 Jack E. Maxfield, A Comprehensive Outline of World History 33-34 (2009), available at http://cnx.org/content/col10595/1.3/:

| The origins and differentiation factors in the races of man continue to raise unsolved questions and continual new concepts. Certain features, such as skin color, which we superficially tend to use to categorize racial groups may be simply environmentally adaptive traits correlated with climatic conditions. Skin color varies, even within each race, with the latitude of the habitat. |
| (Id.)

Although ideas of race are centuries old, it was not until the 19th century that attempts to systematize racial divisions were made. Ideas of supposed racial superiority and social Darwinism reached their culmination in Nazi ideology of the 1930s and gave pseudoscientific justification to policies and attitudes of discrimination, exploitation, slavery, and extermination. Theories of race asserting a link between racial type and intelligence are now discredited. Scientifically it is accepted as obvious that there are subdivisions of the human species, but it is also clear that genetic variation between individuals of the same race can be as great as that between members of different races.
disabilities, the cultural artifact that skin color designates one as an "Other" is no longer questioned, even if exhortations to tolerate those Others are part of the package. Nearly all mechanisms to socially control "deviants" in American law are grounded in two main policy channels: criminal justice and mental health. Yet the earliest roots of "race" describe ways of categorizing things, not skin color or genetic heritage.

The race of youthful scholars is commonly badly brought up, and unless they are bridled in by the rules of their elders they indulge in infinite puerilities...You may happen to see some headstrong youth lazily lounging over his studies, and when the winter's frost is sharp, his nose running from the nipping cold drips down, nor does he think of wiping it with his pocket-handkerchief until he has bedewed the book before him with the ugly moisture.... [When reading, he] does not fear to eat fruit or cheese over an open book, or carelessly to carry a cup to and from his mouth.

—Richard de Bury,

Philobiblon (1473 first print [1345 written]), printed by The Printer of Augustinus De fide, a.k.a. (uncertain) Goiswin Gops or Johann Schilling (discussing the love of books, book collecting, and properly maintaining a library)

The original meaning of "race" was associated with channels or categories, ways of rationalizing divisions. One meaning is a "tract" (OME racu, meaning story, narrative; book, treatise ) or a "groove," "channel," or "passage" (13th c. Late OE from Old Norse rás, "current" or "stream"), consistent with both moving rapidly, e.g., a running race (12th c. Norse "a

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548 The link between negative characteristics and skin color is parallel to the negative links with disability. In Madness: The Invention of an Idea, Foucault explores the transformation of "madness" to "mental illness." He touches upon the practices attendant to categories of pathological people across history, and the way that those practices reflected the attitudes toward them. He traces the changing interpretations of the poor, disabled, and diseased—"in short, all those who, in relation to the order of reason, morality, and society, showed signs of derangement." Placing these categories of people within "the system of moral values and repressions," a punitive system "in which madness was associated with guilt and wrongdoing." (Michel Foucault, Madness: The Invention of an Idea 121 (1954).
rushing") and a branching out (late ME from Old Fr. *rais*, from L. *radix*, *radic* "root"). "Race" refers both to roots (literally in the ground) and the strong or rapid current flowing through a narrow channel (therefore, late 15th c. N.Engl. "rapid forward movement" or early 16th c. "a competition of speed"; mid-19th c. in the sense of "beating the clock"). This comports with another (rare) sense of "race" refers to the characteristics of flavor, typically of wine as a result of the soil (mid-16th c.). Thus the term describes the idea of channels or categories flowing from a specific point of origin.

The distinctive use of "race" to categorize branches of humankind is most often traced to the 16th century (1560s "tribe, nation, or people regarded as of common stock"; early 16th c. Ital. and Mid-Fr. *razza* meaning "race, breed, lineage, family"), but the root word, *ra*, is found in ancient usages to mean "head," related to "origin" (Arab. "beginning"; Heb. *rosh*). Texts from the mid 16th century refer to "races" of men to describe "groups of people with common occupation."

"Race" to refer to ancestry, as in "generation," is attested by 1540s. Early texts most often refer to practices or customs, not precisely ethnicity or complexion, and rarer still to skin color, which was not consistently understood as a source of prejudgment about character or division in social groups in ancient or even medieval times.

The formalization of "race" meaning "great divisions of mankind based on physical peculiarities" can be traced to the late 17th century. One of the forefathers of such divisions for scientific purposes was Carl Linnaeus, the Swedish taxonomist, who built upon earlier taxonomic systems of flora and fauna to develop a more complete system of categorizing species

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549 One example of such a race, a rushing, in the context of history is the 13th century Middle-English poem of nearly 30,000 lines containing a sort of summary of universal history referred to as the Cusor Mundi, "The Runner of the World." See, e.g., Cambridge History, A.W. Ward, ed., (1907).

550 OE þeode meaning both "race, folk, nation" and "language"; v. gehoedan meaning "to unite, to join."

551 For a recent examination of the references to African-Americans in early America, see Jennifer Schuessler, *Tracing the Label African-American to Colonial Times*, N.Y. Times, Apr. 21, 2015, C1.
that included humans. Linnaeus was obliged to revise his *Systema Naturae* (1774) to appease the criticism of the religious establishment about grouping humans *among* animals as opposed to *above* animals. A letter from 1747 quotes Linnaeus:

> It does not please [observers] that I've placed Man among the *Anthropomorpha*, perhaps because of the term "with human form," but...I seek from you and from the whole world a generic difference between man and simian that [conforms with] the principles of Natural History. I absolutely know of none. If only someone might tell me a single one! If I would have called man a simian or vice versa, I would have brought together all the theologians against me.\(^{552}\)

Linnaeus did not have a category for everything. The lowest category comprised the fauna he could not explain. This grouping, Paradoxa, included satyrs, which he described as "hairy, bearded, with a manlike body, gesticulating much, very fallacious...a species of monkey, if ever one has been seen."\(^{553}\) (Linnaeus did not apply these descriptions to dark-skinned persons.)

\(^{552}\) Linnaeus' letter to Gmelin, 1747.

A similar system of taxonomy to Linnaeus is traced to when botanist Rumphius, working for the Dutch East India Company, living on an island in what is now Indonesia, produced the *Herbarium Amboinense*, which was not published until decades after his death. It was "produced in the face of severe personal tragedies, including the death of his wife and a daughter in an earthquake, going blind from glaucoma, loss of his library and manuscripts in major fire, and losing early copies of his book when the ship carrying it was sunk. In addition to his major contributions to plant systematics, he is also remembered for his skills as an ethnographer and his frequent defense of Ambonese peoples against colonialism."

Linnaeus, and a predecessor who developed botanical systems of speciation, Rumphius, were not colonialists; in fact, the latter lived in the Spice Islands and was staunchly opposed to the imperialist policies of the Dutch, who had claimed the islands and dominated the native Ambonese peoples.

\(^{553}\) Linnaeus, *Systema Naturae* (c. 1774).
Although Linnaeus was not chiefly concerned with skin color, he based his systems on what was observable, and ultimately arrived at a system by which many was divided man into four groups according to continent, which correlated to skin coloring. The latter emphasis dominated the scientific literature about human races into the 20th century. (See Figure 12: 1748 Antropomorpha; Homo, Simia.)

Source: *Systema Naturae* by Carl Linnaeus (1748), http://commons.wikimedia.org/wiki/File:Linnaeus_Systema_Naturae_1748.jpg

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Johann Blumenbach, a German naturalist who contributed studies of comparative anatomy to the early field of physical anthropology, divided humans into five categories of races. (*On the Natural Varieties of Mankind* (1775 [tr. 1865])). The five-category system published in works by Carleton Coon is familiar to most people today. Coon theorized that each category derived from a different branch of the primate tree:
- Caucasoids: Europeans, White Americans, Middle-Eastern Whites, Arabs, Jews, Persians, east Indians and the Ainus;
- Mongoloids: Chinese, most East Asiatics, Polynesians, Eskimos, American Indians and Indonesians;
- Congoloids: African and American Blacks, and pygmies;
- Australoids: Australian aborigines and some tribes of India and the negritos of southern Asia; and
- Capoids: San (Bushmen) and Hottentots. (Carleton S. Coon, *The Origin of Races* (1962 [1968])).
Darwin established the bases for the classification of man among primates as one branch of the tree of evolution (1838-1871), solidifying the breach between science and religion that Linnaeus had declined to enunciate. Darwin wrote:

We must bear in mind the comparative insignificance for classification of the great development of the brain in man... [N]early all the other and more important differences between man and the [other primates] are manifestly adaptive in their nature, and relate chiefly to the erect position of man; such as the structure of his hand, foot, and pelvis, the curvature of his spine, and the position of his head.555

In 1876, Cesare Lombroso published Criminal Man, presenting his theory that criminality is innate criminality and is subject to positivistic measures. In a series of five successive editions, Lombroso borrowed Darwinian frameworks to demonstrate the superiority of noncriminal ("honest") people compared to criminals, of males to females, and of Whites to non-Whites (primarily Black persons). In The White Man and the Man of Colour (1871), Lombroso linked "race" to variance in human development (with persons of African descent being inferior to

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Blood types have been used to categorize more numerous races that somewhat vary these groupings.

"Certain features, such as skin color, which we superficially tend to use to categorize racial groups may be simply environmentally adaptive traits correlated with climatic conditions. Skin color varies, even within each race, with the latitude of the habitat. The Mongoloid peoples of Southeast Asia are much darker than those of northern China; Caucasoids of southern India and southern Arabia are quite black; central American Indians are darker than those farther north. Similarly, fair skin, blue eyes and blond hair are climatic adaptations by natural selection to a cloudy, dimly lit northern environment, where every bit of Vitamin D from sunlight is needed and must not be filtered out by melanin in the skin, if the individual is to survive." (Jack E. Maxfield, "A Comprehensive Outline of World History" 33-34 (2009), available at http://cnx.org/content/col10595/1.3/.)

Charles Darwin, The Descent of Man (1871).
white-skinned persons), which in turn was linked to atavism, all of which formed interlocking "scientific" determinants of criminality and other undesirable behaviors. Lombroso recorded copious measurements of the physical attributes of criminals (e.g., skull size, nose shape), as well as their manner of self-expression through writings, drawings, and body tattoos. Lombroso's efforts drew attention to the nascent field of criminology without actually contributing robust content about the cause of crime.  

Darwin's theory of evolution contributed to the development of the field of eugenics (like the name Eugene/Eugenia, meaning "well-born" from Gr. eu meaning "well"; genus or genos meaning "descendant" or "member of the [genetic] group"), notably by his cousin Francis Galton.

Derivative terms, like racialism (1871) and racialist (1917), were replaced in common usage by "racism" (1930s from French racisme, 1935, applied to Nazi eugenic theories). The original meaning related to general categories, whether to describe ancestors or of industries, was overshadowed in the U.S. with the dominant usage as a convenience of slavery and later as a justification for it. (See Figure 13: 1950s Scientists Say Negro Still in Ape Stage.)

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Figure 13: 1950s Scientists Say Negro Still in Ape Stage


By the time Galton explained the desirability of giving “the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had,”557 the study of humans had diversified according to fields of knowledge, from physical health to intelligence. Advances in science should have set aside Linneaeque

557 Francis Galton, Inquiries Into Human Faculty and Its Development 17 (1883).
taxonomies in favor of nonracialized Knowledges, notably blood types (1955, William Boyd) and DNA (1950s-1980s Watson, etc.), should have eclipsed "race" as scientifically useful at all. Yet the biological insignificance of skin color and indeed "race" did not lead to a redemptive "human rights" orientation to categories of persons. The seduction of "improving" the human race—meaning Aryans—through medical science only heightened the emphasis on the dominance of White (Aryan) types in the U.S. and abroad. (In a larger context, the march toward "building" a perfected man, part Golem, part Einstein, reflected apprehension about warring nations between WWI and WWII.)

One has only to view the self-satisfied expressions on their faces as they posed beneath black people hanging from a rope or next to the charred remains of a Negro who had been burned to death. What is most disturbing about these scenes is the discovery that the perpetrators of the crimes were ordinary people, not so different from ourselves—merchants, farmers, laborers, machine operators, teachers, doctors, lawyers, policemen, students; they were family men and women, good churchgoing folk who came to believe that keeping black people in their place was nothing less than pest control, a way of combating an epidemic or virus that if not checked would be detrimental to the health and security of the community.

—Leon F. Litwack,

Without Sanctuary (2000), a book of lynching postcards collected by James Allen
If other nations were looking to the U.S. for guidance, the long and unabashed culture of lynching African-Americans provided the permission to engage in similar forms of extermination of their own local "pest control." Even as late as the 20th century, the permissive
attitude toward ritualized torture of Black people in the U.S. Can be documented in postcards depicting the result of the violence—scarred, charred, mutilated and maimed bodies dangling from ropes, surrounded by local citizens who refer to barbecues and picnics in their messages. (See Figure 14: 1911 Unmailable Postcard of Lynching of Laura Nelson, Okemah, OK, by G.H. Farnum.)\(^558\) The grotesquerie, which reached a peak by 1908 and prompted the U.S. Postmaster to ban lynching postcards from the mail system, exceeded even the objectives of "ethnic cleansing." The extreme and gratuitous violence was a catalyst for social gatherings and a form of entertainment, such that White social dominance presented an existential threat to the African-American community. The failure of the U.S. legal system to protect its vulnerable population(s), coupled with unparalleled impunity for the actors, was rationalized using the "science" of race.

Although lacking an external systematic mechanism to make extermination into a national industry, the American system of prejudice seeped into state laws designed to eliminate "undesirable" categories of persons from society, and in time, from the national identity. From the same strain of science, this techno-medical formula appeared in other countries spontaneously or by replication. Specifically, Virginia eugenics laws were said to have inspired the Nazi exterminations approach to the "Jewish Problem." This system of belief made its way into the 1960s church and temple bombings in the South and the 1998 murder of James Byrd, Jr., in the commitment of the offenders to "the task of saving America and the White race and the preservation of the pure blood of our forefathers."\(^559\) White Supremacist groups drew inspiration from Nazi propaganda (1933-1945), which invoked taxonomic imagery showing Jews

\(^{558}\) The notations for the postcard of Laura Nelson indicate that her son was also lynched. A grand jury, convened by District Judge Caruthers in June 1911 to investigate the lynchings, was instructed that Whites have a greater duty, as "a superior race and of greater intelligence, to protect this weaker race from unjustifiable and lawless attacks." (Wikicommons Media Files, https://en.wikipedia.org/wiki/File:Lynching_of_Laura_Nelson,_May_1911.jpg.) The grand jury was all-White, as a result of a constitutional provision prohibiting "the race to which the unfortunate victims belonged...from participation in our political contests, because of their known racial inferiority and their dependent credulity, which very characteristic made them the mere tool of the designing and cunning." (Id.)

\(^{559}\) NSRP membership pamphlet, FBI file.
as insects (Figure 15: 1944 Resist the Parasite) and as satanic monkeys (Figure 16: 1937 Demon Money). In the rhetoric of secessionists who waver between ceding and seceding depending on whether immigrants are deported, White Supremacist groups in the 1960s planned to establish a National Repatriation Commission to deport and resettle Black people to Africa, Jewish people to Madagascar, and Asians to Hawaii.

Figure 15: 1944 Resist the Parasite

Source: "Der Stürmer" Sept. 28, 1944 (German newspaper cartoon stating "Never satisfied as it creeps about") http://research.calvin.edu/german-propaganda-archive/sturmer.htm
Thus, Enlightenment perspectives that sought to manifest in social policy the inherent equality of man had been subsumed by technocratic aspirations to systematically "improve" mankind. The application of "reason" and "rational thought" combined with universalistic morality, on which the Founders had prided themselves, had been hijacked to support fatalistic views of self-interest and morality: like Rand's Atlas (written in 1957, as the first civil rights laws were passed), the world shrugged off the aspirations of true social justice in favor of a fatalistic social bureaucracy, which left Black populations to fend for themselves against White domination. Even as science was corrupted and redeployed in political discourse, the investment in skin color as a meaningful way to sort individuals into social groups was too deeply embedded
in economic, social, and personal belief systems to end the "habit" of racism. The utopian idea of equality as the basis of an ideal society was twisted into something unrecognizable.

_Above our modern socialism, and out of the worship of the mass, must persist and evolve that higher individualism which the centres of culture protect; there must come a loftier respect for the sovereign human soul that seeks to know itself and the world about it; that seeks a freedom for expansion and self-development; that will love and hate and labor in its own way, untrammeled alike by old and new. Such souls afore-time have inspired and guided worlds._

—W.E.B. Du Bois, _The Souls of Black Folk_ (1903)

**Imagining Identity and Suspension of Disbelief**

Current "identity" trends suggest a rejection of "perfected" formulations of man or woman (or any transmutation of these sex attributes). Modern identity is largely a thing of one's own making. We are not identified; rather, we *identify*... as Catholic but "nonpracticing," or as a "nonobservant" Jew; as an Independent whether or not we voted with a particular political party; as an African-American, a White person, or otherwise—despite the fact that, genetically, we are all mutts. Members of the male sex may nevertheless identify as female, with or without medical assistance to make the declaration biologically substantive. These are indicative of social constructions, and we know that because the claims are subjective, largely based the authority of the individual to make the claim. By contrast, I will have great difficulty *identifying* as a member of the "One Percent," since creditors will eventually reveal that my claim is unfounded. But, since *identifying* is largely performative, most people today would understand that, when I identify as a One-Percenter, the implication is that I'm a poseur, not headed for insolvency. It's a symbolic claim of membership in the group, not necessarily to be taken literally.
In perhaps the most disturbing manifestation of this trend, we must be concerned, however, when a six-time-bankrupt identifying as a billionaire is able to so convincingly identify as a serious contender for the nation's highest political office, with no previous experience or knowledge of matters as crucial as the U.S. Constitution to support his claim, that the public suspends disbelief (and commonsense) long enough to let him into the Oval Office. The elections of a defiantly racist, misogynistic, classist, probably sociopathic, egotistical egoist as the country's antihero-in-chief suggests at best a crisis of national identity. At worst, this event suggests a hardening of national allegiance to the very corruptions of American identity and compromises of Enlightenment idealism that lead to the Civil War.

_I declined to fill in the form for my Senate press credential that asked me to state my "race," unless I was permitted to put "human." The form had to be completed under penalty of perjury, so I could not in conscience put "White," which is not even a color let alone a "race," and I sternly declined to put "Caucasian," which is an exploded term from a discredited ethnology._

—Christopher Hitchens

**Identifying as President.** If they could revisit the Earth today, it seems likely that Galton and the techno-eugenicists he spawned would shudder at the specimen of President Elect Trump. This may be an unfair example of the state of performative identity at this point in history, since Trump is more guilty than most of lifting the face-saving sluice on every blustery uncivil, commonsense-less, factually-void toxic turd that congeals in his mind—no matter what one thinks of his politics. But, as an extreme on the spectrum, he may in fact be a "perfect" example of the way performative identity subordinates objective truth in favor of experiential, present-tense truth: _The truth of the matter as I have experienced it and present it in my Self to you._ Trump's reassurances—"Believe me!" and "This is what I've heard/read on the Internet"—
are Trumpian "truthiness": They are his truths; reality as he sees/hears/believes it to be. The "facts" as his "very good brain" has processed them—which, in the modern era, gives them a self-evident validity. Like the middle-aged female civilian claiming to be Darren Wilson, it's not a lie. If the self-proclaimed Officer Wilson doppelgänger represents "identity" as I declare, therefore I am, Trump represents "identity" as I Tweet, therefore I am, with social media being a one-way mirror on Trump to the world. Performers cannot be self-reflective while performing. The fact that Trump does not believe he needs to use the mirror to look critically at himself would make the Odalisque blush.

One should not vent one's wrath on animals, Theology decree that man has a soul and that the animals are mere 'automata mechanica,' but I believe they would be better advised that animals have a soul and that the difference is of nobility.

—Linnaeus, Dieta Naturalis (1775)

Collectives vs. Performative Identities. Performative identity, discussed later in this dissertation, could not have dominated the social environment of the nation's founding. They were seeking stability in the collective, not individuation from it and certainly not from the realities and truths that a collective implies. From this vantage point, we see the compromises of truth made by the delegates, but that is a very different dynamic. Shared understandings are difficult to come by; they take time. When identity, truth, reality, and other formerly stable features of human life are buffeted by the same transient externalities that buffet the people performing them, then a collective understanding of the shared conditions is beside the point. If collective understanding has no more depth than a Facebook Like, then the craft of creating a written document that reflects collectivity—or collective individuality—is for naught. If the craft is no longer useful, then perhaps the content also can be called into question. Under these
circumstances, even the Leader of the Free World may see no impediment to Tweeting with no knowledge aforethought.

**Codifying Skin Color**

The Western dilemma of systems of slavery within a political landscape of egalitarianism (e.g., U.S., England, and France), with localized rebellions fueled by a restless revolutionary sensibility, made the question of "race" nearly an obsession. Pre-19th century Americans were especially concerned with the meanings attributable to skin color, because so much rested on the resolution of the conflict between "all men are created equal" and Slave Codes and later Black Codes. Slave traders and owners found that blackness offered the advantage of making it easy to distinguish between slaves and non-slaves, or to spot a runaway slave by pure physical appearance. The divisions along racial lines stemmed from commercial imperatives initially, that bled easily into meanings and ideas about the legitimacy of racism. Racism was easily perpetuated, because skin color told the story of the person to be "hated."

Under ancient codes (e.g., the Code of Justinian (1070)), the conquest of land was a conquest of a people, who became subject to the conquerors. What to do with the people—kill them, imprison them, enslave them, rape them—was a residual question of the conquest. The "conquest" of Africans—outsourced and far from the conquered land—was something of an innovation. The determination of what to do with the conquered did not arise from the labor intensive, expensive, dangerous endeavor of conquering Africa. Plantation owners could purchase humans who had been abducted and delivered to their local market, and make the same determinations about what to do with them. In some ways, the humanity of the Africans was beside the point, for if they were conquered, then their humanity or individuality did not matter. To the ancient Romans, the idea that conquered persons, even those who became citizens, had a "relationship" to negotiate with their "government" would have seemed bizarre.
Political "Bodies"

The original body of the Constitution does not use the word "race," "slavery," "slave," "skin color," "White," or "Black." If mentioned at all, slaves are referred to as "other" or "such" persons or as a "person held to Service or Labour." Roger Sherman (CT) "liked a description better than the terms [slave and slavery] proposed, which had been declined by the old Congs and were not pleasing to some people." Another delegate said, "The word slave is not mentioned [because] the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word slave to be mentioned." The word suggested a failure of Enlightenment ideas, brought over from England; an impasse between the American Dream, as conceptualized by the Revolutionaries, and the reality that homogeneity and the social stability that came with it would never exist in the New World.

High-minded reasons for slavery could not have been articulated by most of the colonists. Many of them read little beyond the Bible and few would have had exposure to ancient philosophers. But the fact of slavery, its presence in their everyday life—regardless of what the Constitution said—would have demanded rationalization, and Biblical racism suited their worldview. The reality in the New World was Saints and Strangers.

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Delegate William Paterson (NJ) reminded the representatives that, in the Articles of Confederation, Congress "had been ashamed to use the term 'Slaves' and had substituted a description." (Wendell Phillips, The Constitution A Pro-Slavery Compact; or, Selections from the Madison Papers (2011).

Attempts to enslave Native American Indians (NAI) failed in part because NAI were well armed, had organized social structures, knew the terrain, and were not "chained" by fears of escaping their captors. Also, NAI were so closely identified with their land, they could not have gone through the necessary breakdown of identity (on long voyages of slave ships), the complete cut off from their previous social, familial, and cultural ties (to their tribal communities), language, and customs, and the rebuilding of identity within a backdrop of fear, existential threat, utter powerlessness, and subjugation to a social order in which the slave is simultaneously central to its balance and disenfranchised from it.

In constituting a government "of, by, and for the People," how did rights of citizens or "all men created equal" line up when some exercised their freedom to "pursue happiness" (property) by owning other individuals? If slaves were "property," as slaveowners so vehemently insisted, then Commerce Clause power would have sufficed for Congressional authority over this industry. (See Figure 17: 1836 Categories of Persons on Official Census Form, U.S. second census.) Congress might have declared a "War on Slavery" and banned the practice. But would doing so permanently define African-Americans as chattel?

Figure 17: 1836 Categories of Persons on Official Census Form, U.S. second census
The Framers never got to these sticky points. The debates about slaves were most heated on the issues of representation and taxation. In a Venn diagram of the conflicting interests in building the nation, the key area of overlap where resolution would affect other determinations about the model of the government was the system by which the government purse would be funded by taxing the People's pocketbooks in exchange for political representation. There were three distinct attitudes in U.S. correlating to geography:

- Northeast Revolutionaries, many of whom were learned elites who pressed for equality;
- Southern plantation owners, who were busy building the wealth of the nation (and their own), using the "God-given" resources available to them, including slaves; and
- West Frontiersmen, pioneering the westward expansion, who opposed slavery in favor of rugged self-reliance and individualism, and in relative terms, may have resembled nomadic barbarians of the ancient world to their brethren.

The Three-Fifths rule, Art. I Sec. 2 cl. 3 of the Constitution, was proposed to balance the power of southern slave states against northern commercial states, which did not want slaves to count at all. Population statistics for representation in Congress would have buoyed a southern advantage, where slaves outnumbered Whites, if slaves were counted toward the 30,000 needed for one congressman. Democrats, then pro-slavery, hoped to overturn abolitionist policies passed by Northern Republicans. Abolitionist northerner James Wilson (PA) suggested that, if slaves counted, then the total population to earn representation should increase to 50,000. The proposal was not an attempt to set a precise value on noncitizens or speak to the personhood of slaves themselves. The strategy was intended to prevent the South from carrying to their threat to end constitutional debates altogether while also preventing southern domination in Congress:
The "three-fifths clause" had nothing at all to do with measuring the human worth of blacks. Northern delegates did not want black slaves included, not because they thought them unworthy of being counted, but because they wanted to weaken the slaveholding power in Congress. Southern delegates wanted every slave to count "equally with the Whites," not because they wanted to proclaim that black slaves were human beings on an equal footing with free White persons, but because they wanted to increase the proslavery voting power in Congress.\footnote{Robert A. Goldwin, \textit{Why Blacks, Women and Jews Are Not Mentioned in the Constitution}, Commentary at 30 (May 1987). James Madison explained his view of the meaning of three-fifths of a person in Federalist 54.}

The Clause represents a fundamental inversion in the formation of the country: Those fighting to prevent an erosion of political power among non-slave states, in part to circumvent future policies that would permit the spread of slavery, agreed to a compromise that, on its face, presents a diminution of the value slaves. Stated differently, abolitionists who believed in the equality (and by extension the dignity) of Africans agreed to a compromise that formalized the inequality of the power of Africans. Without implying that the compromise was a good one, it is important to recognize that the debates were situated in the area of overlap regarding state representation in government. When designing a model of government, the delegates did not contemplate abstractions such as "personhood" or "human dignity."

The reluctance on both sides over the course of several weeks of exhausting debate on numerous issues may have stemmed from the proposal's internal illogic. James Wilson (PA) at last admitted he "did not well see on what principle the admission of blacks in the proportion of three-fifths could be explained. [If slaves were citizens], why are they not admitted on an equality with White Citizens?" But if slaves were property, "why is not other property admitted into the computation—"horses, cattle, homes, furniture, pets, etc.? Other delegates damned the Constitution that would permit "drenching the bowels of Africa in gore, for the sake of enslaving
its free-born innocent inhabitants" (Rep. NY) or make all American citizens "consenters to, and partakers in, the sin and guilt of this abominable traffic" (Rep. NH); even a representative from a slave state (Rep. VA) admitted that constitutional support for the slave trade was "excellent [for] an Algerian constitution: but not so well calculated (I hope) for the latitude of America."

Some delegates preferred that no Union form: If "reduced to the dilemma of doing injustice to the Southern States or to human nature [by giving] encouragement to the slave trade," they would choose the former, rejecting any "representation for their negroes." Another said, "[T]his lust for slavery, is portentous of much evil in America, for the cry of innocent blood...hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime."\textsuperscript{562}

Wilson finally argued that these inconsistencies "must be overruled by the necessity of compromise."

Southerners need not have feared losing political power. Threats of secession from both sides resulted in the 1819 Missouri Compromise, which, although a compromise, reinforced the power of the South.\textsuperscript{563} The economic engine of the country depended on a cheap labor force, and politicians felt beholden to profitable Plantation-reliant industries:

In a response to a campaign speech declaring Van Buren's opposition to "any attempt on the part of Congress to abolish slavery in the District of Columbia, against the wishes of the


\textsuperscript{563} Henry Clay and John Calhoun, nationalist leaders in Congress who feared sectionalism, proposed the Missouri Compromise. A postwar depression appeared in 1819 and in the recovery period, the question of slavery arose, with both sides threatening secession. In fear, Congress passed the Missouri Compromise, in which Missouri was admitted to the union as a slave state, but slavery was prohibited thereafter in any area north of Missouri's southern border, latitude 36 30°. At the same time, Maine, which had just detached itself from Massachusetts, was admitted, thus making 12 free and 12 slave states. (Jack E. Maxfield, A Comprehensive Outline of World History 716-733 (2009), available at http://cnx.org/content/col10595/1.3/.)
slaveholding States," an 1830 editorial in the Washington Spectator "gave vent to its indignation:

The slave trade in the Capital. — Let it be known to the citizens of America, that at the very time when the procession [of President Van Buren] and his Cabinet was marching in triumph to the Capitol, another kind of procession was marching another way; and that consisted of coloured human beings, hand-cuffed in pairs, and driven along by what had the appearance of a man on horseback! A similar scene was repeated on Saturday last; a drove consisting of males and females, chained in couples, starting from Roly's tavern on foot for Alexandria, where, with others, they are to embark on board a slave ship in waiting to convey them to the South. [Who] in this Republic [will] plead for the emancipation of the District of Columbia?"564

Although violence may sometimes be done to their feelings in the separation of families, it is by the laws of society which operate upon them as property...yet it should be some consolation to those[representatives] whose feelings are interested in their behalf, to know that [Africans] more frequently bettered and their minds happier by [being transplanted to a more genial and bountiful southern clime].

—Committee on the District of Columbia, Report to the House of Representatives (1829)

1688

Protesting Slavery

The same conundrum about how to resolve the moral dissonance of men owning other men was decided differently nearly 100 years earlier by a group of Pennsylvania Quakers who were viewed—and viewed themselves—as an Out-Group. Their Petition is among the earliest documents grouping the concepts of "generation" (slave status by birth), descent, and color in

the Americas. In the legislative history of the concept of "hate crime," which is linked together by conceptualizations of persons appearing repeatedly in American law, this archival document represents the final element in modern frameworks of Othering. After the following discussion of this document, we begin to move forward in time.

*There is a saying, that we should do to all men like as we will be done ourselves; making no difference of what generation, descent, or colour they are... Here [in the colonies] is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of the body...[Yet] here there are those oppressed which are of a black colour. [T]o bring men hither, or to rob and sell them against their will, we stand against it...*

—The Germantowner Quaker Friends

Among the curious metaphors of history is the provenance of a Quaker Petition drafted in the late 17th century by a group of Dutch-German Pennsylvania colonists. Because they spoke a different dialect from the English Quaker colonists and insisted that their enclave be granted political autonomy (making them exempt from taxes), the drafters were viewed as outsiders in William Penn’s colony. This outsider status also apparently gave the Germantown Quakers both the perspective and the spine to call out the Friends who compromised their shared religious philosophy. In a letter of protest, the Germantowners enumerated all the ways that the slave trade violated their religious tenets and then challenged he Friends leadership issue a formal ruling that slave ownership is not against Christianity. If so ruled, they wrote, "we shall be satisfied on this point." Their sentiments echoed the teachings of the founder of Quakerism, George Fox, who viewed all humans as God’s children. Without directly opposing slavery or attempting to enforce humanistic rules among Quakers, Fox urged his followers to treat well those in a "slavish Condition," to educate slaves "to know the Lord Christ," and to set a term for their enslavement—basically arguing for the widely accepted and practiced system of indentured
servitude that had preceded slavery in the early years of the colonies. This may have been offered as a compromise. The first "hired" workers in the colonies had earned passage to the New World by agreeing to work once they arrived. Although serfdom was gradually ended in northwestern Europe, indentured servitude continued to be a staple of economic structures in other parts of Europe and elsewhere in the world.

Despite—or perhaps because of—its significant content, the Germantown document was lost and rediscovered several times, and is not credited with the rejection of slavery by Quaker 92 years later.

Within a decade of the Germantown protest, another protest against slavery, written by Quaker Cadwalader Morgan from Merion (PA) was presented at the Philadelphia Yearly Meeting. This document prompted a very different reaction: The leadership distributed an official caution to all Friends against owning slaves or participating in the slave trade. In the early colonies the eight year gap between these two documents was not a long time, especially to change the "hearts and minds" of men for whom the economic benefits of slavery were undeniable. Why did the later Morgan document spark an official reaction while the earlier Germantowner protest did not?

The difference in effect lies in the approach of each to the problem of slavery and the portrayal of Blacks.

The Germantown Protest (1688) is a declaration of dissent. Juxtaposed between the 1620 Mayflower Compact and the 1776 Declaration of Independence—the former stating the intention of the signatories to form a "civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends" of establishing a colony, and the latter, dissolving "the political bands which have connected [one people] with another"—the Germantown Protest

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is both a compact among the members of the Out-Group and a declaration against "trafficking in men-body." The Germantowners argued that enslaving kidnapped persons brought from other nations does not serve the preservation of the body politic and the ends of the colony, without however going so far as to declare independence from the community.

Like Jefferson's later protestations to King George, the Germantown Petition was addressed directly to the Friends leadership and mimics the form of an indictment:

- The leaders are no better than pirates for stealing men, and they are indeed worse because they call themselves Christians;
- Slave-owners oppress people not because conscience demands it (as in Europe) but because of the color of their skin;
- In a place people go to enjoy "liberty of conscience," Quaker slave-owners deprive Africans of liberty of body;
- Quaker slave-owners commit adultery by forcing married couples into adultery by separating them;
- Quaker slave-owners sell children away from their parents;
- Quaker slave-owners who profess that it is wrong to steal engage in the worst form of stealing—of "men-body"; and
- Slavery creates a bad "report" of the colonies among European Friends, who envy the freedom of colonists but would see the hypocrisy in Quakers owning slaves.

They wrote, "Ah! do consider well this thing, you who do it, if you would be done at this manner and if it is done according to Christianity!" They even warned that Quakers abroad, if they hear that Quakers in the colonies "do here handel men as they handel there [in Europe] the cattle," will decide not to emigrate from Europe to the New World.
The arguments correlate with violations of the core tenet of Quakerism: the Golden Rule; the prohibition on adultery (which is violated by separating wives from their husbands in the slave trade); the sanctity of the family (violated by the sale of children away from their parents); usurping God’s role by owning other men as one owns chattel; and any attempt distinguish slavery of Black people from White people to do an end-run around the sanctity of human life. "Now, though they are Black, we cannot conceive there is more liberty to have them slaves, as it is to have other white ones." Because the had no reference point by which to frame a fundamental distinction between men of color and White men, they made the radical suggestion that slaves have as much right to freedom as Whites—to do unto their masters as the masters would do were their positions reversed: "[Have] not these poor negers as much right to fight for their freedom, as you have to keep them slaves?" They urge the Friends to "[deliver captured slaves] out of the hands of the robbers, and set [them] free as in Europe." In a statement that reads, from a bird's eye view of history, like the fulcrum between their "Protestant" cousins (originally pronounced pro-TEST-ant) and the "Enlightened" Founders, Germantowners understand liberty as central to all other pursuits. They describe the African slave trade as an affront to the foundations of Quaker religion itself: Religious liberty is as important as "liberty of body." Because Quakerism is based on "liberty of conscience," their very philosophy is compromised when any among them are kidnapping and selling "men-bodies" against their will.

Logical Consistency in Liberty and Humanity

The Germantowners draw a line from liberty to responsibility (conscience) by communicating "libertie" from two perspectives: the liberty of Quakers to own men as property—an act that violates the conscience of the Quaker religion; and the liberty of Africans to the same freedom of body and mind to which all humans (men) are entitled. They explicitly link the limits on the liberty of man with the freedom and equal treatment of all men.

The Protesters asks, if slavery is "good," then what is evil?
The butcheries of black men... the flaying alive...the burning of one...the hanging of a 15-year-old girl...until the dark and bloody record of the South shows 728 Afro-Americans lynched during the past eight years. Not fifty of these were for political causes; the rest were for all manner of accusations from that of rape of white women...[and after these statistics were reported,] not less than 150 have been known to have met violent death at the hands of cruel blood-thirsty mobs during the past nine months.

—Ida B. Wells

The 1688 Petition has been described as the first formal protest against slavery on the American continent. The drafters ruminated on absence of a rationale by which men may own men, like chattel (a word, sharing roots with "cattle," meaning a res or possession). The document is also among the first in the colonies to posit—and mean it—that all men should be treated alike. The Germantowners do not question that "negers"—one of a number of translations of the color "black" that were used throughout the 17th and 18th centuries used as descriptors, not as derogatory terms—are men (human) or imply that being men "of black colour" places them in an inferior social position relative to Whites.

Although the Germantowners were not alone in their rejection of slavery, the majority of Pennsylvanians, including Friends, had come to rely on slavery as an economic imperative. Black "men-bodies" were commodities. Slave merchants of the time, including Quakers, listed "Negroes" among other imported commodities: "Pipe-staves [stoves], Pork and Beef Salted and Barrelled up, Bread...all sorts of Grain, Pease, Beans, Skins, Furs, Tobacco... Sugar, Molasses, Silver, Negroes, Salt, Wine, Linen, Household Goods, etc."566

The Germantown Petition articulates a corruption of (colonial) authority to demoralize (African) agency. Deeming Africans to be slaves based on "negritude" deprived them of their agency—"doing unto" the Africans precisely the abuse of authority the colonists had fled. The

566 Darold Wax, Quaker Merchants and the Slave Trade, 86 Pennsylvania Magazine of History and Biography 146 (1962).
Germantowners articulate an inversion: The same method of formalizing status according to a passive circumstance of birth—the Old World monarchical structure that deprived Quakers of religious and other liberties—is here used against Africans, but not to rule, to be ruled. The system is not one of merit or the Protestant work ethic (an idea not yet labeled), but one of tyranny. The hypocrisy is so objectionable, the Germantowners suggest that the slaves would be righteous in rebelling to free themselves.

The Germantowners are themselves an Out-Group even within the Friends' community. They intone judgment of their brethren, but they meticulously refrain from shaking their fingers at the Africans. Nor does the Petition contain apologetic sympathies that, although they are "coloured," Africans still deserve to be treated equally. And, their demand that Quakers end the enslavement of other men does not change the fact that Africans are Others. But extricating the Friends from the slave trade ends the pretense, inherent in slave-owning, that Quaker men may act as gods over the lives of other men. Their petition reflects an unadorned 17th century "identification" with the victims of the slave trade: They are "negers"!

When faced with their own moral conflict, the Quakers leadership deferred their decision. Then 1688 Germantown document was read at the Monthly Meeting at Abington (PA), but the petition was deemed by the leaders to have raised an issue too "weighty" to be "meddled" with, the "tenor of it being nearly related to ye Truth." The document was given a similar reception at the Philadelphia Quarterly Meeting and later at the Yearly Meeting, the Quaker forum of highest authority on American soil. The petition was deferred again:

A Paper being here presented by some German Friends Concerning the Lawfullness and Unlawfullness of Buying and keeping Negroes, It was adjudged not to be so proper for this

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567 See Max Weber, Die protestantische Ethik und der 'Geist' des Kapitalismus (1904)
568 Abington was among the vast land of Pennsylvania purchased by William Penn during the 1680s from Native American Indian Lenape. European settlers seeking religious freedom built Hill Township, along what became known as Old York Road. Abington incorporated in 1704. By 1734, the town had records of 42 resident landowners.
Meeting to give a Positive Judgment in the Case, It have so General a Relation to many other Prts, and therefore at present they forbear It.  

Although the Germantown Protest was written to Quakers in the colonies as well as European Friends, the document appears to have never left the colonies. The Yearly Meeting minutes note that the petition would be forwarded to the London Yearly Meeting, but the London minutes do not reflect a discussion of the petition. (The Germantown Protest was not rediscovered until 1844, and by then it was put to use to affirm the fully formed Quaker abolitionist identity. The document was forgotten again until 1932, when a Pennsylvanian historian called the Protest "the memorable flower which blossomed in Pennsylvania from the seed of Quakerism.")

The Germantowners grounded their objection in religious and humanistic principles. "Conscience" and "liberty"—the twinned objectives sought by Quakers when they came to the New World—are thoughtfully woven into arguments against slavery, regardless of skin color. So, why didn't this cleverly designed argumentation prompt the Friends to oppose slavery? Morgan had a better argument.


571 William Hull, Penn and the Dutch Quaker Migration to Pennsylvania 299 (1932).
Logic of Othering

In 1696, Morgan offered a different reason to avoid the slave trade. Morgan roiled up fears about the risks of dark-skinned foreigners, especially the "wickedness" of Africans. Whereas the Germantown Petition framed slavery as immoral, Morgan framed slaves as immoral.

When the same Quaker leaders who set aside the 1688 Petition contemplated the dangers of "wicked" and "filthy" Africans, they issued warnings to the Friends community. Friends were urged "be more careful not to Encourage the bringing in of any more Negroes, and that such that have Negroes be Careful of them, bring them from Loose, and Lewd Living as much in them lies, and from Rambling abroad on First Days or other Times." Morgan's Petition did not need to suggest that Quakers ill-treat their slaves for his words to incite "hate." Here we see the beginning of "unfreedom" in two ways: slavery and suspicion. To monitor a group of Others increases and reaffirms the divide, especially when one's security is thought to be at risk.

Colonists were also concerned about the overall numbers of slaves, who might overpower Whites in a rebellion. But the fear instilled by Morgan's Petition (1696) was more successful than the reasoned approach of the Germantowners. Morgan harnesses the fear of personal safety while the Germantowners "grant" the slaves the right to rebel based only on their humanity:

If once these slaves (which they say are so wicked and stubborn men,) should join themselves fight for their freedom, and handel their masters and mistresses, as they did handel them before; will these masters and mistresses take the sword at hand and war against these poor slaves, like, as we are able to believe, some will not refuse to do? Or, have

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572 Quoted in Barry S. Levy, Quakers and the American Family: British Settlement in the Delaware Valley 138 (1992).
573 Quoted in Jean Soderlund, Quakers and Slavery: A Divided Spirit 19 (1985).
these poor negers not as much right to fight for their freedom, as you have to keep them slaves? 

Among other things, the differential effect of the Germantown Protest and Morgan’s Petition reflected the geographic influences on social life in the colonies. Whereas German and Dutch Quakers were not accustomed to black skin or slavery and thus had not developed social constructions of "race," Morgan, the Quaker leaders, and most of the Friends in William Penn's community were English. Exposure to slavery and ancient systems of indentured servitude in Europe inured the English Friends to the hardships on Africans. Also, they believed that dark skin color reflected an inferiority both socially and spiritually, and this was ordained by God and therefore not problematic or not a problem they were authorized to intervene on. Like ethnocentrists in Copernicus' time, the order of the world was believed to be Created by an authority divine and omnipotent enough to constitute an entire world and in "His" wisdom, Whites (males) were the center around which all else was oriented. Caste differences according to skin color happened "because god said so!"

The conflict illuminated by the Germantowners was also central to Jefferson's life. How did the same person write breathy declarations that "all men are created equal" without confronting his daily practice of treating men as unequals? How does the author of the declaration that men have inalienable rights profit by the alienation of the rights of other men?

Like the Quaker leaders who were able to define men differently according to social and religious spheres, Jefferson and other Enlightenment thinkers were able to define men differently in spiritual (ideological) and political spheres. For Jefferson, in the political franchise, not all "men-bodies" were part of the body politic. But who was the gatekeeper? "We the People," unrestricted by religious dogma in their political lives, had the benefit of removing

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oppression of a certain sort in a government "of" and "by" us. But "the People" did not establish any formula for ensuring antidiscrimination "for" the (Other) People.

*Can any one tell us why the great advocates of Human Equality...forget that when they were a weak party and needed all the womanly strength of the nation to help them on, they always united the words "without regard to sex, race, or color?" Who ever hears of sex from any of these champions of freedom?*

—Frances Grange

In sum, anti-slavery protesters, all the way through abolition, like the Germantowners, frequently drew from religious authority to argue its immorality. Defenders of slavery (like the eugenicists, the White supremacists, and the Southern politicians in their Manifesto, mentioned earlier) drew from the same sources. Even purveyors of scientific knowledge, which tended to flatten manmade hierarchies of church and State—Copernicus, Galileo, Linnaeus—compromised their revelations to suit church dogma. Customs brought over with the early settlers also insulated slavery from challenges, finding justification in racialized norms, especially when formal laws were highly generalized, like the Mayflower Compact, which employed a general standard of the overall good of the colony—which tended to mean White male control.⁵⁷⁵ When the U.S. was constituted, there simply were no obvious sources free from religious, monarchical, or land-based doctrines to tell the People what to do when men confront men as humans. Even the popular texts from which the public, including Jefferson and his colleagues, gained new insight into the equality that existed among humans did not eliminate hierarchies. (See Figure 18: 1860 Commentary on Veto of Bill to Remove "White" from Massachusetts Statutes Books.)

iii. Agency of Others

Law of Letters

When documentation was rare, formal communication rudimentary, authority of god or king seemingly equally far away, and the coercive physical presence of an official State police force nonexistent, the written word had force. When ink on parchment produced a singular
document—transcribable but not reproducible—the messages conveyed in the text carried weight with readers. As we saw in the Mayflower Compact and Declaration of Independence, writings confirmed or gave power to the author.

Figure 19: 1771 Encyclopedia Britannica or A Dictionary of Arts and Sciences


The earliest books, long since converted from the scroll to the codex for the convenience of storing and referring back to internal text, included Bibles, Encyclopedias (Figure 19: 1771
Encyclopedia Britannica or A Dictionary of Arts and Sciences (title page)), and varieties of Almanacs, as well as romance poetry and adventure tales that approximated encyclopedic formats. *The Travels of Marco Polo* (c. 1300), vastly more successful than most, was copied by scribes for 175 years, until the book was finally published in print form, only 30 years after the Gutenberg Moveable Type Press had been invented (1454) and similar machines were replicated across Europe. In fact, Columbus obtained a hand-written copy of Marco Polo's book, which he heavily annotated and which convinced him there was a westward sea route to Asia. In late 1638, the first printing press arrived on American shores, and in 1639, the first books published in the colonies included the well-known *Whole Booke of Psalms* (also called *The Bay Psalm Book*, after the Massachusetts Bay Colony where it was conceived by the ministers as an English translation of the Hebraic psalms), the Bible, an almanac, and the *Oath of a Freeman.*

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The Bible, the almanac, and the *Oath of a Freeman* were recorded to have been printed in the New World. The first book printed in colonial America, the *Whole Booke of Psalms*, conceived by ministers of the Massachusetts Bay Colony and edited by Richard Mather, John Eliot and others, was also the first book printed (in 1640 by Stephen Daye, a locksmith) in English in the New World, translated from the original Hebrew. (*Id. See also* The History of Information, available at http://historyofinformation.com/expanded.php?id=438.) "Thus this first product of the American press represented a distinct break from Old England, both in production and translation." (Reese, "The Printers' First Fruits, An Exhibition of American Imprints 1640-1742, from the Collections of the American Antiquarian Society," no. 1 (1989).)
[T]he handling of books is specially to be forbidden to those shameless youths, who as soon as they have learned to form the shapes of letters, straightway, if they have the opportunity, become unhappy commentators, and wherever they find an extra margin about the text, furnish it with monstrous alphabets, or if any other frivolity strikes their fancy, at once their pen begins to write it.

—Richard de Bury, Philobiblon (1473 first print [1345 written]), printed by The Printer of Augustinus De fide, aka (uncertain) Goiswin Gops or Johann Schilling (discussing the love of books, book collecting, and properly maintaining a library)

In the Enlightenment era, the most influential books were epistolary novels, a handful of which cast a spell upon wide swaths of readers in America and Europe in ways that, in the sense of being time-bound, have the localized hysteria of the Salem Witch incidents—with moralistic human affinity instead of bonfires.\(^{577}\) One of the most popular books of its time, both in the colonies and in Europe, was the novel *Virtue Rewarded* [Pamela] (1744). This novel, like the handful of similar novels-in-letters that also later gained frothy popularity, seemed to scratch a popular itch for a way to deploy Enlightenment fraternity to find connections between Self and

\[^{577}\text{Novels of similar content and style were popular into the 19th century, including Charles Dickens, Thomas Hardy, Herman Melville, Nathaniel Hawthorne and Mark Twain. However, the most influential writers of the time were Jane Austen (Pride and Prejudice) and Sir Walter Scott (Ivanhoe), both of whom influenced other authors thematically and stylistically.}

"These two were 'the literary equivalent of Homo erectus, or, if you prefer, Adam and Eve,' Matthew L. Jockers [of the University of Nebraska-Lincoln] wrote in research published last year. He based his conclusion on an analysis of 3,592 works published from 1780 to 1900. It was a lot of digging, and a computer did it.

The study, which involved statistical parsing and aggregation of thousands of novels, made other striking observations. For example, Austen's works cluster tightly together in style and theme, while those of George Eliot (aka Mary Ann Evans) range more broadly, and more closely resemble the patterns of male writers. Using similar criteria, Harriet Beecher Stowe was 20 years ahead of her time, said Mr. Jockers, whose research will soon be published in a book, 'Microanalysis: Digital Methods and Literary History' (University of Illinois Press)." (Steve Lohr, "Dickens, Austen and Twain, Viewed in a Digital Lens," N.Y. Times, Jan. 27, 2013, BU3, available at http://www.NYTimes.com/2013/01/27/technology/literary-history-seen-through-big-datas-lens.html?nl=todaysheadlines&emc=edit_th_20130127&r=0; http://historyofinformation.com/expanded.php?id=3930.)
Other. *Pamela*, the most widely recognized of this genre, included in its proemial full title the exhortation that the book should "cultivate the principals the virtue and religion in the minds of the youth of both sexes. A narrative which has its foundation in truth and nature...at the same time...it agreeably entertains by variety of curious and affecting incidents."  

The book did indeed affect readers deeply, giving its broad populist audience a spark for and the language by which to articulate a connection to the interior world of others that in previous cultural eras had been ignored. When enlivened in the context of the enlightened thought, books like *Pamela* and the series of similar epistolary novels that followed provided a channel for the ethical humanism that existed in readers as well as their neighbors. Whether or not insights into the subjective experience of Others was a broad concern prior to this era, the genre of epistolary novels gave utility and direction to such insights. Readers told their friends, "One feels oneself drawn to the good with an impetuosity one does not recognize. When faced with injustice, you experienced a disgust you do not know how to explain to yourself."  

Yet religious leaders decried such novels as "gateway" books to moral decline and self-involvement. They predicted a popular wave of indulgence in romantic fantasies and the seduction of "sentiments that are too lively and too marked" to sustain the social strictures of communities. They were not altogether wrong. The experience was sensory—not intellectual even for the leading intellectuals of the Enlightenment. Diderot, a sober philosopher who authored an encyclopedic entry on "natural rights," described his experience reading *Pamela* as a new form of empathetic connection to others, illuminated by sensing that he was inside the minds of the characters. By reading the thoughts of the characters, one experienced the feelings of the characters, which brought them to life in three dimensions. In turn, readers "recognize [themselves] in the characters." The interior worlds of separate (independent) individuals became accessible through the act of reading. And, by plugging into the identity-experience of

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the characters, readers became more fully aware of their own identity-experiences. Experiencing this boomerang of feeling, moving between reader-as-subject to protagonist-as-object and back to the subject (who is thus the object of the ricocheting feelings themselves) was described at the time the way people today describe the effect of psychoactive drugs.

Epistolary novels were described not as "mind-altering," but as emotion-altering. Existing emotional regimes expanded in ways that could not have been accomplished before the genre of novels in letters bloomed in an Enlightenment swoon. Also, as part of the larger history of narrative, identification with the protagonist could not have occurred until reading had become predominantly a silent and solitary affair. Unlike the theater, which had been far more popular entertainment than novels preceding the Enlightenment, silent reading admitted no distance between the emotions contained in the text and the mind of the reader. Silence and shared interiority connected character and reader in identity-experiences, florid, "torrential," "untamed," like the effects of a drug.

Jefferson believed that, because ordinary characters seemed "dramatically present and familiar," fiction "produces the desire for moral emulation even more effectively than reading history."582 Silenced to outside stimuli, readers communed with the characters,583 to deeply feel the "passions [depicted as] those I feel in myself."584

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583 "It is understood that in the ancient world all reading was typically done aloud, either to oneself or to others. This process is believed to have continued until well after the transition from the roll to the codex, and after the decline of the Roman Empire, to around the fifth century CE, after which the rise of monasticism, with its ideal of silence, and the introduction of word spacing, gradually caused the preference for silent reading, which we know today.
Shift from scroll or roll to code or book form, continues through 9c."
(http://www.historyofinformation.com/narrative/oral-to-written-culture.php;
http://www.historyofinformation.com/narrative/roll-to-codex.php.)
"Based on these interpretations, the transition from the papyrus roll to the codex would appear to have three main causes:
(1) An evolution and expansion of the tabula or codex form, traditionally used for shorter documents, to write, preserve, and distribute longer documents including books. This required the expansion of the codex form from leaves of wood or metal tied together to folded leaves of papyrus and parchment sewn in gatherings. The transition may well have started, as Meyer suggests, by the process of "writing on and folding . . . papyrus differently" so as to imitate the wooden codex form.
(2) The distinct preference for the codex form by early Christians who would have been influential in promoting the form as Christianity spread.
And in the first place as to the opening and closing of books, let there be due moderation, that they be not unclasped in precipitate haste, nor when we have finished our inspection be put away without being duly closed. For it behoves us to guard a book much more carefully than a boot.

—Richard de Bury,

Philobiblon (1473 first print [1345 written]), printed by The Printer of Augustinus De fide, aka (uncertain) Goiswin Gops or Johann Schilling (discussing the love of books, book collecting, and properly maintaining a library)

**Emotivity and Identity**

Numerous academicians from different fields have detailed the affect of these novels as a social phenomenon. Epistolary novels are credited with crystallizing the empathetic discourse that is one hallmark of Enlightenment: "[T]o know the individual, we must not merely contemplate him, we must make him live, and to make him lead it is necessary to know him, to think him...[T]hought must make use of the facts of life." The facts of life, including pathos, which had "never been exhibited with equal power, and it is manifest [that] obdurate and insensible tempers have been softened into compassion, and melted into tears, by the death, the sufferings, and the sorrows of the [characters]." The novels were not unlike soap operas, but they were far more operatic: "[I]n almost all of them [the novels], the rights of the divine and

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(3) Preference for the codex form over the bookroll for technological and economic reasons, which may have influenced both educated Roman society as well as early Christians in their adoption of the codex and the phase out of the bookroll. These three explanations interacting together, rather than any one of them by itself, may provide a more balanced explanation of this significant early transition in the history of the form and function of the book." (Id.)

human justice [are] violated, parents authority over their children scorned, the sacred bonds of marriage and friendship broken."

These novels did not simply alter the range of human emotion. They are described as having allowed readers to feel in new ways. The "upheavals," "bitter tears," "devouring fire," and "torrents of emotion" that were aroused by the relatively new genre of epistolary novels spurred a popular awakening in England, the U.S., and elsewhere. Madame de Staël, a Swiss woman of letters, wrote that novels transformed readers by giving them access to new emotions, new nuanced internal conditions. Because the novel "conceived actions and situations in which individuals worship asserting their private, intrinsic worth, in opposition to tyranny, disaster, obloquy...the history of Struggle for self realization...[giving] value and interest of human feelings." The "value" of emotion is its ability to animate ideas. The total effect exemplified in this examination of epistolary novels is that passivity—of authority through land and kings—is replaced by passion. Not irrationality, but an identity-agency guided by reasoned ideas and powered by emotion: "a witchcraft of passion and meaning."

The emotivity of these experiences was the driving force of the Declaration and Constitution that launched the country. Action and authority, fueled by passion, were given reasoned direction. If all men drew from the same well of emotions then all men were indeed equal.

Yet, these novels were written along class lines not racial lines. One marginal irony of the effects of epistolary novels was that they were popularized in part because of economic stability that allowed a leisure class to emerge, which in some regions was built on slave labor. The great swell of human affinity did not alter feelings toward Black persons or trigger a Eureka-moment in which slaveowners could no longer deny their slaves' humanity. Formal Slave Codes made this a self-fulfilling prophecy; these official laws did not permit slaves to be educated, to own

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property, or to enjoy any other features one would normally associate with actual humanity. By reinforcing the subhuman conditions of slaves, slaveowners could make their subhumanness a reality. (This process of dehumanization, discussed elsewhere in this dissertation, is used by White Supremacist groups and was a tool of the Nazis to publicly reinforce the inferiority of Jews. (See Sections V.D.1, V.D.3.b.ii.) Also, class lines in Europe predominantly divided groups of Whites. In America, skin color was a visual boundary that no novels or declarations could eliminate. The one example when skin color was transversed was the Germantowner Protest, and as discussed above, it was written by a group so outside the norms of English colonial life they did not "see" the meanings attached to skin color.

To ask how Jefferson, for example, reconciled his interior and experiential swell of ethical humanism when reading novels about Others with owning slaves—and, infamously, even elevating Sally Hemings to a conjugal position (literally) with her own interior apartment adjacent to his bedroom—is thus to miss the point. Jefferson and the Founders did not "speak" the language of the Dutch Quakers. These foreign-born immigrants brought with them an established framework for viewing themselves as separate from Others without the categorization implying conquest or a hierarchy. Contrasted with the American Revolutionaries, the Pennsylvania Dutch were defined by Germanic social traditions from northern continental Europe, where they never (according to accounts by American Quakers) had encountered people of color. Their default position stemmed from humanistic religious traditions. Within these social and religious frameworks, their sense of Self in relation to Africans did not trigger an impulse to conquer, rule, or own Others. It was not that they didn't "speak" the language of hierarchies at all; they routinely categorized persons as Friends and Strangers, and they followed biblical commands that placed men above women in social strata. But skin color was not, for the Germantowners, determinative of man-to-man status. If we can make comparisons between Germantowner emotivity and American emotivity (see Sections V.B, V.C; see also Section IV), we might say that core Quaker impulses were staunchly religious and communal, while the
American core impulses were and continue to be primarily capitalistic; that is, commercial, individualistic, conquest-driven, materialistic, and competitive.

On American soil, national identity depended upon hierarchical divisions between Self and Other as a matter of both survival and constitution. As an example of the former, for the Mayflower and other settlers (see Section V.D.3.b.ii), the division was existential vis a vis the Native American Indians, who could have handily wiped out the colonies before they spread. With regard to the latter, traditions of hierarchical divisions, well-established in social and religious English and British American customs, were the framework that constituted the nation. (See Section V.D.3.a.)

Dividing the nation into geographic sections reflects various aspects of the national identity and jurisdictional impulses, which in turn correspond to Othering attitudes (see Sections V.A, V.D.3.b.ii; see also Section IV):

- Western "frontiersmen" sought to "tame" the environment, which meant land and the people on it who hindered "manifest destiny." (This is why lynching of Mexicans was more common than lynching of Africans in this territory, and the impulse to lynch had less to do with social control or terrorizing the community than to do with clearing away obstacles to conquest and settlements of the physical terrain.)

- Northern merchants supplanted monarchical rule with commercial imperatives, which scaled people according to wealth. (This is why a class of Black freedmen was compatible with social norms of northern life, and why wealthy Black freedmen found acceptance into northern society easy relative to other parts of the nation.)

- Southern plantation owners who adopted a hybrid of the former attitudes in a "manifest destiny" of White Christianity organized around commerce, which produced a cruel trifecta against Africans in social, religious, and commercial life. (This is why southern attitudes about Black-White relations are so deeply entrenched. Social equality, if it
existed, would not produce or result from economic equality. And, even though Black people have largely adopted southern Christian religions, their practices are culturally distinct from their White counterparts such that even these shared traditions are viewed as indicative of disunity. Thus, inequality bleeds from one area to another, overriding shared traditions or attempts to affirmatively create equality.)

As a single identity, Americanism merges religious dogmatism with mercantile striving and a sense of exceptionalism. Under these seductive identifying features, adapting skin color to national objectives—subsuming a category of persons to the very idea of a nation—was integral to the constitutive moment of "these States United" and indeed, to the Jefferson and the Founders, seemed rational, reasonable, and not at all lacking in humanism.

In ancient times, when a man was [lynched] people felt that an obscene god was pursuing him. No mortal could be so relentless. No mortal could surround another with such ingenious cruelty. Only a conspiracy of fate could make horror so massive.

—The New Republic 1913

Limits on Reason

The Germantown Petition (1688), however, was not principally based on empathy for slaves. There are no "torrents" of emotion to pull the reader into the author's sway. The language is as clunky as Quaker shoebuckles and as dour as their wide-brim hats. The words do not soar, they land hard in accusations. The language is judgmental but lacks the eloquence to even be pious. The Germantown Petition perfectly reflects their Dutch Quaker identity. Nevertheless, in an inversion of what we typically mean, by "revolutionary," Germantowner identities, shaped by their traditions and perhaps guided by a fear of God on Earth and in the Afterlife, supported their attitude against slavery, which was indeed revolutionary in its historical and social context.
Aside from its unusual content, detailed in the previous subsection, the Germantown Protest is unusual in its structure. Because the petition was intended for an audience with whom the drafters did not regularly come into contact, the written message is intended to replace the customs of face-to-face interactions, and it reads like one person speaking aloud to another. Yet the petition uses none of the rules of social exchange that were practiced in Quaker society, as well as other communities. Notably, the opening dispensed with the typical Friends’ salutation, which would have been several lines long, expressing warm-hearted references to "Friends and Brethren" for whom the author's stated affection might equal his appreciation for God's goodness and mercy, etc. Instead, the Protest began with a declaration of the problem: "the reasons why we are against the traffik of men-body." The authors withheld a "Friendly" affirmation of their shared community bonds until the question of their shared values about slavery were sorted out. Virtue for the Germantowners is grounded; it is no more complicated than the agency inherent to the bodies of men.

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592 Katharine Gerbner, "We Are Against the Traffik Of Men-Body": The Protest of 1688 American Germantown and the Quaker Origins of Slavery: The 1688 Germantown Protest Against Abolitionism, 7(2) Penn. Hist. 150 (2007). Gerber did an analysis of the customary references in Quaker texts and reported that:

||The intra-Quaker epistles were intended to solidify and strengthen the Quaker community through praise and in recognition of common customs.
|* * * |The discrepancy regarding the word "Friends" is particularly telling. "Friends" is a recognized, insider term that was used by Quakers on a daily basis, both in text and in spoken language. Two Quakers who recognized each other as members of the same community would call each other "Friends."
|* * * |Numbers tell the story: The 1687 and 1688 London Epistles and the 1689 and 1692 Philadelphia Yearly Meeting (PYM) Discipline and Epistle use the words "Jesus Christ" or "Christ" an average of 3.75 times per document while the Germantown Protest never references either word.41 The words "Lord" or "God" appear an average of 12.75 times in the English Quaker texts, while they never appear in the Germantown Protest. The most significant disparity is with the word "Friends." The Germantowners never use the word, while it appears an average of 16.75 times in the English Quaker texts. The words "Christian" or "Christians," conversely, appear four times in the Germantown Protest while they are only used an average of 1.75 times in the English Quaker texts. The Germantowners also use the word "Quaker" twice, which never appears in the 1687 or 1688 London Epistles, the 1689 Discipline or the 1692 PYM Epistle.||

(Id.)
Whereas the Germantowners do not invite (or want) empathetic connection with the leaders, the writings of Jefferson and other Founders seek empathetic links through ideas. The Founders' language is infused with Cartesian "strivings and struggles of the life of the mind...to expand the realm of the intelligible." Insights into the internal condition of others—the fact of another's emotion world—gives one access to a font of ideas supplemental to one's own. Access to this virtual warehouse of thought changes our Selves by uniting us with Others. Thus, recognition of the inner Selves of Others and an empathy that allows one to "read" the content of another's sensibility formed the necessary glue between men on which the bonds of a Union of States was built. Authority came not from the writing but from the political "bands" that the writing represented. To declare independence is to claim the authority to do so; to constitute a nation is to constitute the power to do so; to enumerate a Bill of Rights ("bill," L. from "bull" or edict, formerly a church (papal) decree) is to admit to the presumption that the rights existed prior to the writing. To presume that rights precede writings means that, as discussed earlier in this dissertation, humans come preloaded with inalienable identity-rights that are equal—before they enter the body politic. As members of a political body, individual rights are artificially determined according to hierarchies. Thus, hierarchies are more fundamental than equality in politics.

The success of a body politic was what worried George Washington in 1789 when he described the thirteen states as united only "by a rope of sand."

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594 Hierarchies are ore fundamental than equality even in social relations, according to some scholars. Judith Butler describes how one becomes a subject—"subjected" in the sense of being subjected to another who has had the conception of Self and Other. In her argumentation, "the recognition of the other...is conferred through subordination, [and moreover] formation is impossible without dependency." (Judith Butler, The Psychic Life of Power 9 (1997).)
I, John Brown, am now quite certain that the crimes of this guilty land will never be purged away but with blood.

—John Brown, on the eve of the Civil War, before being hanged for attempting unsuccessfully to instigate a slave revolt

Identity Dislodged

The sections above present an outline of the complications that arise when rights and identity are disconnected from land and when authority is disconnected from monarchy or other titles. Freedom once conceptualized as "virtual"—unmoored by ancestry, property, nobility, and even god—led to sacrilegious, treasonous, revolutionary ideas that had profound implications for the conceptualizations of "Self" and "identity." In the progression of the concept of "Self," the most exhilarating idea was that "Self" could exceed the physical limitations of one's body. Like the adventures tales that enjoyed their height of popularity before epistolary novels, writings could transport readers to another place, where readers were invited to share the protagonist's sights and experiences. The experience of identifying with a protagonist was inseparable from the reader. Identity-experience was not understood as being separable from the individual. Thus, "transported identity" is thus unmoored from earth-bound limitations, but may be moored to the interior world of Others.

Additionally, the related concept of "individuality" remained tethered to property and rights exercised in commerce. Individuality was not spoken of outside of the collective; to be an outsider would have conjured up fearsome images of Cain. Individuals did not want to be "free" of government; they wanted to be protected within it. In particular, freedom of speech, a right as fundamental the American national identity as freedom of religion, made no sense outside a collective. The right was understood as a freedom to dissent publicly, without government condemnation. As in good parenting, a firm structure allows one to be secure in being free. Even property-based legal fictions that permitted an individual right to be peeled away from the
person (for example to sue on a *chose in action*) and transferred to another (who could then pursue the lawsuit) still depended upon the connections among the parties. Thus, the ability to act freely, specifically to consent (to governance), depended on a recognition of Self-as-agent. "Agency" is the abstract idea reflected in the **Bill of Rights (1791)**, which grant deference to individual agency in social and civic life.

But, what happens when identity is (temporarily) dislodged from Self and imagined in the identity of another, as happened in the mid-18th century with the mass "discovery" and popularity of the epistolary novel? When the identity of others can be imagined and experienced as one’s own, does agency then follow? And, when one acts on the imagined narrative of another (or an agency imagined as belonging to another), does the narrative then become "real"? These questions cannot be answered at this point in history. The concept of citizenship as defining identity took center stage in the minds of the colonial populace, as the hub around which other spokes of identity rotated, including individual rights, state identity, national identity, and the various personal categories of identity, such as religion, "race," socioeconomic status, national origin, sex, and political affiliation, among other things.

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**Law of Citizens**

In 1775, Patrick Henry’s most famous speech culminated in the cry to fight the British, "Give me liberty or give me death!" Henry, a "half-Quaker" slaveowner who preferred gradual emancipation of slaves, persuasively articulated two stark choices to his colleagues: Americans either dither about fighting for "the holy cause of liberty" while "lying supinely on our backs and hugging the delusive phantom of hope, until our enemies shall have bound us hand and foot" or face the fact that "war is inevitable...[It is] nothing less than a question of freedom or slavery." He rejected "retreat...in submission and slavery." He pointed toward the British warships in the
harbor and said, "The war is actually begun!...Our chains are forged! Their clanking may be heard on the plains of Boston!"

Here we see the difference between epistolary reverie and military revelry. As between Henry and Jefferson, the latter limits of the Self discovered through the epistolary novel—an "ideal presence"\(^\text{595}\) animated by moral agency. The righteous imperatives of revolutionary agency served to justify, on any number of grounds, the differences between Whites (men) and everyone else. Henry often used enslavement as a persuasive metaphor in his oratory, but not (in my research) when speaking about slavery. "Liberty was the keynote of all his political acts....How did Henry reconcile his combative advocacy of the rights of man with his own petty overlordship of men?"\(^\text{596}\) Like the Framers of the Constitution, he believed that immediate abolition would "be a heavy loss to the [economy] and probably no gain to the [Africans]."\(^\text{597}\) However he believed that slaveowners should make "some amends for the drudgery of their bodies by cultivating their minds."\(^\text{598}\) Many like Henry believed that slavery would not last into the new century.

Henry, like his Revolutionary comrades, was concerned with commerce. He lobbied for liberty of contract. With regard to self-governance, the point of consent was its mutuality, to regularize transactions and marketplaces.

The Constitution and its amendments reflect similar usages of "consent." The document is drafted in contractual terms, between citizen and government, "securing" the rights of citizenship. The default position is individual freedom, followed by state sovereignty, with interference from the federal government only as explicitly permitted, to avoid despotic or tyrannical rule. Centralized federal power presented ideological challenges for the colonists, most of whom had fled personal oppression—through nationalized religion—as well as political and economic restrictions by which individuals were limited by caste systems. The colonists

\(^{596}\) George Morgan, *The True Patrick Henry* 244-45 (1907).
\(^{597}\) George Morgan, *The True Patrick Henry* 244-45 (1907).
\(^{598}\) George Morgan, *The True Patrick Henry* 244-45 (1907).
were suspicious of authority unified in a single entity. State sovereignty was designed to mediate federal power to restrict citizens, and the variation among states offers citizens choice of local laws and customs to suit their religious and political beliefs, and general attitudes. Citizens may favor the "old-fashioned virtues" of Iowa or the "new values" of Vermont (where in recent years same-sex unions have been approved).

Judicial oversight tempered the reach of government was well as the libertine impulses of citizens. The rights of citizens have been awkwardly stated by the Supreme Court and legislated by Congress. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community...[T]here may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." (See Figure 20: 1800s Manifest of Negroes, Mulattoes, and Persons of Color.) Americans prized personal freedom for themselves, but the co-extensive freedoms belonging to other citizens were obscured by the diversity that confronted them. Federal power was designed to unify access to freedoms. Federal responsibility to protect features of national

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599 Limitations on federal power early in the nation's history were related in part to the distinction between rights derived from national citizenship versus state citizenship. (See Collins v. Hardyman, 341 U.S. 651, 659 (1951). But the distinction between one's identity as a national citizen and one's identity as state citizen has been obscured to citizens as the erosion of limitations on federal power and the complex overlap of state and federal activities puts state-federal identity out of reach of many citizens.


601 Aside from English Protestants, Americans by the 18th century had roots in France, Sweden, Norway, Holland, Prussia, Poland, among other countries; in religions including Roman Catholicism, Calvinism, Lutheranism, Quakerism, Judaism, and Anglicanism; in socioeconomic standing ranging from landed gentry to slaves and indentured servants. The backbone of the nation were middle class farmers, sailors, shipwrights, weavers, carpenters, and a host of other tradespeople. The geographic differences were based largely on economics:
- East coast shipowners preferred free and open trade with other nations;
- Midwest farmers and Southern cotton growers sought high commodity prices, while millers sought low grain prices and manufacturers sought low cotton prices;
- Southeast tobacco growers wanted low tariffs and export fees; and
- Later, Pacific Northwest lumberers would seek low transportation costs.

The impossibility of satisfying the various views was clear during the constitutional debates. Exhausted delegates could not agree on the form of the new government, and in frustration a few recommended an omnipotent ruler styled on a monarch, an idea that was rejected.

602 The powers of the federal government that became part of the Constitution were the following:
- Ensuring "domestic tranquility";
citizenship, regardless of state sovereignty, has gradually been more readily deployed to protect the "health" of the Constitution.

Figure 20: 1800s Manifest of Negroes, Mulattoes, and Persons of Color

Manifest from the schooner Gustavus showing increased value of slaves in the domestic market after compromise made at the Constitutional Convention to close the African slave trade in 1808.

Source: Records of the U.S. Customs Service, RG 36

At no time in American history was the health of the nation more threatened than during the Civil War. The outcome of the war prompted a radical change in the structure of federalism. The national government gained specific control of certain areas of social life that, in a different history, might have remained in state hands. The Framers believed that a republican government can "refine and enlarge the public views by passing them through the medium of a

- Protecting the states against invasion from outside attacks (no part of the continental United States has been invaded by a foreign nation since 1815);
- Forming a "more perfect Union" after the Civil War determined the status of slavery and, more importantly, federal supremacy;
- Equalizing justice and legal protections;
- Promoting the nation's general (economic) welfare; and
- Securing the "blessings of liberty to ourselves and our posterity."
chosen body of citizens," Madison's preference for the principle of pluralism diffuse conflicting passions and interests, but only is that body is governed by a commitment to the shared Knowledges about freedom, equality, and liberty. The Emancipation Proclamation (1863), an Executive document, launched the "New Birth of Freedom" through the Reconstruction Amendments (1865, 1868, 1870), which granted Congress, the Legislative branch, the authority to legislate in areas explicitly dealing with individual rights, with Supreme Court judicial oversight. The Amendments necessarily shifted the balance of state-federal power. Through this shift, Congress gradually acquired a recognized right to legislate to protect categories of persons.

1865-1870

Reconstructing Rights of Others

The Reconstruction Amendments "secure" the Bill of Rights to citizens at the national and state level, including the rights to be free from slavery and to vote freely, and the Supreme Court has interpreted them to permit federal intervention if a state or a private actor threatens any fundamental right of a citizen. The Thirteenth, Fourteenth, and Fifteenth Amendments are worded as admonitions to the states. The language of the Thirteenth Amendment doesn't affirmatively grant freedom but, by removing slavery from the legal and economic lexicon of states' rights, the Amendment effectively told half of "the People" what they can no longer do. (See Appendix 13th Amt.) The Fourteenth Amendment affirmed the operability of existing national rights within state jurisdictions, building a "fence around a fence" in the form of substantive and procedural Due Process. (See Appendix 14th Amt.) The Fifteenth Amendment does not speak to citizens or about citizens' actions at all. The language implies that citizens have a right to vote, but fails to articulate an affirmative right. Instead, the Fifteenth Amendment refers to citizens without specifying a right to vote for all citizens.

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603 Jams Madison, The Federalist Papers, Number 10, (1787).
604 See Felix G. De Fontaine, American Abolitionism, From 1787 to 1861 (1861) (delineating four epochs of abolitionism, including embracing narratives of the Ordinance of 1787, the Compromise of 1820, the annexation of Texas, the Mexican war, the Wilmot proviso, the Compromise of 1850, the Kansas bill of 1854, the John Brown insurrection of 1859 among other insurrections, riots, and rescues of slaves).
Amendment circumvents the question of voting rights and leaves their reflection in the prohibition against the government from abridging or denying voting rights. (See Appendix 15th Amt.) As will be discussed in Section V.D.7, the void in the place where an affirmative right belonged had consequences for the way civil rights and "hate crime" laws were drafted.

The tenor of the Reconstruction Amendments suggests that the federal "Leviathan" is less of a worry for individual citizens than the tentacles of states, like those at work in Loving v. Virginia, 388 U.S. 1 (1967), Bowers v. Hardwick, 478 U.S. 186 (1986), and Griswold v. Connecticut, 381 U.S. 479 (1965). When race is activated, some states have become notorious for their "subtle and ingenious" justifications for racism and punky defiance of civil rights policies of the southern states. The congressional debates on Reconstruction laws, as in the 1956 Southern Manifesto quoted in the previous section of this genealogy, are consistent with more than 200 years of rationalizations, resolutions, laws, and failed laws geared toward equality under law that reflect the residue of Confederate thinking. This may explain why the power of Congress to enforce the Reconstruction Amendments through "appropriate legislation" was wide open to Supreme Court equivocation. Decisions that formed "supreme law of the land"

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605 See Thomas Hobbes, Leviathan (1651).

606 Interracial contact between the sexes comes with weighty emotional and political significance, especially in the South. But more recent indictors suggest that interracial dating is viewed positively among young people. While previous research has documented the existence of a racial hierarchy within the dating world with white women and men on top, a new study finds that in certain circumstances multiracial daters are actually seen as more desirable than individuals from all other racial groups, including whites. (Am. Sociological Assoc’n, 'Bonus effect' for certain multiracial daters (Aug. 17, 2014).

607 Civil Rights Cases, 109 U.S. 3, 26 (1883) (Justice Harlan, dissenting).

608 See generally Library of Congress Collection, Slavery in the Courtroom: An Annotated Bibliography of American Cases by Paul Finkelman (1985); Slaves and the Courts, 1740-1860, presents pamphlets and books documenting legal cases argued in courts in the United States and Great Britain on the issue of slavery. Included are accounts and analyses of cases and the court decisions for these cases, arguments from cases, and proceedings. Of special interest are copies of the slave code of the District of Columbia, material on the Dred Scott case, and material documenting the activities of John Brown, John Quincy Adams, and William Lloyd Garrison.
were buffeted by the Justice's own uncertainty and contradictory views of the meaning of "appropriate" when the rights of the "sable race" were invoked.

|| HCPA, 18 U.S.C. 249 Findings

(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States. ||

1865

"Badges and Incidents" and the Thirteenth Amendment

On the eve of the American Civil War, Thomas Cobb, in a treatise defending slavery as grounded in custom and natural law, wrote: "No organized government has been so barbarous as not to introduce [slavery] amongst its customs. It has been more universal than marriage, and more permanent than liberty." Cobb detailed the varieties of African people, determining that Africans benefit from slavery because it "develops and perfects" their nature. Therefore, he concludes the institution of slavery could not be contrary to natural law.609

Cobb provides a window onto the narratives about Africans that infused the discourse of the South. Although "Negro slavery alone was in the mind of the Congress which proposed the

609 Thomas R.R. Cobb, An Inquiry Into the Law of Negro Slavery xxxv (1858). For a discussion of the ways writers used natural law to support or condemn slavery, see Parker, supra note 22, at 182-87.
Thirteenth Article, it forbids any other kind of slavery, now or hereafter."610 (See Appendix 13th Amt.) "[T]he obvious purpose was to forbid all shades and conditions of African slavery," and to prohibit even the "badges and incidents" of slavery.611 Because racial (i.e., African American) "bondage" was not de facto eliminated through constitutional means, it is necessary to criminalize attempts to perpetuate the subjugation of individuals identified by any hue of skin and, by extension, other characteristics. "[The Amendment] has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States, [empowering Congress] to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,"612 even encompassing the actions of individuals.613 The language of the Amendment does not use the phrase "badges and incidents"; but the "appropriate legislation" clause granted Congress an almost sanctified level of jurisgenerative authority.614 The first Civil Rights Act of 1866 relied on this authority.615 The HCPA also bases its authority in part on the Thirteenth Amendment.

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610 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69, 71-72 (1873). See also Hodges v. U.S., 203 U.S. 1, 16-17 (1906). Also, the Supreme Court distinguished "servitude" from "slavery." (Slaughterhouse cases? rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the "word servitude is of larger meaning than slavery.")

Congress abolished peonage under statutes found valid under its Thirteenth Amendment authority by prohibiting individuals from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage. (Ch. 187, § 1, 14 Stat. 546, now in 42 U.S.C. § 1994 and 18 U.S.C. § 1581. Upheld in Clyatt v. U.S., 197 U.S. 207 (1905); see also U.S. v. Gaskin, 320 U.S. 527 (1944). See also 18 U.S.C. § 1584 (prohibiting the holding of a person in a condition of involuntary servitude), which is a merger of 3 Stat. 452 (1818), and 18 Stat. 251 (1874), dealing with involuntary servitude. Cf. U.S. v. Shackney, 333 F.2d 475, 481-83 (2d Cir. 1964).)

611 Id.


613 Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (opining that "there has never been any doubt of the power of Congress to impose liability on private persons under 2 of [the Thirteenth Amendment].").

614 Although the Supreme Court initially interpreted the Thirteenth Amendment to be limited by the Fourteenth Amendment, by 1968, the restrictions had loosened. Compare Griffin v. Breckenridge, 403 U.S. 88 (1971) (affirming the broader interpretation of the Thirteenth Amendment set forth in Jones v. Alfred H. Mayer Company); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (expanding the scope of the Thirteenth Amendment) with The Court ruled that the Fourteenth Amendment restricted its application. See Civil Rights Cases, 109 U.S. at 23 ("Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.").
Under a strict reading of the Thirteenth Amendment, states could simply eliminate the laws upholding slavery but maintain as "good law" its defunct Slave Codes.\textsuperscript{616} This would allow them to retain symbols of Black oppression that would inspire fear in former slaves. "No slavery shall exist" had to mean something beyond merely slavery-as-law. The best model for deploying this law would have been Great Britain: Ironically, the commitment to equal and "inalienable" rights \textit{vis a vis} the races arrived first in England—the very "despot" lambasted nearly 100 years earlier by Jefferson as guilty of a "long train of abuses and usurpations"—where slavery was abolished in 1833.

\textsuperscript{615} Levin places the origins with the U.S. Civil War and the drafting of the Constitution, which forced the delegates to debate "free expression, federalism, and status characteristics." Slavery necessitated legal protections based on status.

Levin highlights three Reconstruction Acts that shaped the nature of later civil rights laws:
- The 1871 Force Act, which imposed criminal punishments on anyone convicted of interfering with the exercise of the Fifteenth Amendment;
- The Ku Klux Klan Act of 1871, imposing criminal sanctions on government officials convicted of interfering with any protected civil rights or depriving citizens of equal protection under the Constitution; and
- The 1875 Civil Rights Act, which granted equal access to public places and public amenities to people of all races and status.

Thus, slavery, race, and status were bound together as pretexts for unfair treatment and deprivation of rights. (B. Levin, From Slavery to Hate Crime Laws: The Emergence of Race and Status-Based Protection in American Criminal Law, 58(2) J. of Social Issues 227, 227-28 (2002).) But the concept of "hate crime" is not part of a linear track. Understanding the way the nation was founded—hurriedly, often in mind-affecting heat or cold, wearing uncomfortable shoes and scratchy wigs that were distinctive to the nation from which the Framers had parted—is only one aspect of the concept's infancy.

Mr. Hammond (SC) in a speech used the following language: "I warn the abolitionists, ignorant, infatuated barbarians as they are, that if chance shall throw any of them into our hands, he may expect a felon's death! And, Mr. Preston (SC) declared in the same debate, "Let an abolitionist come within the borders of South Carolina, if we can catch him, we will try him, and notwithstanding all the interference of all the governments on earth, including the Federal Government, we will HANG him."

—Reply to a petition against the continuance of slavery in the District of Columbia presented to the House of Representatives, April 1836

Although the phrase has been used to support nondiscrimination at lodges and move theaters, "badges and incidents" drips with the cruelties of slave life, including branding by hot iron and public lynchings. In view of the totalitarian nature of the institution of slavery, a total—societal—solution was needed. The authority to eliminate "slavery" was aimed at its institutions, but the Thirteenth Amendment would not alter the social habits of the South. Even with "badges and incidents" authority, congress could not erase the slavemastery inscribed in the national identity through official compromises for slavery, from the Three-Fifths Clause to the Missouri Compromise. The question that remains unanswered from the Thirteenth Amendment forward is how far federal authority must expand to reverse the sense of "unfreedom" that slavery had created. The HCPA may be one step along the way to the answer.

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618 The integration of African-Americans during the latter part of Reconstruction, which initially showed some promise, was short-lived. In the 1870s, Levin observes, Jim Crow laws began to take shape, and laws protecting equality were dismantled. Social attitudes reflected increasingly bold White supremacist positions buoyed the waves of violence against African-Americans and against immigrants that became one hallmark of the late 19th and early 20th century. (B. Levin, From Slavery to Hate Crime Laws: The Emergence of Race and Status-Based Protection in American Criminal Law, 58(2) J. of Social Issues 227, 232 (2002).)
619 See Lawrence, Punishment of Hate, supra, at 372 (discussing the situation of the Unconscious Racist and concluding that such an actor cannot be found guilty of a bias crime).
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(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

Two-Color Solution

Without the imperative of a Union, there might have been a two-state solution instead a two-color solution. William Lloyd Garrison, a vocal abolitionist, derided the "the pro-slavery, war-sanctioning Constitution of the United States" as a "covenant with death" and "an agreement with Hell," in which freedom was traded for the enslavement of Africans. He rallied for dissolution of the Union—"No Union with Slaveholders!"—and boycotted electoral politics in the U.S. because to do so meant supporting [slavery]. 620 If North and South had formalized their separation, the institution of slavery might have worked its way out differently. Its possible that a northern neighbor built on a different economic structure might have served southern slaves in an internal rebellion against southern Whites the way the French served the rebelling colonists against Great Britain. The complexion of the South, literally and figuratively, might look very different today had the states then united believed they had the functional ability to refuse admission to Slave states. (For a depiction of the territory, see Figure 21: 1783-1803 Map of United States.)

620 Wendell Phillips, The Constitution A Pro-Slavery Compact; or, Selections from the Madison Papers (c. 1859)
Like the attempt by South and North to elide "slavery" in the text of the Constitution because some "found it displeasing," the geographic correlates of "hate" did not fall along a tidy North-South boundary, as embodied in the Byrd and Shepard cases, such that folding an imagined map of the country might blot out the odious half. In fact, the 1787 Northwest Ordinance, on which the wording of the Thirteenth Amendment was based (see Appendix NWO), outlawed slavery in the Northwest Territories along a West-East axis before the institution became so deeply
embedded in the cultural Knowledges of the settlers, at least with respect to Africans. There were lynchings in the Territory. In 1856, Charles Cora and James Casey (see image below) were lynched by the San Francisco Committee of Vigilance, whose members targeted Irish, Chinese, and Mexican immigrants. But the records of lynching—primarily of Mexicans—and the coerced labor of Chinese immigrants established a different pattern of Othering not directly addressed in the Thirteenth Amendment, but not nearly as entrenched as Black racism or as detrimental to their prospects over the next two centuries.

The more pressing question is how a country can eliminate "badges and incidents" when the protected peoples' genetic inheritance is one of those "badges"? What law can so deeply alter the attitudes of the dominant group that the meanings attendant to something as unavoidable—as "inalienable"—as skin color are expunged? Setting aside the scars on the national identity created by the compromises favoring slavery, it is difficult to imagine "appropriate legislation" that Congress can pass to undo the "badges" of inequality and the "incidents" of unfreedom when they are inscribed into the very identity of the people to be protected. Moreover, what anti-narratives have the power of the epistolary novel to crack open the indelible biases that were expressed by the murderers of Byrd (and Shepard)?

But this conundrum is not entirely a failure of law or Congress—at least, it need not be. Law and social policy give way to new conceptualizations of identity. As I have attempted to show in summarizing the relevant historical antecedents to the concept of "have crime," each stage of development emerged from an insight about an abstraction. To achieve greater agency and emotivity, "identity" shook off the limitations of land, property, inheritance, nobility, class, and perhaps in the modern era, sexuality, gender, and transgenderism. And law is nothing more than the People "of, by, and for" whom it is designed. The central problem is far more challenging than "badges" or White Supremacists. The narratives exist in the national

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621 See generally regarding historians who emphasized the role of the western frontier on the nation's identity and imagination, Alessandro Arcangeli, Cultural History: A Concise Introduction 58 (2012).
collectivity of individuals who carry the doctrines of their history. "Race" may be reaching its demise as meaningful in social life, but skin color is not an abstraction. Today, given the tenacity of skin color to divide the nation and undermine the Jeffersonian and even more so its Lincolnesque identity, it appears more and more apparent that we have indeed chosen a "two-state" solution. (See Figure 22: 1916 Jesse Washington Lynching, Waco, TX.)

Figure 22: 1916 Jesse Washington Lynching, Waco, TX

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A large crowd watches the lynching of Jesse Washington, an 18-year old black man in Waco, Texas. May 15, 1916. TEXAS COLLECTION - BAYLOR University, Waco
Source: Baylor University, Collections

**c. Controlling "Badges" While Protecting Their Right to Be**

Enlightenment narratives, the point at which we end this section of the genealogy, were powerful because they allowed the Founders to find power not in traditions, but in the outcome of dislodging terms from their traditional restrictive meanings—deriving authority from
Declarations and unknown passions from exploring the interiority of fictional others. Instead of resulting in an existential "colony collapse," dislodging pushing the boundaries of individual and national identity allowed the Founders to imagine a higher "order" of government and social life. In fact, the first novel published by an American, in 1789, was titled *The Power of Sympathy* by William Hill Brown. But seeing the world through the Other's eyes did to allow even enlightened thinkers to feel through his or her skin.

Early signs of the expansion of identity to its contemporary status as nearly all-encompassing—human thought, emotion, appearance, and most actions—can be documented in the influence of the epistolary novel. Readers, some of whom were the Founders, described the way that empathetic connection cracked open the small-minded terrestrial boundaries of Self, to give individuals insights into Others.

The habit of identity hierarchies was not broken in this transformation, however. The practice of passing titles of nobility and related property to one's descendant was officially erased in the American Revolution. The practice of passing slave status from one generation to the next was not. The epistolary novel was most successful at connecting people only across class lines, not erasing dissolving racial boundaries. Skin color or "race" placed individuals on a different track with few expectations of any rights.

The conflict present in the previous section about how to rationalize unequal distribution of equality continue into the next section, returning to 1994 and the Crime Bill, and the present day. The core of the conflict is the moral, legal, and constitutional directives to protect people of color, who embody the badges of slavery, when the customs and traditions on which the nation was constructed and from which the nation profited are seared into the nation's own narrative. Put differently, the "badges" of slavery are the badges of national identity. This conflict is evident in the design of the laws that attempt to resolve it, as explained in the next section of the genealogy, after the summary below.

Rationales of "Hate Crime"

Federal ABL is not intended to abolish the narratives of Otherness we carry. Instead, it is aimed at relieving some of the fear of being an Other. The HCPA is built on a two-prong extrapolation of protections: (1) if "badges" are those traits that create "unfreedom" for groups, then the relevant characteristics that define these unfree groups are numerous (more numerous than the original four); and (2) what is "incident" to these unfreedoms are the harmful effects on communities of Out-Groups. The HCPA is aimed at the impulses to treat Others differently—violently—with no better rationale than the offender's narrative about a hated group, which includes the recognition that subjugating Others was once tacitly or explicitly permitted by the government.

In the preceding section, the examination of jurisdiction, powers, and persons demonstrates early connections between person and property, property and power, and power and jurisdiction. The origins of the maxim, "Possession is nine-tenths of the law," can be found in this early history. Even when possessory rights become abstracted and severed from the individual who originally held them, they are easier to track and understand because there are "real" items with measurable value to which an individual's rights or a sovereign's powers can be traced. Abstractions were a tool that gave new life to Knowledges about such ideas as "freedom" and "individuality." (See Table 8: HCPA-Related Knowledges of Powers and Jurisdiction.)
Table 8: HCPA-Related Knowledges of Powers and Jurisdiction

<table>
<thead>
<tr>
<th>Powers of Federal Government to Intervene on &quot;Hate&quot;</th>
<th>Persons Rights and Identity</th>
<th>Permissions to &quot;Hate&quot; Embedded in Constituting of Country</th>
<th>Concept of Identity and Self Over Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerce Clause governs transactions, therefore governs individual &quot;liberty&quot; and autonomy.</td>
<td>Property Rights are Personal rights.</td>
<td>Federal permissions built into Constitution. State permissions enacted with Supreme Court permission.</td>
<td>Identity in social hierarchy imposed by birth status.</td>
</tr>
<tr>
<td>Structure of government with dual systems requires good faith of both to ensure power harnessed for health of nation.</td>
<td>To be Other is to be restricted from rights; to be restricted is to be violated; to be violated is to be victim; to be victim is to require protection.</td>
<td>By eliminating rights, states eliminate &quot;person.&quot; By creating categories and neglecting persons, states permit &quot;hate&quot; crime.</td>
<td>Identity-as-wealth entitles one to rights, e.g., to petition king, against unfair taxes, etc.</td>
</tr>
<tr>
<td>Manifesting Destiny requires &quot;hate.&quot;</td>
<td>&quot;Subjects&quot; are not citizens. Citizens are legal persons.</td>
<td>State and state actors reject federalism by rejecting persons given rights within federal system.</td>
<td>Identity can be fragmented; divisions of interest in property create abstractions in &quot;personhood.&quot;</td>
</tr>
<tr>
<td>Governing &quot;hate&quot; is largely geographic matter. States govern geography, therefore federal government at disadvantage.</td>
<td>Government's job is to protect rights; rights thus have power. Rights are legal correlate of person, therefore persons have power.</td>
<td>States role is to individualize from federal government. To conform is to give up state identity.</td>
<td>Abstractions of personhood tied to identity as bundle of divisible rights.</td>
</tr>
<tr>
<td>Residue of ancient forms of governance remain in constitutional democracy. Government powers to mediate corrupt extremes depends on state-federal cooperation.</td>
<td>Self-governance requires consent. Only persons can give consent. Personal agency is inherent in self-governance.</td>
<td>Social control through state actors ensures that federalist policies for personal freedom are not effective</td>
<td>Recognition of power of consent creates identity-agency. Skin color designates one as not entitled to identity-agency.</td>
</tr>
<tr>
<td>&quot;Liberty&quot; is the freedom to exercise rights. Rights are not rights if they cannot be exercised.</td>
<td></td>
<td></td>
<td>Public carries impression of identity; impression from government action gives permission to &quot;hate.&quot;</td>
</tr>
</tbody>
</table>
But abstractions eventually required literal connections to reality. In contrast, in the modern era, we have shed many literal reference points when it comes to abstractions of identity. For example, consider the universal applicability of the HCPA to all races, skin colors, religions, equal orientations, etc. By contrast, an early Supreme Court decision found these abstract attributes were not universally applicable. In U.S. v. Harris, 106 U.S. 629 (1883), the Supreme Court held that one of the Reconstruction Civil Rights Acts prohibiting conspiracies, if applied to White people and persons who were never enslaved, "clearly cannot be authorized by the [Thirteenth] Amendment which simply prohibits slavery and involuntary servitude." In other words, bathed in literality, the Court found that the reach of the Amendment was limited to Africans, and laws that extended to other skin colors exceeded congressional authority. By 2009, the reverse holding would have been issued: The groups enumerated in the HCPA must apply to anyone of any color or creed—not limited to Blacks—because any other interpretation would be unconstitutional.

Pre-Enlightenment thinkers conceived of "natural rights," which have no physical analog, as a way of distinguishing from god-given rights without using terms that necessarily would be an affront to religiosity. "Natural" meant "at liberty"; governance thus required consent. Thus Jefferson's "inalienable rights" referred to essential qualities of men not connected to physical sources—that is, not arising from property or privileged birth, and the feature that most captured Jefferson's attention was not the right itself but how it determined the government's ability to reach individuals and restrict their "pursuit of Happiness." Jefferson and his colleagues recognized that any time man comes into contact with another, he is no longer fully at liberty, and governance is therefore required for communities to support the "pursuits" of their individual members. In Enlightenment thinking, the universality of rights would have been beside the point, since there was no context in which "natural" liberties could be actualized.
A similar change in formalizing the rights of humans can be drawn from the discussion in the previous section. The classic definition of a human right is one that is universal, held by all persons, simply because he or she is human. In that sense, its universality is what distinguishes a "human" right from "manmade" rights. Human rights exist for all men and women, in every place, at all times.\(^{622}\) They are driven by a fundamental assumption that morality alone sufficiently establishes a violation when these rights are denied, but their "natural" basis renders them weak and difficult to enforce without a governing body, which would arguably transform them into manmade rights. This reflects a further distinction between the genealogy of human rights and that of the concept of "hate crime." Whereas human rights are deeply universal, "hate crime" is deeply personal. The former is grounded in the premise that individual identity does not or should not matter. The latter cannot exist without narratives about personal identity.

This section of the genealogy traced an arc of the concept of identity that moved from one describing an inherited set of traits (or wealth) to "identity" acquired by declaring and documenting it. Recognition of Self-as-agent continues in modern American political and social life to be tied to individual rights. The commitment to First Amendment freedoms of religious practice and public dissent toward the government served as the predominant clarifying lens through which the dilemmas of individual agency have been resolved. But as "identity" changes, so too does this type of freedom.

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\(^{622}\) Wasserstrom is often quoted for the "requirements" for a right to be a human right:

1. It must be possessed by a human being;
2. It must be the same right that all human beings possess equally;
3. It not be a right that stems from one status, for example as a parent, government official, or party to a contract; and
4. It is one that is "assertable, in a manner of speaking, against the whole world.


Increasingly, the understanding of "human rights" has become less a demand to be recognized as human, the typical refrain from slaves or former slaves, and more a plea for basic human needs and freedom from abuses as inseparable from human dignity. Dignity has been used to refer to an emotional or spiritual requirement of individual identity, which is satisfied by the provision of basic human needs and freedom from violence. This is different from the concept of "human rights" as a plea or demand to be recognized sufficiently to gain access to political rights.
Modern conceptualizations of "identity" have altered the understanding of free speech. Speech in Bill-of-Rights terms is any outward expression or demonstration of an opinion, an attitude, or a feeling—all of which are proxies for personal "identity." Feelings thus have been given currency in political thought. As discussed elsewhere in this dissertation, feelings externalized have been conflated with external facts. Feelings have increasingly demanded recognition as valid in equal measure to "facts," if not in the same factual "reality." In the pre- Trump era, the place where feelings could be validated without compromising a shared reality was some abstract realm made more comprehensible by the notion of "virtual reality." Current discourse has given such gems of collective insanity as "alternative facts," objective "truth" oriented to one's subjective sense of something, and Bill Maher's mockery of this mockery of "truth," "reality," and "facts" in his segment titled "I Don't Know It for a Fact, I Just Know It's True."

In terms of law, speech-as-action and identity-as-expression are relatively recent developments. Constitutional protections for symbolic acts, such as burning the American flag, "the one visible manifestation of 200 years of nationhood,"623 did not even come before the Supreme Court until the 20th century. Nor did serious reviews of combined "speech" and "nonspeech" protests the government.624 If acts are speech and expression can be symbolic, then aren't all forms of identity-as-being protected under the Free Speech Clause of the First Amendment?


In this case, David O'Brien and three friends burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the FBI, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The Supreme Court upheld O'Brien's right to speech-acts of protest, but it also upheld the government contention that the law the defendant violated was constitutional.
Amendment? In this sense, the HCPA looks less like an affront to freedoms—namely, the First Amendment—than indirect limitations on the New Leviathan of individual expression.

Contemporary interpretations of one's right to expression have nearly subsumed all other values. A contemporary example involves the Westboro Church, whose congregants made themselves notorious not for their charitable works or high forms of "turning the other cheek," but because of their practice of staging protests outside the homes and nearby the funerals of the families of deceased military veterans who had come out as members of the LGBTQ+ community with picket signs reading, "Thank God for Dead Soldiers," "Fags Doom Nations," and "You're Going to Hell!" As with other examples of this trend, the speech occupies both the public space and the most private moments of the families—all private individuals (not celebrities, whom the law treats differently)—as well as every moment going forward during which the family will summon up the decedent’s memory. In keeping with contemporary blurring of boundaries described by Young, the Court conflated the constitutional right to speak and petition one’s government, under the constitutional contract between citizens and the federal government, with the right to "petition" directly another individual and in doing so override their rights to privacy, to be free of harassment, etc. In part this is related to a trend toward greater dissolution of the boundaries around identity-as-expression, the merging of speech and action, and the increasing dominance of identity-agency.

Under a different set of cultural Knowledges, "agency" required more than simply declaring a stance or a choice; it required acting on choice. Even the Declaration of Independence and the Emancipation Proclamation were followed by action—the widespread, deliberate, bloody actions attendant to achieving the objective set forth in the text. Action is of course core to the meaning of "agency," (agent, L. agentem, "one who acts"; 1670s "a mode of exerting power or producing effect"). Agency was not conceived of as a thing—an abstract res that one possesses

625 See Jock Young, The Vertigo of Late Modernity (2007).
around which one's rights prevent interference—like "expression." Agency was thus a matter of \textit{doing}, and "identity" was not conceptualized as "expression" when expression is simply \textit{being}.

This is taken to an extreme in relatively recent developments of identity-as-performance, briefly mentioned earlier. One demand of the performative identity—the identity that is curated on social media or proffered in public—is to be \textit{seen}. Not necessarily accepted or celebrated; certainly not seen as "perfected." But curation and exposure have no meaning without social interaction—even if no one-on-one social exchange actually takes place. Social interactions may in fact present problems for the performative identity, since the "reality" of the identity, like a stage play or a movie, requires some suspension of belief. Without a "belief" in the performance, the identity may collapse. Rachel Dolezal, discussed elsewhere in this dissertation, taught us that lesson. Performative identity requires a measure of distance from Others. The Odalisque props up her mirror and watches the viewer watching her.

In a 60 Minutes segment titled "The Lost Boys" (2013), referring to the young Sudanese boys orphaned during the country's two-decade-long civil war who, as adults, were resettled in the U.S., the boys share with Scott Pelley how they were initially unable to distinguish between truth and fiction. For example, when they watched old episodes of \textit{Mr. Ed}, they did not at first question that a horse could talk. One of the adult "boys" explained that, where they come from, the idea that an American man had walked on the moon seemed impossible. And yet it was true! Why then should they doubt something much less outrageous—that an animal could talk? Like other elements of reality, terms such as "identity" were not designed to be \textit{entirely} matters of faith, of faith in individual assertions with not further support than their claim, however convincing the insistence might be. "Reality" was not a term designed for things requiring faith, especially when faith involves willful individual agency to suspend disbelief. These are signals of crises, and the concept of "hate crime" is a label for physical manifestations of these crises.

The modern view of "reality" implies an assumption that it can splinter; "reality" can be individuated into as many valid versions as there are personal identity-experiences to inform it.
This understanding of reality also implies a hypersubjectivity of truth. Reality and truth are not objectively provable conditions or baskets of information, they are malleable, something one can curate, like identity; Stephen Colbert's "Truthiness." But, we are getting ahead of ourselves: Along the trajectory of the concept of "identity," feelings-as-facts surpasses identity-experiences and identity-claims.

What is missing in the journey from identity-experience as fact (a type of reality) c. 1980 and feeling-as-fact (reality) c. 2015 is the individual's understanding of the Other. If one’s experience is "fact" then there is no need for an Other. Others can only add complicating but irrelevant factors to the information. (The "hate crime" enhancements in some states for the category of "political affiliation" reflect this worldview.) Studies of viewing habits of television "news," which has been swallowed up by opinion "news," show that viewers increasingly change the channel when a commentator begins to take a partisan position on an issue. The point at which "hate crime" enters the public discourse is also the point at which personal narratives became a touchstone for what is best described as "collective individuality." Collective individuality is the affirmation of one's individuality through the resonance of another's narrative. Individuality is affirmed (an objective process) when the narrative is felt subjectively, creating a "collective" between the narrator and the "followers." The individuals who form the collective need not know each other, and probably need not know of each other. Collective individuality is the best description of Internet networks. The Odalisque has entered a funhouse of mirrors: Individuals watch each other watching each other watch others, and so on.

In the context of unstable meanings, "hate crimes" may be a shorthand for the eruptions that occur when the conflicts detailed in the previous sections cannot be resolved.626

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626 Cf. Sara Sun Beale, Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?, 80 B.U. L. Rev. 1227, 1268 (2000) ("The public probably has no sophisticated understanding of federalism, but there seems to be a popular sense that federal law is distinctive and important, perhaps more important than state law.")
V.D.5. Harnessing the Liberation Discourse for Crime Control

Referring to the Federalist Papers, which offer lucid arguments for the Union, Clinton Rossitor wrote, "The message of The Federalist reads: no happiness without liberty, no liberty without self-government, no self-government without constitutionalism, no constitutionalism without morality; and none of these great goods without stability and order." To the exclusion of other goals, the imperative of "stability and order" was the idea harnessed by tough-on-crime policymakers in 1994. Using the robust power of the Commerce Clause, Congress has been able to extend its jurisdiction to drugs, guns, sex crimes, and more. In fact, nothing on the societal agenda—nothing beyond the preferences of libertarian-inclined citizens—suggests that a recalculation of this jurisdictional formula is due. Indeed, global indications suggest that federal commerce powers will continue swallow up nearly every aspect of modern social life.

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See also Barbara Perry, In the Name of Hate: Understanding Hate Crimes 57, 157, 174 (2001) ("Throughout most of the history of the United States, there was little question of who "the American' was. He was undoubtedly [sic] and unquestionably white"; "As hate groups would have it, the tide of immigration must be turned to minimize and reverse the flood of 'mud people' onto United States shores. Violence is perceived to be a legitimate strategy by which to eradicate that which has been constructed as evil and sinister."); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 48-49 (1992) (portraying the horrors of traveling throughout the country in the midst of racism and threatening communities).

\[627\] The Federalist No. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961).

The spirit of democratic laws was expounded by other philosophers at the time the colonists were determining their fate. The French political philosopher Montesquieu opined in 1748 that liberty for individual citizens presupposes that powers of the legislative, executive, and judicial branches of government remain separate. In Montesquieu's words:

||All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised [any more than one of the] three [governmental] powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.||

(Charles Montesquieu, The Spirit of the Laws 157 (Cohler et al. trans., 1989).)

To this axiom, Madison added his insights into human nature:

||If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. * * *

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments.||

(The Federalist No. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961).)

\[628\] Pensacola Telegraph Co. v. Western Union Telegraph, 96 U.S. 1 (1878).

In Pensacola, The Supreme Court held:
communications, technologies, and more have all expanded the webs of interstate and interpersonal connections and dissolved barriers to interstate (and global) transactions. The Crime Bill, which revised federal law in hundreds of areas of social life in 1994, is merely one "elephantine carcass" among many less grand demonstrations of federal police powers.

In this third section of the sociolegal backbone of the genealogy, the following laws are discussed, with commentary:

- 1994 Crime Bill;
- 1870 Reconstruction Era Civil and Criminal Civil Rights Laws; and
- 1865-1870 The Reconstruction Amendments to the U.S. Constitution.

||The powers [granted to Congress] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.||
(\textit{Id.})
Congressional control expanded along with technological advances in various Acts governing, for example, communication:
||Thus, when modern means of communication became available, there seemed little question that Congress could regulate them. The Radio Act of 1927, [Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 et seq.,] whereby 'all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions' were brought under national control, affords such an illustration.||
| 1994 |

The reach of federal law over criminal behavior operates in tandem with other forces. In most instances, far-reaching tough-on-crime measures nearly uniformly receive popular support. In attempting to leverage popular attention to legislative objectives, hyperbolic language works: Words like "hate," "violent crime," and even "crime control," like catnip, may attract emotional reactions in the populace—especially when these "trigger terms" resonate with existing fears. While social anxiety and political hyperbole are not enough to support a grant of authority for federal penal law, the U.S. Supreme Court may revise its determinations from time to time, "in the light of the evolution of decisional law in the years that have passed since [a given] case was decided" or its discovery "that many of the constitutional problems [previously] perceived simply do not exist." The Court is not immune from—and not intended to be deaf to—the mood of the society regarding the social issues of the day, which guide its decisions. What was the mood of society in 1994? The Crime Bill itself tells us.

The Crime Bill reads like a Bible of premillennial angst for a nation with a fully commercialized Internet yet facing Y2K, and midway between such media-inebriating events as the grisly diet of Jeffrey Dahmer (1991), riots in LA following the 1991 beating of Rodney King, raids of Ruby Ridge (ID) (1992) and Branch Davidian (TX) (1993), Jesse Timmendequas' sexual

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630 See, e.g., Hate Crimes, Cong. Rec. S12538 (Oct. 14, 1998) (statement of Sen. Specter) (noting that hatred for others is "antithetical to America, antithetical to the concepts of the melting pot...We should not await the next tragedy on hate—whether it is directed to someone of Asian ancestry, or someone who is Jewish, or a Muslim, or a gay, or an African-American—to motivate us to take the appropriate steps and be very, very tough in the response and prosecution of those offenses"); James A. Strazzella, The Federalization of Criminal Law 15 (1998) (noting that "federal crime legislation is politically popular").

assault and murder of Megan Kanka (1994), and the subsequent bombings in Oklahoma City
(1995)\textsuperscript{632} and the Atlanta (GA) Olympic games (1996), the Jonesboro (AR) (1998) and
Columbine (CO) school shootings (1999), among others. Reports about these events alarmed
public sensibilities about safety, access to information about nearby threats, and the tactics—as
well as the limited capabilities—of law enforcement. Present in these Young enumerates three
justifications for the law to intervene on a social problem:

(1) Conflicting interests: The interests of a powerful group are directly threatened;
(2) Moral indignation: A particular subculture threatens the moral values of a more powerful
group;
(3) Humanitarianism: A powerful group seeks to curb the activities of another group to
protect (paternalistically) the latter group. "Interventions arising from moral indignation are
thus justified either by assertions of violation of public safety or the safety of the deviant."\textsuperscript{633}

All of these rationalizations were active around the time the 1994 Crime Bill was enacted.
Provisions that substantially amended or added to the U.S. Code suggested daily threats to

\textsuperscript{632} After the 1995 OKC bombing, the public assumption that the crime was committed by a racial
"Other"—not a sane, White young American citizen—was so strong, the government received more than
200 reports of harassment; threats and assaults against Arab Americans and Muslims. (See Howard
LEXIS, News Library, Denver Post file; Tolerance.org, Tolerance in the News: Americans vs. Americans,
at http://www.tolerance.org/news/article_tol.jsp?id=275, quoting Marvin Wingfield, the director of
education and outreach for the American-Arab Anti-Discrimination Committee, who gave the statistics of
incidents within 72 hours of the bombing.).

\textsuperscript{633} Jock Young, Moral Panic: Its Origins in Resistance, Ressentiment and the Translation of

Note that "hate crimes"—to the extent they can be understood as a category of crime intended to
commit violence against another, as opposed to an idea about protecting Others from the unfreedom of
generalized social oppression—do not themselves fit with the idea of moral panics. Statistics show that
"hate crimes" tend to be more brutal and sadistic than "normal" violent crime. In that sense, they do not
fit the "soft deviance" described by Young that sparks social control unnecessarily, thereby amplifying
deviance and further social controls. In the same way that minority groups are granted special protections
for civil rights, these groups are granted protection from violence for being part of the group. Thus, if
members of the group have anxiety about these matters, the anxiety is not "misplaced." (Id. at 9). If
anything, "hate crime" laws have sparked panic about the laws themselves; they are less a reflection of a
panic about "hate" or intolerance than a panic about the regulation of it, which better expresses the
"compulsion to moralize" described by Young than does ABL. (Id. at 9.)
public safety too random to be prevented by law enforcement and too mortal to be survived: drive-by shootings, contract killings, airport rage, violent escaped prisoners, "rape and child molestation murders," and the murder of federal employees or foreign nationals. Under the Title regulating firearms, the Crime Bill added a list of approximately 600 types of assault weapons to the existing list.\textsuperscript{634} On a 24-hour news cycle, the effects refresh throughout the day on the morning, evening, and nighttime news, like a morphine drip for narratives of sensation, scandal, and threats to personal security. In the big-screen versus small-screen battle for viewers' eyeballs and clicks, cable news and nascent websites filled the blanks on the \textit{tabula rasa} of moral panics. Tallied up, the information seemed to suggest that, if children weren't being raped and murdered, they were being eaten. If they weren't themselves "superpredators" attacking citizens, they were shooting each other at school.\textsuperscript{635} If law enforcement officers weren't raiding

\textsuperscript{634} 18 U.S.C. § 921-22.

\textsuperscript{635} James Q. Wilson, a conservative political scientist who supported incarceration and the "war on drugs," and J.J. DiIulio, a professor at Princeton University's Woodrow Wilson School of Public and International Affairs, labeled juvenile offenders Superpredators and predicted that demographic projections indicated that roving bands of young men would soon be swarming in the country, pillaging and murdering. This image was more descriptive of the late 1950s than the mid-1990s, however.

New York in 1959 was described as a "metropolis...splintered into feudal enclaves, run in effect by gangs of ruthless, amoral teenagers." (James Gilbert, A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950s (1986).) FBI reports showed skyrocketing numbers of arrests of individuals under 18 years-of-age throughout the 1950s (total arrests grew dramatically as well). The agency's semiannual Uniform Crime Reports offered a steady drumbeat of warnings throughout the decade, each year noting a percentage increase over the last. The 1959 FBI report declared that juvenile court cases had increased 220% between 1941 and 1957. A 1959 U.S. Senate study found that there was a 7% increase in juvenile crime the suburbs and a 15% increase in rural areas. Even when the burgeoning rates of baby boomers was taken into account to control for the growth in the young population, the FBI reported that "juvenile arrests have increased two and one-half times as fast." (For these data, refer to the U.S. Department of Justice, Uniform Crime Reports for 1950, from the Government Printing Office, 1960.)

Other headlines described shootings from homemade weapons, bombs, and death threats all made by juveniles. (See, e.g., "Who the Teen Killers Are: The Gangs of New York," Newsweek, Sept. 14, 1959; "Bad Boys, Bad Time," Irving Sarnoff, the New Republic, January 18, 1960 (criticizing moral decline in society, "Juvenile delinquency in America is largely a reflection of institutions and values which typify our way of life.").) A juvenile court judge in Boston described the fear caused by gang activity: "We have the spectacle of an entire city terrorized by one-half of 1% of its residents. And the terrorists are children." Mugging in Washington, D.C., was so common, it was said to be an "epidemic." Rundown areas, which during this era included nearly all of New York City, were known as "juvenile jungles" and "places where boys kill." This radical increase in youth crime extended into in the 1960s and 1970s, as part of an overall crime wave that did not begin to taper off until the 1980s and was measurable in the 1990s. (James Gilbert, A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950s (1986).)
separatist ranches on the brink of implosion hidden in the nation's vast rural areas, they were beating or shooting African-American men on the side of the highway. Old-school mid-century terms like "discrimination," "prejudice," and "bigotry," seemed inapt to explain predatory children, truck-sized fertilizer bombs, and "large capacity ammunition feeding devices," otherwise known as assault weapons. Vocabulary like "hate" did not seem hyperbolic alongside descriptors like "terrorism," "cannibalism," "wilding," or a teen "Trenchcoat Mafia." To accomplish that transformation, the dizzying pressures of late modern vertigo as described by Young began to affect the national outlook.

*Manuscript found at bottom of wastebasket by parent of eight-year-old male:*

*My plan for Barbara Rikker: 1. Hang her up. 2. Shoot her with bow and arrow. 3. Throw bundles at her.*

— Talk of the Town, *The New Yorker*, at 21, 1961

To fully understand the 1994 Crime Bill one has to appreciate the atmosphere at the time. For the previous decade, Americans had usually identified crime as the biggest problem facing the country. Although it was not known at the time, violent crime had reached its peak—by one

During the transition from the first half of the century to the second half, societal perspectives on youth crime were becoming increasingly antagonistic and policies applicable to juvenile crime—and to crime generally—were becoming more retributive. The shift in perceptions about young offenders could be laid out in roughly four stages: The first viewed child criminals as disease-afflicted people, who inspired compassion and would benefit from rehabilitation; the second worried about young offenders as "status" offenders, whose affect on public safety was mild and temporary; the third stage, which blended with stages two and four, saw the rise in gangs and youth violence as confirmation that young people were the agents of their own criminality, worthy of blame and punishment; and the fourth stage viewed young offenders as dangerous threats to public safety, whose blameworthiness had become irrelevant in light of the necessity for public safety. The latter view was buoyed by increasing crime rates among juveniles and sense that the entire youth subculture was out of control. Throughout the first half of the 20th century, although a number of theories were propounded to explain juvenile violence—everything from biological, psychological, sociological and socio-structural, and conflict theories. Youth crime was thought to be attributable to something. That outlook was somewhat different from the panic expressed near the turn of the millennium about juvenile violence. By that time, one could argue that the mid-century criminological theories had all been exhausted—not wholly proven wrong, but none of them proving to be the answer to juvenile crime prevention. Rates had increased significantly; youth crime was increasing in urban and rural settings; deterrence was having no effect on juvenile behavior.
accounting, 500 times higher than it was 30 years previously.\textsuperscript{636} This climate of fear was summed up by President Bill Clinton, who in signing the 1994 Crime Bill, said: "Gangs and drugs have taken over our streets and undermined our schools. Every day, we read about somebody else who has literally gotten away with murder."\textsuperscript{637}

**Blurred Lines Between "Us" and "Them"**

In 1990s political rhetoric and public perception, threats to one's safety were extreme and intractable, and, in some of the most fear-inducing incidents, the Others who carried them out for the most part appeared to be like Us. (Indeed, school shooters and social media bullies were the children of Us.) Their Otherness seemed inexplicable and mysterious, and therefore even more sinister. And, because the emblems of danger that made Us suspicious of Them were no longer limited to skin color—and indeed might be invisibly located in our quiet neighbors, our noble priest, our humble dog catcher, or even our own children—there was every reason to focus on interior inspirations for violence: individual belief systems, "orientations" (chiefly regarding sex), and (multi)culturalisms.


Describing mass incarceration as a reflection of "a [political system's] solution that outlasted the original problem," the authors note that the U.S. prison population has grown 700% since 1970. (Pew Charitable Trusts, Public Safety Performance Project, Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011 i (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf (stating that the prison population grew by 700% between 1970 and 2005.) The federal government shapes the criminal justice landscape, even at the state level, through the purse. Grant money assists states and localities in criminal justice initiatives, but it also bribes them to conform to federal priorities.
[R]estlessness and indocility seem to become contagious and common both in the schools and in the boardinghouses in certain days of atmospheric agitation.

—in Antonio Marro,
Influence of the Puberal Development Upon the Moral Character of Children of Both Sexes, 5(2) Am. J. of Sociology 193-219 (Sep. 1899)

Additionally, if the guideposts of ethnicity, race, and ancestry would no longer serve as markers of dangerousness, then determining who were the dangerous Others was vastly more complicated. The basic rule is that criminals are clearly Others, while victims generally are not. But a Black victim, like anyone else in the Them category, does not become less of an Other because of his or her victim status. Civil rights laws serve as a reminder of the perseverating divisions between the dominant Us and the minority Them categories. By 1994, race was only one of several categories that defined Them. These divisions—born and bred on American soil even before the country existed—fractured when transferred from civic social settings, where White (heterosexual male) dominance held sway, to the criminal arena, which was defined less by White dominance than by Black (and other minority) subjugation. Civil legal protections ensured that Others were entitled to freely exercise their rights. Whites were instructed to step aside and let the Others vote, attend public school, etc. But civil protections did not alter the fact that, in a criminal justice setting, these same Others were subject to presumptions of guilt and harsher punishments than "Us" Whites.

638 Put differently, so long as the criminal justice system continued to treat Black defendants and other minorities more harshly than Whites, the system did not require explicit White dominance. In theory, criminal justice mechanisms could be run by Black people, or by a diversified lot, or by little green men. With institutional support built on a long history of indoctrination, dominance and oppression can operate separately. This allows Us-Them divisions to fracture when moving the categories from civil to criminal systems. The differences between civil rights exercised in civic life and access to civil rights in the criminal justice system is crucial to understanding the bases for "hate crime" laws.

Also, the basic rule did not fit a scenario where the offenders were children or police officers. Regardless of any other factor, how can the video of kicking a man on the shoulder of the highway be understood as showing anything other than an expression of hate for simply being Other? From a contrary perspective, how could the security video of black-suited teens hunting down their classmates be seen as showing anything but the expression of hate by an Other?

The confusion about Us-Them status, echoed in the difficulty finding a meeting-of-the-minds when conceptualizing "hate crime," inflamed public anxiety. Anecdotal reports of "hate crimes" were marked by their "brutality." The impulse to address extreme, heinous, brutal crimes was unavoidable—and by doing so, imagine that a brightline would thereby be drawn between Us and Them, between the general public and brutal "hate crime" offenders. As a metaphor, clarity through policies drawn in simple bold lines would provide the corrective lenses to help us see better the difference between Us and Them.

**Zero Tolerance Solutions**

Increasingly, the public and Congress showed a willingness to discuss "hate"-motivated crimes as a separate social problem from other violent crimes. This separation of the stereotypical "hate crime" gradually became viewed as distinct from other forms of cruelty and violence, and this division was reinforced by political rhetoric carving out a special type of

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640 Civil rights for juveniles were included in the Crime Bill under 42 U.S.C. § 14141, Pattern and Practice [of depriving rights in administration of juvenile justice]. This provision makes it unlawful for any governmental authority with responsibility for the administration of juvenile justice or the incarceration of juveniles to deprive juveniles own their care of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The statute identified the types of misconduct it contemplated to include:

1. Excessive Force
2. Discriminatory Harassment
3. False Arrest
4. Coercive Sexual Conduct
5. Unlawful Stops, Searches, or Arrests.
Radical brutality prompted radical reaction. Zero-tolerance initiatives, possibly parroting propaganda styled after First Lady Nancy Reagan’s national anti-drug "Just Say No" campaign, found their way into policies affecting a range of activities: policing, school discipline, workplace management, drunk driving, drug use, and even parenting habits. Ferberizing offered a suitable metaphor for the time: Closing the door on undesirable behavior and withholding compassion from "undesirables" who engaged in antisocial conduct seemed not only appropriate, but also necessary—as a matter of self-care or personal security.

The solution to violent expressions of intolerance for Out-groups, framed in zero-tolerance terms, sanctioned even minor infractions with severe discipline or legal punishment. Critics were primarily concerned with the technocratic defects built into zero-tolerance, such that the policy left no room for contextualizing action or understanding motivations to tailor the response to the circumstances of the offense and the offender. Critics argued that zero-tolerance

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642 The testimony states in part:

||For example, in southern Virginia last year, a soft-spoken black man was soaked in gasoline, burned alive, and then beheaded in the yard of his slayer. The victim was the only son of his parents, who were incredibly proud of his service in the Marines. He was targeted for this act of violence, it was discovered, simply because he was black. Likewise in April 1994, two African American men murdered a white father of three in Lubbock, Texas. The killers later stated that they had set out to find a victim this time who was white. Earlier this year in Illinois, a Hispanic family mourned the loss of their son who was kicked and verbally abused as he lay on the ground bleeding to death, shortly after being in a car accident with the assailant. According to the authorities, the driver of the other car was upset that his car had been damaged and went over to the victim and repeatedly kicked him in the stomach while shouting, "Mexican, go back to Mexico."

(Id.)

social control mechanisms were not simply aimed at sanctioning today's acts, but were attempting to prevent inchoate future crimes on terms not much more sophisticated than Beccaria's theories about criminal body types: The vast majority of "offenders" subjected to zero-tolerance-type criminal justice policies did have a particular "body type"; they were young Black males. Academics explaining the New Jim Crow articulate this resurgence in social control of Others.

Three decades after the revolutionary 1960s, when civil rights marchers and antiwar flower children spooned North and South in a societal yin-yang around issues like equality and free speech, the country had telescoped its attention to the realism of domestic security. In discourse, idealistic ambitions seemed to have been eclipsed by marketplace ideologies. Trickle-down in economics would later be revealed as a failure but, in law and corrections, trickle down injustice succeeded in crippling generations of communities where long prison sentences, discriminatorily applied to minority defendants, left gaping holes in the fabric of society. The 1994 Crime Bill was the moral of the story that cries for peace and songs about love could not drown out the cacophony of Us-Them rhetoric of "Wars" on Crime, Poverty, Drugs, Terror, etc. Solving these ills, as shown in the Crime Bill provisions, relied on the holy water of harsh punishments to exorcise these social demons.644

644 The various "Provisions for Review, Promulgation, or Amendment of Federal Sentencing Guidelines," which would permit sentencing enhancements for specific type of crimes offer a laundry list of the concerns of the time that the Crime Bill was responding to:


In this context, the term "hate crime" seemed not at all radical and even sounded rational as part of the 1990s criminal justice food pyramid.\(^6^{45}\) Staking public safety on zero-tolerance attitudes, the Crime Bill increased penalties and added death penalty clauses across the board in federal criminal law as a proxy for prevention.\(^6^{46}\) Death penalty provisions were added to existing criminal civil rights statutes.

**Intentional Selection of Categories**

The Crime Bill also introduced a new "hate crime" related Act, the **1994 Hate Crimes Sentencing Enhancement Act (HCSEA)**. The HCSEA directed the US Sentencing Commission to "enhance" sentences for federal "hate crimes," which were defined as crimes "in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime because of the actual or perceived race, color, religion, Pub. L. 103–322, title XI, § 110502, Sept. 13, 1994, 108 Stat. 2015.—Second offense of using explosive to commit felony.
  Pub. L. 103–322, title XVII, § 180201(c), Sept. 13, 1994, 108 Stat. 2047.—Possession or distribution of drugs at truck stops or safety rest areas.

\(^6^{45}\) As early as 1993, Professor Frederick M. Lawrence, a proponent of ABL, published an article containing a list of federal criminal civil rights statutes:
- 18 U.S.C. § 241 (conspiracy to violate civil rights);
- 18 U.S.C. § 242 (deprivation of rights under color of law);

national origin, ethnicity, gender, disability, or sexual orientation of any person."647 (See Figure 23: 1994 Federal Sentencing Enhancements Direction.)

Figure 23: 1994 Federal Sentencing Enhancements Direction

Under the HCSEA, the legal premise of special protections for minorities, specifically racial minorities—going back to the Reconstruction Era of the 1870s—did not change. However, the categories of protected persons expanded from the four with Reconstruction Era roots—race, color, religion, or national origin—to eight, adding ethnicity, gender, disability, and sexual orientation.

Under the Crime Bill, "disability" was also added to the HCSA for the purpose of statistical data. Curiously, "gender" was not, but civil penalties for "gender" violence were enacted under the Crime Bill's provision for Civil Rights Remedies for Gender-Motivated Violence Act, Subtitle C of the 1994 Violence Against Women Act (VAWA).648 Although the statute criminalizes


(a) Definition.—In this section, "hate crime" means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

acts "motivated by gender" in the style of ABL, VAWA was not originally construed as a "hate crime" statute. Part of VAWA was ruled unconstitutional but its effects have so far not affected congressional power to pursue "hate crime" legislation.

**Victim as Object**

The concept of "hate crime" was not about the offender's criminal objective but about the offender's object. A victim selected to suit the offender's desire for money or who is present when an opportunity to obtain a benefit illegally arises does not support a "hate crime." Rather, the nucleus of the concept of "hate crime," spelled out in the congressional record about the HCSEA was its link to specific victim characteristics that have been recognized, based on American

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The Act established civil remedies, such as remedies punitive damages and injunctive relief, for women subject to violence "committed because of gender, on the basis of gender, and due, in part, to animus based on the victim's gender." (Section 40302(d)(1).) Congressional jurisdiction was based on "section 5 of the 14th Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety." (103-322 § 40302(a), 108 Stat. 1941. But see U.S. v. Morrison, 529 U.S. 598, 613-14 (2000) (invalidating the part of VAWA that authorizes women to seek civil remedies against their attackers due to lack of Congressional authority under the Commerce Clause).)

Despite early resistance to the addition of "gender" to the protected categories under "hate crime" laws for fear that every case of sexual assault would also be a "hate crime," it appears that cases of "hate" based on gender—even as an extension of domestic violence and rape cases—have not overwhelmed the reporting or prosecutorial systems. As a failsafe, prosecutors retain the discretion to choose to not prosecute for "hate crime" under the HCPA or employ "hate crime" sentencing enhancements.

The Violence Against Women Civil Rights Restoration Act of 2003 (H.R.394), would have revised provisions of the 1994 VAWA regarding remedies for civil rights violations, by making a person liable to the injured party for crimes of violence motivated by gender that are under federal jurisdiction (e.g., gender motivated crime in which the defendant or the victim travels in interstate or foreign commerce, or the defendant employs a weapon, a narcotic or drug listed under the Controlled Substances Act). The act would also authorize the Attorney General to institute a civil action in U.S. district court for appropriate equitable relief whenever there is reasonable cause to believe that any state, political subdivision, official, employee, or someone acting as their agent has systematically discriminated on the basis of gender in the investigation or prosecution of gender-based crimes.

Since "gender" was added to the list of protected categories under the federal ABL in 2009, VAWA has been increasingly included in discussions about "hate crime."

"[A]few days after the Morrison decision nineteen U.S. Senators jointly proposed a federal "hate crime" statute based on grounds rejected in Morrison. (See 146 Cong. Rec. S5370 (daily ed. June 19, 2000) (identifying the Commerce Clause and Civil War Amendments as sources of congressional power for the Local Law Enforcement Enhancement Act of 2000, a statute that would grant federal jurisdiction over violent crimes motivated by bias).) [The] implications of the Morrison holding, that Congress lacks power under either the Commerce Clause or Section 5 of the Fourteenth Amendment to provide the federal civil remedy created by [VAWA (1994)], are far reaching."

history and contemporary social life, as synonymous with prejudice enacted in violence against targets who have or are believed to have one or more of the same small group of attributes. In short, victim as object.

In keeping with the overall thrust of the Crime Bill, the HCSEA, applicable to eight predicate federal crimes nearly identical to the HCSA list, ratcheted up penalties as much as 30% [three offense levels], when the defendant's prejudice was shown beyond a reasonable doubt. The HCSEA was the first federal law to increase criminal penalties in this circumstances, and it was vaunted by law enforcement as a model to attach longer sentences to crimes of domestic terrorism, treason, and sedition. The enhancement was significantly limited, however, to scenarios in which the crime occurred on federal property or while the victim was engaged in "federally protected activities," such as attending public school, voting, serving jury duty, etc. This narrow application of the HCSEA to activities related to national citizenship and, for minorities, to activities implicating state citizenship was anchored in jurisdictional hurdles.

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651 Enhanced penalties under the 1994 Hate Crime Sentencing Enhancement Act, like the HCSA, applied to crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and vandalism.


653 28 U.S.C. § 994, note. The provision of the HCSEA reads:

(b) Sentencing Enhancement.--Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.

(Id.)

In May 1995, the United States Sentencing Commission announced its implementation of increased punishments for hate crimes, which took effect on November 1, 1995.

Critics of the HCSEA have questioned its legality. To be illegal and therefore invalid, a sentence must:

- exceed statutory limits;
- impose multiple terms of imprisonment for the same offense; or
- otherwise violates constitutions or the law. (See, e.g., Mohamad Al-Hakim and Susan Dimock, Hate as an Aggravating Factor in Sentencing, 15(4) New Crim. L. Rev.: An Int'l and Interdisciplinary J. 572 (Fall 2012) (arguing that hate crime sentencing enhancements fail the proportionality doctrine, which states that sentences must be proportionate to the gravity of the offense and the degree of culpability of the offender).)

The Act has not been successfully challenged, however individual sentences may be challenged ad hoc on other grounds. "The determination of whether a sentence is illegal is made by reference to the authorizing statute or applicable constitutional provisions and is, therefore, a matter of statutory interpretation." (Brown v. Wyoming, 2004 WY 119, 99 P.3d 489, 491 (2004).)
limiting the operationalization of the HCSEA's companion law, Section 245 of Title 18, governing interference with "federally protected activities," detailed below.\textsuperscript{654} This latter statute—passed during the Civil Rights Era—was itself revised under the 1994 Crime Bill to increase applicable penalties for interference with its enumerated protected activities.

|| HCPA, 18 U.S.C. 249 Findings

(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes. ||

\textbf{1968}

\textbf{Protections Follow Activities}

In 1968, while the \textbf{Civil Rights Laws of 1964} were in their infancy, the assassination of Martin Luther King, Jr., Robert Kennedy (after President Kennedy's assassination in 1963), among other national traumas, had a profound effect on the nation. Some expressed the sense that the nation was not simply divided across racial lines, but was caving in around the conflicts embedded in the national identity. If killing over integration was the nation's method of "debate," then "the center will not hold." The mood of the country was not very different from that of 1994 in some respects, and federal laws were revised substantially.\textsuperscript{655} Along with previous civil rights laws aimed at "protecting precisely and effectively the exercise of the most varied civil

\textsuperscript{654} When the federal sentencing enhancement for "hate crimes" was passed, prosecutors were obliged to allege federal civil rights violations under Section 245 to argue for a longer sentence for a convicted offender. Because the HCSEA was thus linked to Section 245, the two have been interchangeably referred to as federal "hate crime" laws, despite the inaccuracy of that label.

rights” with criminal sanctions, after two years of debate, Congress added a provision to the existing criminal civil rights statutes under Title 18 of the U.S. Code, titled “Federally Protected Activities.” Section 245 has been referred to as a federal “hate crime” statute despite the fact that it was enacted decades before the concept of a “hate crime” had been recorded in public or legal discourse. The bland declarative title reflects a number of salient points about the law itself and the social context in which it was enacted.

_Surely the essential and unarguable core of King’s campaign was the insistence that pigmentation was a …false measure of mankind and an inheritance from a time of great ignorance and stupidity and cruelty, when one drop of blood could make you “Black.”_

—Christopher Hitchens

First, Section 245 was enacted during the civil rights era as part of a series of remedial laws—both civil and criminal—mimicking in language, intention, and design the hard won Civil Rights Acts of 1957, 1960, 1961, 1964, and the Voting Rights Act of 1965. The most difficult battles for civil rights up to that point in history had been fought, and Section 245 was the caboose to related legislation. In fact, as discussed more fully below, the popular name for Section 245 and related law passed at the same time—the "Civil Rights Act of 1968"—did not appear in the index of the U.S. Code until the 1976 printing, and this short title was not formally added to the text of the U.S. Code until 1988 (see image below). That Congress did not use the label "Civil

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658 Jacobs and Potter (1990) treat 18 U.S.C. § 245 as the beginning of modern civil rights ideation and its seduction by movements of identity politics, because the jurisdiction of the law extends to federal, state, and local levels, and the law enumerates activities where individuals must be free from threats of victimization or actual discrimination.
659 Pub. L. 90-284, 82 Stat. 73-92 (Apr. 11, 1968), comprised the following Acts:
- The Civil Rights Act of 1968, so named in 1988;
- The Fair Housing Act, later formally named and amended in 1988;
- The Indian Civil Rights Act of 1968; and
- The Civil Disobedience Act of 1968.
Rights Act” in 1968, when previous legislation had been so designated, may reflect the view that this was not initially conceived as notable civil rights law or that the formal designation would work against its passage. When the 2009 HCPA was passed under Section 249 of Title 18 as the next iteration of Section 245’s protections, its title, "hate crime," spurred interest in its innovations and opposition to it. Yet Section 245, the "grandfather" of federal "hate crime" statutes, was never spotlighted as an innovation in the law.

Second, perhaps building on lessons learned in the process of enacting previous civil rights laws, Section 245 opens by addressing federal-state jurisdiction. In an unusual structure, the statute begins with a statement affirming that the law does not create new federal jurisdiction, but leaves to the States the prosecutorial responsibility for crimes under the statute while retaining concurrent federal investigatory power, generally consistent with the distribution of state-federal power in the area of civil rights. Such "whereas" clauses typically appear at the end of a statute, as a kind of renunciation of any conflicts that may arise from the preceding provisions. The fact that this affirmation appears at the beginning of the statute reflects the heightened concern of the day about federal incursion on state matters. The issue of state sovereignty in policing state citizens originates with the founding of the country. As detailed in the previous section, the shift from confederalism to federalism reset the balance of federal-state powers. In the Civil Rights Era, the balance tipped toward federal oversight, largely because states continued to ignore the basic tenets of equality and to promote racialized violence.

States rights advocates have long been aligned with racist mindsets. As one example, the infamous Bull Connor, a city commissioner in Birmingham in the 1950s, embodied the very ideologies and segregationist enforcement actions at which civil rights laws were aimed. He cultivated extremist brutality against African-Americans by promising Klansmen an "open season" on the 1964 Freedom Riders, echoing the sentiments of Governor Patterson (AL) that

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660 Pub. L. 85-315, 71 Stat. 636 (Sept. 9, 1957), establishing the Civil Rights Commission. Federal investigatory power rested with the FBI, which reluctantly took up the cause of civil rights, in contravention to its notorious founder's general attitudes, which permeated the agency.
they were "free to do as they pleased when it came to the hated integrationists," but insisting, "By God, if you are going to do this thing, do it right!"\footnote{661}{Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 431 (2004).}

State acquiescence in Klan violence and the generalized public sentiment that gave Connor's campaign a landslide victory in 1957 reflected a resurgence of Jim Crow, which was a revival of Black Codes, preceded by Slave Codes, preceded by Lynch Law, preceded the Massachusetts Body of Liberties. The dividing line between these various forms of segregation separated justifications based on economic profitability from systems based on social superiority. Rationales for pre-Thirteenth Amendment laws were based on the pocketbook; post-Thirteenth Amendment laws were based on saving face. Presenting the stasis of state-federal jurisdiction up front, if it had any effect at all, would have diffused objections to Section 245.\footnote{662}{18 U.S.C. § 245(a) (1968).}

Notwithstanding the opening provision, the title, "Federally Protected Activities," stands as a caution to states. The title of Section 245 echoes the "not protected, not prohibited" standard discussed in the previous section, by which states can intercede on matters not protected and not prohibited by federal law. Aside from interstate commerce, the areas of social life over which federal authority is justified because they demand national uniformity or central coordination is not a straightforward determination and the question has spurred federal-state tension since the infant-nation shifted from a "confederacy" to "these States United."

Third, perhaps for these reasons, Section 245 does not add new rights as did the previous Civil Rights Acts. And, Section 245, like the HCPA, does not criminalize behavior anew. Rather, it identifies the endeavors of civic life for which violent or harmful interference with existing rights will draw a penalty. The statute is oriented around the protections afforded by federal
police powers, as opposed to the powers themselves.\textsuperscript{663} As a point of comparison, the Voting Rights Act is drafted as "an act to enforce" rights, not to protect activities. (See Appendix VRA.) The peculiarity of Section 245's statutory structure is more obvious when applied to other types of law. For example, in a hypothetical corollary, the language of a law protecting banks from robbery would say that banks have a right to not be interfered with when going about the business of banking. This unusual structure stems from the structure of the powers granted to Congress under the Reconstruction Amendments. Most importantly, the Thirteenth Amendment declares that "slavery shall not exist," which the Supreme Court later interprets to include "badges and incidents." The Amendment does not say, "All former slaves are now free and enjoy the rights of citizens under the Bill of Rights." The language does not say, "All men (people) are created equal and equally enjoy all the rights in the Constitution and under law."

Given the language of its antecedent authorities, Section 245 could not say, "All citizens have the right to be free from slavery." For southern states, this language would have been tantamount to permitting slavery, since plantation states had denied citizenship to Africans from the very beginning. Flowing from the original aversion to the use of "slave" or "slavery" in the Constitution, the Thirteenth Amendment simply declares that slavery and related systems shall not exist in the U.S.—as if to wipe away the stain that it ever had existed. Thus, in so far as Section 245 was an extension of "badges and incidents" powers, the statutory language could only protect activities that distinguished slaves from "freedmen."

\textsuperscript{663} Federal protections via its police power against private and public discriminatory actions have been ruled to be constitutional only for a handful of rights, which are recognized by the US Supreme Court as deriving from one’s citizenship. These rights include the right to petition the government, to vote in general and primary federal elections (\textit{Ex parte Yarbrough}, 110 U.S. 651 (1884); \textit{U.S. v. Classic}, 313 U.S. 299 (1941)), to inform federal officials of violations of federal law, to travel interstate (\textit{Griffin v. Breckenridge}, 403 U.S. 88 (1971) (holding criminal civil rights statute constitutional under Thirteenth Amendment and protected right to travel, obviating the need for the Court to consider Congress’s powers under § 5 of the 14th Amendment), and to the guarantees of the Due Process and Equal Protection Clauses of the U.S. Constitution (\textit{U.S. v. Guest}, 383 U.S. 745 (1966); \textit{Griffin v. Breckenridge}, 403 U.S. 88, 97-102 (1971) (holding that "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," thus the statute was held constitutional)). This line of decisions shaped the statutory protections for certain actions by which one exercises one's constitutional rights.
The versatility of talent which [Douglass] wields, in common with Dumas, Ira Aldridge, and Miss Greenfield, would seem to be the result of the grafting of the Anglo-Saxon on good, original, Negro stock. If the friends of "Caucasus" choose to claim, for that region, what [then] remains...they are welcome to it. They will forgive me for reminding them that the term "Caucasian" is dropped by recent writers on Ethnology; for the people about Mount Caucasus, are, and have ever been, Mongols. The great "white race" now seek paternity, according to Dr. Pickering, in Arabia--"Arida Nutrix" of the best breed of horses &c. Keep on, gentlemen; you will find yourselves in Africa, by-and-by. The Egyptians, like the Americans, were a mixed race, with some Negro blood circling around the throne, as well as in the mud hovels. —James McCune Smith, Introduction, My Bondage and My Freedom by Frederick Douglass (1855)

With regard to voting, Section 245 faced a similar problem. The progenitor of voting right, the 1870 Fifteenth Amendment, did not affirmatively grant a right to vote. (See Appendix 15th Amt.) Although it has been interpreted to imply that such rights exist, the language of the Fifteenth Amendment instead grants citizens the right to freedom from interference with the right to vote. The wording suggests the suffix, "...whatever those voting rights may be." Because the antecedents to Section 245 did not offer explicit structural support for individual freedoms beyond the right to not be interfered with, Section 245 is not titled in terms of rights but in terms of activities. Thus, as an extension of the illogic of the Founders' logic when crafting the Constitution, and the ramifications planted in the Reconstruction Amendments, Section 245 on its face says that to be a citizen is to be entitled to certain activities. Action is the core of American identity. Congress opened the backdoor to get criminal civil rights on the books, since rights are not rights unless they can be exercised.
Constitutional "Activities," Not Rights

The core of Section 245 contains five provisions, two of which directly prohibit injury, intimidation, or interference with an individual's exercise or enjoyment of certain enumerated rights and privileges of citizenship. One of the two so-called "hate crime" provisions, which protects everyone, enumerates activities generally related to the federal franchise, including the right to or campaign for public office, receive federal public benefits or participate in public programs, to be employed in a federal government agency, to serve on a federal jury, to receive public assistance, and, most importantly, the right to vote. The other provision protects a parallel set of activities related to the state franchise and applies only to people whose "race, color, religion or national origin" is the basis for discriminatory intimidation. Thus, the statute is a demand that states adhere to newly enacted civil rights laws in every area of civic life that the federal government could then reach and provides a set of Cliff Notes of those rights.

One provision protects an individual's freedom to attend public school, receive or enjoy any State benefit, be employed by and enjoy the perquisites of employment in a private business or public agency, organize the labor force, serve on a jury in State court, travel interstate, or patronize any business that serves the general public. These protections applied only to victims who were intimidated or injured "because of [their] race, color, religion, or national origin"—the same categories then listed in the (noncriminal) civil rights statutes. (See Appendix CRA.)

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664 18 U.S.C. § 245, Pub. L. 90-284 (1968). Under the subsection implicating categories of persons, the statute requires two elements to be proven: (1) that a crime of violence was motivated by racial, ethnic, or religious hatred; and (2) that it was carried out with the intent to interfere with the victim’s participation in one or more of the federally protected activities.

665 18 U.S.C. § 245(b). These protections roughly mimic Civil Rights protections, which prohibit discrimination in voting, employment (Title VI), public accommodations, education and when participating in programs that receive federal financial assistance.

666 This provision brought federal law governing such criminal acts into line with Supreme Court decisions regarding the power of the federal government to regulate private actors, which is permissible, among other things, if race or other minority status is implicated by the action.
But Congress' wording in Section 245 is simultaneously direct and evasive: The activities covered by the law are explained plainly and in detail, but the precise nature of the individual "rights" underpinning those activities is not clear. On one hand, protecting the exercise of constitutional rights means protecting persons who are entitled to the rights of citizens. On the other hand, Congress does not affirmatively state that citizens have the (civil) rights to attend public school, vote, or serve on a jury; rather, these rights are implied in the protection to act on them free from intimidation or injury. To offer some sense of how unusual the language choice is, the U.S. Code contains only two other areas of law invoking "federally protected activities"—both dealing with employer-employee relationships: one protecting union activities, and the other protecting employee whistleblowers. Moreover, the wording is such that federal protections cease when the individual, who remains a citizen of both the nation and a state, stops engaging in a specified activity or, alternatively, departs from lands under federal jurisdiction. This gap in protection undermined the usefulness of Section 245, and this point was one of the most compelling arguments for the HCPA, which closed that gap.

|| HCPA, 18 U.S.C. 249 Findings

(6) Such violence substantially affects interstate commerce in many ways, including the following:

(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

(C) Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce. ||

Jurisdiction and Protections

Within the broader scope of federal criminal regulations, at the time Section 245 was enacted, criminal civil rights under Title 18 comprised a small but contested area of law that had been revised between 1866 and 1948 as societal changes played out in Supreme Court jurisprudence—chiefly about the scope of federal jurisdiction. Much of the jurisprudence did not debate whether protections were warranted for certain members of the public based on the U.S. history of slavery and discrimination, but how far congressional authority could go in creating such protections. As explained in the previous section, the Thirteenth Amendment and the Commerce Clause expanded the reach of the federal government significantly—but nevertheless, Section 245 was emasculated by the protections of Section 245.

In summary, the addition of Section 245 in 1968, which followed a similar jurisdictional formula as Sections 241 and 242, consolidated years of jurisprudence on federal power to protect constitutional promises. The scope of congressional authority generally and on criminal civil rights protections specifically was one thread of the conversations between the U.S. Supreme Court and Congress going back to the founding of the country, notably in the jurisprudence of the Thirteenth, Fourteenth, and Fifteenth Amendments. The enumerated activities under Section 245 built upon Reconstruction era ideals, placing them in the context of
mid-century American life when the public school system was fully realized, States had
developed systems of public assistance, and there was a labor force eager to self-organize.

Reconstruction Civil Rights Laws, Sections 241 and 242

The statutory companions to Section 245 are Reconstruction Era laws that remain relatively unchanged among the numerous unsuccessful criminal civil rights laws that failed to meet constitutional standards. The Supreme Court acknowledged that the first civil rights provisions had been hastily adopted during an era of national distress:

The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues... Although enacted together, [§§ 19 and 20 of the Criminal Code of the United States, 18 U.S.C. (1946 ed.) §§ 51 and 52, now 18 U.S.C. (1950 ed.) §§ 241 and 242, 18 U.S.C.A. §§ 241, 242] were proposed by different sponsors and hastily adopted. They received little attention in debate. While the discussion of the bill as a whole fills about 100 pages of the Congressional Globe, only two or three related to [the original version of § 241, then titled, "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union, and for Other Purposes" (Act of May 31, 1870, 16 Stat. 140, § 6] and these are in good part a record of complaint that the section was inadequately considered or understood.668

667 “The depth of feeling which the lawlessness of the period evoked is reflected in the letter of Chief Justice Thomas Ruffin to his son, July 8, 1869. See 4 Hamilton, The Papers of Thomas Ruffin, 225.” (U.S. v. Williams et al., 341 U.S. 70 n.4 (1951).)
Overall, with regard to civil rights laws, the early track record of the legislative and judicial branches was dismal. Congress enacted seven statutes designed to implement the provisions of Reconstruction Amendments, prohibiting forms of discrimination and intimidation by states, private individuals, and mobs. The vast majority of laws passed by Congress between 1866 and 1950 to ensure enfranchisement and punish interference with access to the benefits of citizenship failed under Supreme Court scrutiny. For many provisions deemed unconstitutional as written, Congress allowed the protections to languish. The Supreme Court's track record with regard to civil rights laws was equally lamentable. Framing its rulings as jurisdictional matters, the Court declared all but two of the early civil rights statutes unconstitutional or otherwise rendered defunct. The Supreme Court holdings on the rights of citizens reflected its ambivalence about the nature of equality and the reach of the democratic franchise. Reconstruction as a social phenomenon was largely abandoned. As with the first attempt, the "New Birth of Freedom" never achieved its aspirations.
That ambivalence lingered until the 1950s.\textsuperscript{669} Beginning with the Act of 1957, Congress relied heavily on its Commerce Clause jurisdiction until Supreme Court decisions hinted at untapped congressional power under the Reconstruction Amendments.\textsuperscript{670} Coupled with the familiar landmark Supreme Court cases of the Civil Rights Era, Congress dismantled institutionalized separate-but-equal standards and enacted provisions prohibiting interference with civil rights into the late 1960s and beyond. In 1968 when Section 245 was passed, only two of the four federal statutes in Title 18 prohibiting crimes against the "elective franchise and the civil rights of citizens"\textsuperscript{671} had been carried forward from related Reconstruction era laws.\textsuperscript{672} The formula of


The death of Chief Justice Vinson in 1953, who was a fair but not visionary voice on the Court, created an opening for Chief Justice Earl Warren, the former California Governor who decided the landmark rulings that changed the tone of the nation.


\textsuperscript{671} 1874 Rev. Stats., Title 70, Ch. 7. The two other criminal sanctions under Title 18 (1968) incorporated provisions (previously listed under other Titles) prohibiting discrimination in the selection of juries (18 U.S.C. § 243 (1948) Exclusion of jurors on account of race or color.) and against uniformed officers (18 U.S.C. § 244 (1994) Discrimination against person wearing uniform of armed forces).

The provision prohibiting the exclusion of jurors was part of an 1875 civil rights statute. The Civil Rights Act of 1875 made race-based discrimination in jury service illegal. Not long thereafter in 1880 a Supreme Court decision in Strauder v. West Virginia turned back a state provision that restricted jury duty to Whites. The Supreme Court took up the issue in 1965 in Swain v. Alabama, a case involving a Black man, Robert Swain, sentenced to death by an all-White jury for the rape of a White woman. At the time, no Black citizens had served on a jury in Talladega County since 1950. The six Black people on the prospective jury panel were struck by the prosecutor. The Supreme Court found that the prosecutors did not intentionally discriminate against Black potential jurors. The ruling in Swain stood for twenty years, and in that time no litigant successfully won a claim of jury discrimination during those two decades. The Court took up the issue again in 1986 in Batson v. Kentucky and reversed itself, and held that a prosecutor cannot use preemptory strikes to exclude a prospective juror based on his or her race. It lowered the standard a proof, and in theory, required that in situations where there appears to be an inference of discrimination in jury selection by the use of peremptory strikes, a prosecutor must explain why he removed potential Black jurors.

In Batson, the Court established a three-step test for a defendant to establish that a prosecutor removed potential jurors solely based on race. First, the defendant must establish that the prosecutor's actions in selecting jurors raise an inference of discrimination. The latter can be established by the pattern of the prosecutor's "strikes" against potential jurors or statements made by the prosecutor during the jury selection process. The prosecutor must then refute the claim by presenting nonracial or "race neutral" reasons for eliminating the jurors in question. It is a low threshold to meet and the Supreme Court has ruled that the reasons do not have to be plausible or persuasive. Finally, the trial judge has to assess all of the information and circumstances and determine if the defense has proven that the prosecutor has intentionally discriminated against individuals of color on a jury panel. The history of such challenges show the trial courts rarely take action and appeals are difficult and generally not successful.
these two statutory provisions serves as the lynchpin between contemporary discussions about ABL and the statutory support for "hate crime" statutes that existed in prior law. How did Section 245's companion statutes, Section 241 and 242, provide federal criminal protections for civil rights?

Freedom to Engage in Activities

The substance of civil rights laws was to "constitutionally secure against interference [with] rights which arise from the relationship of the individual and the Federal Government"\(^673\); that is, the rights of citizenship.\(^674\) Defining these rights was a longer-term proposition than the initial assay at establishing a framework of federal civil rights. Title 42 provides remedies for violations of the rights to "inherit, purchase, lease, sell, hold, and convey real and personal property," and to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Even after successive revisions in the U.S. Statutes (Revised) of 1874 to 1878, the 1909 U.S. Criminal Code, the 1926 U.S. Code, the 1948 U.S. Criminal Code

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\(^{673}\) U.S. v. Williams et al., 341 U.S. 70 (1951).

\(^{674}\) The Williams Court clarified that protections under Section 241 and other civil rights provisions do not extend to noncitizens. "Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 656, 32 L.Ed. 766, held that a conspiracy to drive aliens from their homes is not an offense under the statute, since it is expressly limited to interference with citizens. In three other decisions of this Court the section was involved, but no question pertinent to the issues now before us was decided. U.S. v. Mason, 213 U.S. 115, 29 S.Ct. 480, 53 L.Ed. 725; O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980; Pennsylvania System Federation v. Pennsylvania R. Co., 267 U.S. 203, 45 S.Ct. 307, 69 L.Ed. 574." (U.S. v. Williams et al., 341 U.S. 70 (1951).)
(Revised), and other subsequent major revisions to federal law, the fundamental rights under the constitution and the rights secured to citizens as envisioned by Reconstruction laws were still being precisely defined. (See Appendix FABL-R.) To ensure the integrity of the Thirteenth, Fourteenth, and Fifteenth Amendments, the imperative to pass law, even ill-considered law, to protect former slaves was expressed in urgent terms in the congressional record, especially to end the "lawless activities of private bands, of which the Klan was the most conspicuous." Mob violence *ad hoc* was as much a danger as the organized ritualized violence by the KKK and related groups. Such "private lawlessness" was within the reach of Section 241 under Congress' Thirteenth Amendment ability to prevent "badges and incidents" of slavery. Thus, Section 241 prohibits conspiracies—including "[going] in disguise on the highway, or on the premises of another"—that are designed to intimidate or injure any citizen in the free exercise of rights. The rights envisioned in this law, although not explicitly identified, have been interpreted by the Supreme Court to be narrowly drawn, encompassing only those rights that are "granted or secured" by the Constitution.

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675 18 U.S.C. § 241 (1996). *See also* Griffin v. Breckenridge, 403 U.S. 88, 104-06 (1971) (holding that Congress had constitutional authority to reach private conspiracy both under Section 2 of Thirteenth Amendment and under its power to protect the right of interstate travel).


The scope of the rights covered by Sections 241 and 242 has been so narrowly construed by the Supreme Court that it strains credulity. In U.S. v. Powell, 212 U.S. 564 (1909) the Court held that participants in a mob that seized a "Negro" from the custody of the local sheriff and lynched him were not indictable under § 241. As examples, the Williams Court summarized Cruikshank and *Ex parte Yarbrough*. In Cruikshank, "defendants were indicted for conspiring to deprive some Negro citizens of rights secured by the Constitution" and found guilty. The verdict on the counts "alleging interference with rights secured by the First, Second, Fourteenth and Fifteenth Amendments were objectionable [by the circuit court]" because the rights asserted were not 'granted or secured by the Constitution or laws of the United States' within the meaning of the statute. The pattern set by this case has never been departed from." (Williams, *supra*.)

"*Ex parte Yarbrough*, 110 U.S. 651, was the first of seven decisions in which the Court held or assumed that the right to vote in federal elections was protected by this legislation because it was a right 'granted or secured' by the Constitution or laws of the United States. *Guinn v. U.S.*, 238 U.S. 347; *U.S. v. Mosley*, 238 U.S. 383; and *U.S. v. Saylor*, 322 U.S. 385, held that interference by private persons with the right to vote in general elections for members of Congress is an offense under § 241; in *U.S. v. Classic*, 313 U.S. 299, the statute was found applicable to the Louisiana system of primary elections for Congress." *(Id.)*

The Court offered other examples:
But Congress also sought to prevent state actors from disregarding the new laws protecting constitutional rights. Black Codes, which were reinvented versions of Slave Codes that had been drafted during Reconstruction, followed by Jim Crow laws, and specific public statements that incited violence against Blacks, such as The Southern Manifest of 1956 discussed earlier in this dissertation, demonstrates the lengthy history of state action to undermine racial equality. Section 242 therefore prohibits deprivation of rights "under color of law," that is, with "the appearance or semblance, without the substance, of legal right." The provision protects a citizen's freedom from any deprivation of any rights, privileges, or immunities, or the imposition

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||In U.S. v. Waddell, 112 U.S. 76, interference with the right to establish a claim under the Homestead Acts brought the offender within § 241. The right did not pertain to United States citizenship; but since it was 'wholly dependent upon the act of Congress,' obstructing its exercise came 'within the purview of the statute and of the constitutional power of Congress to make such statute.' 112 U.S. at 79, 80.||

(Id.)

Section 241 is violated when conspirators assault a citizen in the custody of a U.S. marshal. (Logan v. U.S., 144 U.S. 263 (1892).)

"[A] citizen may not be denied the right to inform on violation of federal laws. In re Quarles, 158 U.S. 532, Motes v. U.S., 178 U.S. 458." (Id.)

"Contrariwise, we have held that conspiracies to force citizens to give up their jobs or compel them to move out of a State are not within the terms of the statute. Hodges v. U.S., 203 U.S. 1. U.S. v. Wheeler, 254 U.S. 281." (Id.)

Congress emphasized the importance of protecting the right to vote:

||There are, Mr. President, various ways in which the right secured by the Fifteenth Amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in Section 2 of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. * * * But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the Fourteenth Amendment, as well as trespass upon the right conferred by the Fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose... I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country.

* * *

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. It a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.||

(Cong. Globe, 41st Cong., 2d Sess., 3480, 3611-13 (1870) (statements of Senator Pool). See also U.S. v. Williams et al., 341 U.S. 70 (1951).)

of different punishments, pains, or penalties "on account of such person being an alien, or by reason of his color, or race."679 The prohibitions are limited to State actors for those rights "which the Constitution merely guarantees from interference by a State."680 What was originally a grab at federal jurisdiction over the State officials who might thwart or ignore their responsibilities to ensure the equality in the exercise of constitutional rights or to enforce violations of those rights became the proving ground for federal criminal civil rights and the limitations on the Fourteenth Amendment.681

"Under Color of Law, Statute, Ordinance, or Custom"

The most significant difference between Section 241 and Section 242 is the basis of congressional authority to regulate behavior. One type of authority allows Congress to prohibit typical criminal behavior, such as fraud, murder, and conspiracy that violates federal law. Another allows Congress to restrict the action of government officials or anyone acting in a quasi-official capacity. Therefore, Section 242 hinges on the phrase "under color of law," which refers to the authority granted to the actor by a local, state, or federal government agency, as well as exceeding one's authority.682 "Color of law" might mean under an existing state law (which likely does not meet constitutional standards) or actions carried out by a state official or

680 U.S. v. Williams et al., 341 U.S. 70 (1951) (noting that Congress may legislate to protect the "right of citizens to vote in congressional elections...from individual as well as from State interference," citing Ex parte Yarbrough, 110 U.S. 651; but "an individual's interest in receiving a fair trial in State courts cannot be constitutionally vindicated by federal prosecution of private persons," citing U.S. v. Powell, 212 U.S. 564; accord Hodges v. U.S., 203 U.S. 1; U.S. v. Wheeler, 254 U.S. 281). The Court observed that the "distinction...between rights that flow from the substantive powers of the Federal Government and may clearly be protected from private interference, and interests which the Constitution only guarantees from interference by States, is a familiar one in American law. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 310."
681 "[I]nterference with civil rights by State officers was dealt with fully by § 17 of the Act. Three years before its enactment Congress had passed the first general conspiracy statute. Act of March 2, 1867, § 30, 14 Stat. 484, R.S. § 5440, now 18 U.S.C. (1950 ed.) § 371, 18 U.S.C. § 371. This provision, in conjunction with § 17, reached conspiracies under color of State law to deprive persons of rights guaranteed by the Fourteenth Amendment. No other provision of the Act of 1870 was necessary for that purpose." (U.S. v. Williams et al., 341 U.S. 70 (1951.).)
an individual deputized or otherwise given quasi-official authority. In the Reconstruction Era, this would have prohibited the acts of extrajudicial bodies, chiefly groups that imposed Lynch Law during the interregnum between colonial rule and the new government, and quasi-officials who operated in the vast open Territories where professional law enforcement was rare or nonexistent. Even after the KKK and related white Supremacist organizations could no longer openly operate as a quasi-official organization, their representation in law enforcement meant that the "incidents" of slavery, even after Reconstruction, literally bled over into the White Supremacist framework.

|| HCPA, 18 U.S.C. 249(a) (2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.-

(A) In general.-Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) [Commerce Clause jurisdiction] or paragraph (3), willfully causes bodily injury to any person... ||

The phrase "color of law" was used in federal law when "law" was not fully defined and even before a professional police force had been established (which began in populated cities between 1870 and 1900). Moreover, since federal legal codes were nearly completely inaccessible to residents of the nascent nation for its first 100 years, few would know whether an "official" act followed law. Fewer would have the ability to avoid extrajudicial actions if the community supported the punishment. Modern statutory provisions speak about the actor's "official

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684 Acting "under color of law" is a description of the way one holds oneself out to others—not how one is perceived, but how one presents. And it need not be intended to be false—or false at all. To act "under color of law" is a flexible idea suited to an era when professional law enforcement institutions were rare or nonexistent and the swaths of ungoverned territory was vast. Operating "under color of law" might include those with an official imprimatur—a badge, a professional title, or possibly ownership of a large swath of land—and without a formal title, even a civilian with tacit approval from the government.
capacity” or, in civil law, "scope of employment." This type of improper or illegal conduct is construed today to mean willfully using "unreasonable" or "excessive" force; sexual assault or coercion to engage in sexual activities; false arrest; or fabrication of evidence.685

Mob Violence

In contrast to Section 242, "the principal purpose of [the conspiracy provision, Section 241] was to reach private action rather than officers of a State acting under its authority. Men who, [under Section 242], 'go in disguise upon the public highway, or upon the premises of another' are not likely to be acting in official capacities."686 Moreover, the Court stated, "Going in disguise [is in fact] an activity so little associated with official action and so commonly connected with private marauders that this clause [of Section 242] could almost never be applicable under the artificially restrictive [constructions]" of congressional authority.687 In the mid-20th century, the Supreme Court interpreted congressional police powers to be significantly expanded. In stark contrast to earlier interpretations striking down nearly all the civil rights laws of Reconstruction as unconstitutional—thereby deflating the aspirations for a New Birth of Freedom and constricting Congress' power to carry out its mandate in the Reconstruction Amendments—the 1950s Supreme Court saw the need and the authority for new federal criminal civil rights laws regulating both private and official acts.

685 FBI, Civil Rights, What We Investigate, available at https://www.fbi.gov/investigate/civil-rights (noting that safeguards against abuses by federal law enforcement, judges, prosecutors, security guards, among others, is necessary to keep in check the power they have been granted, including the power to detain, arrest, search and seize property, bring criminal charges, and particularly to use deadly force in certain situations, and in some cases acts that exceed the actor's lawful authority; "Off-duty conduct may be covered if the perpetrator asserted his or her official status in some way").


687 Id. referring to Collins v. Hardyman, 341 U.S. 651 (1951).
Thus, Section 241 and 242 were intended to operate in tandem. The actors envisioned in these Sections were not stereotypical offenders; they conspired as mobs and they claimed the authority of "law." The boundary between State actors and individual citizens was sometimes porous, and official identities were not always clear. The structure of these statutes reflects the wide spectrum of authority for intimidating actions against Others, including the now largely anachronistic hoods worn by Klan-style groups, as well as the wide spectrum of actions by which an actor might "deprive" another of rights. Together they serve as an early version of a restraining order on mobs and masked offenders who sought to intimidate local minorities.

Section 245 was the caboose: Adding to federal control over state and private actors, Section 245 placed a protective umbrella over citizens while engaged in certain activities. If we look at criminal actions to interfere with civil rights as fact patterns that generally involve officials, and/or individual co-conspirators, and victims, the reach of Section 245 makes more sense. Federal law by 1968 controlled all the parties in the battle for civil rights—but only to a limited extent. Section 245 tied together Reconstruction Era amendments and legislation, and mid-century civil rights, deploying the limits of congressional power over lands, commerce, and "appropriate legislation" powers to protect constitutional rights. The very enactments that had expanded federal power also tied Congress' hands. Section 245 allowed the federal government to protect "pre-victims," i.e., African-Americans and those who had come to their aid—but the protections did to exist at all times or for all purposes. Because of its limited reach, Section 245 was seldom used. A new more flexible law was needed to address the type of violence outlined in Section 245.

As discussed in the previous section, the twinned abstractions of the "health of the nation" and the national identity were shaped by the Supreme Court's waxing and waning latitude for federal police power. If rights are not rights until they can be freely exercised, then citizens are not truly free until they have equal access to the rights promised. Because states continued to
subvert the fundamental premise of unifying the "United" States, federal authority was necessary to regulate state actors as well as the failure by states to properly ensure access to the rights of citizenship. Put differently, Sections 241 and 242 reflect the understanding that to deprive citizens of equal rights—specifically Blacks, members of other Out-Groups, or those who came to their aid, discussed earlier in this dissertation—or to conspire against rights is tantamount to depriving the nation of its very identity. Similarly, to band together to deprive the nation of its core is to conspire against the government, since the government is the protector and indeed the purveyor of individual rights. In this way, 1968 Section 245 is fundamentally about federal power to protect the rights of citizens (national identity) in their exercise of those rights (identity-agency).

What then did the HCPA have to contribute to this formula? As detailed later in the genealogy, the HCPA added provisions that responded to the modern conceptualization of "identity" as performative (by expanding the categories of protected persons beyond those associated with the formation of the country and the civil rights era), as expressive (by protecting the symbolism individuals may embody for an entire Out-Group), and as a merging of action/doing and being (by preventing attacks on individuals "because of" their attributes—because they exist). These issues are discussed on broader strokes in the HCPA section below.


After 1998, versions of ABL were seriously contemplated in Congress but they did not get sufficient congressional support to become law, in part because the 2001 terrorist attacks of

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688 As early as 1998, months after the Byrd and Shepard cases made national news but before the cases had been fully adjudicated, Congress began several attempts to pass comprehensive ABL. Representative John Conyers first introduced the HCPA, substantially in the form it was passed in 2009, in 1999 as part of that year’s Department of Defense authorization bill. (Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999)). The key improvement to existing law was that the proposed federal "hate crime" protections would extend to all activities in which a victim might engage and "ought not to have the highly technical, legalistic concepts of the exercise of a federally protected right." (Hate Crimes, Cong. Rec. S12538 (Oct. 14, 1998) (statement of Sen. Specter).)
The 1999 HCPA, which would have eliminated the "federally protected activities" requirement for federal sentencing enhancements and added sexual orientation, gender, and disability to the protected persons, passed both the House and the Senate but was rejected in conference before reaching the President's desk in the final appropriations bill. Despite bipartisan support and approval from civil rights and other advocacy groups, the 1999 HCPA failed.

In 2000, Senator Kennedy proposed the first bill, separate from attempts to modify the HCSEA, following the widely reported Matthew Shepard (WY) and James Byrd, Jr., (TX) murders, which had entered public discourse and given faces to the need to fill critical gaps in the then-existing federal "hate crime" regime. (107th Cong., 1st Sess., HR 74; S. 19, 107th Cong. 107(a) (2001).) With 51 co-sponsors and bipartisan support in both the House and Senate around the turn of the millennium, the 2000 HCPA, which was included in the annual defense appropriations bill, seemed promising. (See Video Recording on Hate Crimes Legislation, Sept. 13, 2000), available at https://catalog.archives.gov/id/6850737. See also Video Recordings of the White House Television Office, Clinton Administration, 1/20/1993 - 1/20/2001.) The law's formulation would have mimicked the 1968 civil rights laws in protecting the exercise of federally protected rights, while drawing from the HCSEA to enhance sentences for such violations, including and especially crimes committed using explosives or firearms. Kennedy's bill initially passed in the Senate.

Despite favorable testimony by significant scholars on the proposed federal bias crime statute to the House of Representatives’ Committee on the Judiciary, the Senate bill failed to win enough support in the House and it was dropped from the appropriations bill. During a discussion of an early draft of the HCPA, Representative Dick Gephardt emphasized that the law 146 Cong. Rec. H7532 (daily ed. Sept. 13, 2000) (statement of Rep. Gephardt, noting that the HCPA "sends a message to the world that crimes committed against people because of who they are...are particularly evil, particularly offensive. It says that these crimes are committed, not just against individuals, not just against a single person, but against our very society, against America.").

In 2001, Congresswoman Sheila Jackson Lee made another attempt to pass a "hate crimes" bill. (HR 74, 107th Cong. 4; S. 19, 107th Cong. 107(a) (2001).) As with earlier versions, the bill would have expanded the federal definition of "hate crimes" to include crimes based on gender, sexuality, and disability. The Act also would have authorized the Attorney General to provide technical, forensic, prosecutorial, or other assistance in the criminal investigation or prosecution of any federal violent crime motivated by prejudice. But the proposed HCPA of 2001 did not win enough support and languished in the Senate. (See also Local Law Enforcement HCPA of 2001, HR 1343, 107th Cong. (2001); Local Law Enforcement HCPA of 2001, S.625, 107th Cong. (2001).) In 2002, the Act was reintroduced (108th Cong., 1st Sess., HR 80), but no action was taken on it.


Later, the 2004 House version of the HCPA (H.R. 4204), with 177 bipartisan co-sponsors, was introduced as a companion bill to the Senate 2003 HCPA, but the HCPA provisions (S. 666/H.R. 4204) of the larger defense appropriations bill failed in October of 2004 in part due to the reluctance, among Republican leadership, to include sexual orientation as a protected category. (Charles Hurt, Hatch Joins Kennedy to Push Hate-crimes Bill, Wash. Times, Nov. 13, 2003, at A1, available at 2003 WL 7722625.)

Similar committee bills in 2004 and 2005 languished, primarily because antiwar Democrats opposed the defense portion of the bills and conservatives opposed the idea of hate crime legislation in the Republican-led House. (Local Law Enforcement HCPA of 2004, S. 2400, 108th Cong. (2004); Local Law Enforcement HCPA of 2005, HR 2662, S. 1145, 109th Cong. (2005).)

In 2007, the HCPA passed in Congress but ultimately was rejected by President George W. Bush, on threat of veto for the entire defense authorization bill if hate crimes legislation was attached. (Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEA), HR 1585, HR 1592, S 1105, 110th Cong. (2007). 153 CONG. REC. H4421 (daily ed. May 3, 2007) (statement of Rep. Holt) ("By making our Nation's hate crimes statutes more comprehensive, we will take a needed step in favor of tolerance and against prejudice and hate-based crime in all its forms. This legislation sends a strong message that hate-based crime cannot be tolerated and will be vigorously prosecuted."). For a statement of the Bush Administration's reasons for resisting the legislation, see Office of Mgmt and Budget, Statement of Administration Policy: HR 1592: LLEA Hate Crimes Prevention Act of 2007 (May 3, 2007), available at www2.nationalreview.com/dest/2007/05/03/sapohr1592.pdf (calling the bill "unnecessary and constitutionally questionable").)
9/11 diverted the attention of Americans, their representatives, and the Executive, serving as Commander in Chief of the U.S. military, to concerns with national security in an increasingly polarized international arena and how to achieve domestic security without comprising the nation’s fundamental values. The post-9/11 era was littered with debate about the "War on Terror," the search for Osama Bin Laden, the seemingly oxymoronic PATRIOT Act of 2001, attempts to define "civilized" torture, among other polarizing topics in a similar vein. It is therefore not surprising that the HCPA appeared as the last, comparatively tiny, provision in the gargantuan National Defense Authorization Act (FY 2010). Perhaps it is also not surprising that the law was signed by the nation's first president regarded as African American, just a year into his first term and ten years after the 1999 brutal murders that prompted serious proposals for the law—events which themselves occurred during the first years of then Senator Obama's...
first term representing the state of Illinois, a place many continue to regard as Lincoln's constituency and thus the terra origo of Emancipation.\textsuperscript{692}

The HCPA expands certain 1968 Civil Rights Act\textsuperscript{693} provisions by removing the biggest obstacle to "hate crime" prosecutions—the requirement that the victim be engaged in a federally

person they love. No one in America should be forced to look over their shoulder because of who they are or because they live with a disability.

At root, this isn't just about our laws; this is about who we are as a people. This is about whether we value one another, whether we embrace our differences rather than allowing them to become a source of animus. It's hard for any of us to imagine the mindset of someone who would kidnap a young man and beat him to within an inch of his life, tie him to a fence, and leave him for dead. It's hard for any of us to imagine the twisted mentality of those who'd offer a neighbor a ride home, attack him, chain him to the back of a truck, and drag him for miles until he finally died.

But we sense where such cruelty begins: the moment we fail to see in another our common humanity, the very moment when we fail to recognize in a person the same fears and hopes, the same passions and imperfections, the same dreams that we all share.

* * *

In April of 1968, just 1 week after the assassination of Martin Luther King, as our Nation mourned in grief and shuddered in anger, President Lyndon Johnson signed landmark civil rights legislation. This was the first time we enshrined into law Federal protections against crimes motivated by religious or racial hatred, the law on which we build today.

As he signed his name, at a difficult moment for our country, President Johnson said that through this law "the bells of freedom ring out a little louder." That is the promise of America. Over the sound of hatred and chaos, over the din of grief and anger, we can still hear those ideals, even when they are faint, even when some would try to drown them out. At our best we seek to make sure those ideals can be heard and felt by Americans everywhere. That work did not end in 1968. It certainly does not end today. (Administration of Barack H. Obama, 2009, Remarks on the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, October 28, 2009, DCPD Number: DCPD200900859 (promoting H.R. 2647, Division E, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-83; referring to David Bohnett, chairman of the David C. Bohnett Foundation, and his partner Tom Gregory; Dennis and Judy Shepard, parents, and Logan Shepard, brother, of Matthew Shepard, who was attacked and killed in October 1998; and Betty Byrd Boatner and Louvon Harris, sisters of James Byrd, Jr., who was attacked and killed in June 1998). ||

In an earlier statement, President Obama urged Representatives to "consider HR 1913, the Local Law Enforcement Hate Crimes Prevention Act of 2009 [and] to act on this important civil rights issue by passing this legislation to protect all of our citizens from violent acts of intolerance, legislation that will enhance civil rights protections, while also protecting our freedom of speech and association. I also urge the Senate to work with my administration to finalize this bill and to take swift action." (Administration of Barack H. Obama, 2009, Statement on Congressional Action on Hate Crimes Prevention Legislation, April 28, 2009. DCPD Number: DCPD200900301.


\textsuperscript{693} 18 U.S.C. § 245.
protected activity, such as voting or jury service, to trigger the law's protections.\textsuperscript{694} The Act punishes criminal actors who cause "bodily injury" to their targets "because of" their perception that the victims embody certain characteristics. The HCPA expanded the list of protected categories from the four originally listed under the criminal Civil Rights Acts to the eight currently recognized as Out-Groups. (See Section II.A, Figure 2: Legislative Events and Othering Categories.) According to the language of the law, victim who does not (or is not perceived to) have one of the protected attributes or an offender who does not cause "bodily injury" removes the crime from the purview of the Act. Thus, hate crime legislation can be viewed on a continuum with federal Civil Rights Acts, which authorized federal involvement in enforcing basic democratic principles of freedom and equality against acts or patterns of discrimination.\textsuperscript{695} Federal authority over bias crime helps to clarify and unify the variations in state law and unevenly implemented protections for Out-Groups, and, more importantly, provides protections

\textsuperscript{694} The HCPA eliminated the significant jurisdictional impediment that victims be engaged in a "federally protected activity" for federal protections to apply. HCPA jurisdiction stems from the Commerce Clause under 18 U.S.C. § 249(a) (2) (B) (2009). Federal jurisdiction based on the Commerce Clause arises when the crime occurs in the following circumstances:

1. [the victim was traveling] across a State line or national border [ ] or using a channel, facility, or instrumentality of interstate or foreign commerce
2. the defendant uses a channel...or instrumentality of interstate or foreign commerce
3. the defendant employs a firearm...or other weapon that has traveled in interstate or foreign commerce
4. the conduct...interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct or
5. [the conduct] otherwise affects interstate or foreign commerce.

Jurisdiction also arises from the 13th Amendment, and the Act overlaps these jurisdictional grounds for cases involving religion and national origin to ensure that there are no technical gaps in the law's coverage.

The Attorney General has the authority to establish federal jurisdiction by State request or because a State lacks jurisdiction.

\textsuperscript{695} The HCPA is the last Act in Chapter 13 Civil Rights, of Part I Crimes, of Title 18 Crimes and Criminal Procedures, of the U.S. Code:

- § 241 - Conspiracy against rights
- § 242 - Deprivation of rights under color of law
- § 243 - Exclusion of jurors on account of race or color
- § 244 - Discrimination against person wearing uniform of armed forces
- § 245 - Federally protected activities
- § 246 - Deprivation of relief benefits
- § 247 - Damage to religious property; obstruction of persons in the free exercise of religious beliefs
- § 248 - Freedom of access to clinic entrances
- § 249 - Hate crime acts.
for enumerated Out-Groups even if state and local legislatures do not. (See Table 9: HCPA-Related Knowledges Taking Shape by the 2000s.)

Table 9: HCPA-Related Knowledges Taking Shape by the 2000s

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<tr>
<th>Element</th>
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<td>Blurring of Us-Them</td>
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<td>Categories described as Out-Groups cover all, even members of In-Groups.</td>
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<td>Victims represent entire community.</td>
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<td>States continue to permit racialized violence, demanding oversight.</td>
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</tr>
</tbody>
</table>

By 1999, when James Byrd, Jr., and Matthew Shepard were lynched in separate incidents by small posses of White heterosexual males, the groundwork for federal ABL had already been laid. The statistics on "hate crimes" supported policy shifts to address the problem, largely fostered by public attention to brutal criminal acts against minorities and the message implied in the failure to pass more stringent prohibitions. We had statistics, but we did not have a clear narrative to match what we meant by "hate" until more than a decade after the term "hate crime" entered legislative discourse. It took "classic" cases, like the Byrd and Shepard murders, to illustrate the meaning of the term and to nag us with the vague sense that unfreedom shadows certain segments of the population: the truck, the chains, the separate body parts discovered along a trail like an Easter egg hunt; friendly disposition, the slight build, and the mask of blood... Even the frenzy of lynching postcards that clogged the USPS before a special regulation
was passed to ban such indecent images from the mail system reflect a long history of an official laissez-faire attitude toward violent prejudice. "Bias and prejudice are not figments of a liberal imagination; they are very real acts especially when they result in death or injury. Unless we make a clear public policy statement opposing these acts, we give the attackers the impression that their abhorrent behavior is acceptable." The HCPA is designed to end the assumption that violence against Others is permitted, no matter what American history and the national identity appear to say.

Despite the history of Supreme Court resistance and acquiescence to congressional authority over certain activities that form the cornerstones of a citizen's full participation in civic life, the criminal powers that expanded during the Civil Rights Era were not the "floodgate" that invited federal "hate crime" legislation. General critiques of the expansion of federal power miss the point. The ability to conceive of "hate crime" laws emerged from realigning the Knowledges of Others that became part of the national identity in the Enlightenment Era with the diverting rationalizations stemming from economic imperatives. As matter of (democratic) principles, the Constitution was formed from Knowledges that the citizens' most dangerous enemy was the State. The Constitution was not written from the perspective that the worst enemies of citizens would be other citizens. Given the enormous demand for collective loyalties, it is not obvious that the earliest members of the nation would have assumed that, nearly a quarter-millennia later, violent prejudice would become the default position.

**If You Preach "Hate" You Get a Talk Show**

The previous subsections, which discuss the early founding to the country and its relationship to federal police power near the turn of the millennium, outline the sociolegal

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principles relevant to the concept of "hate crime" and to the HCPA. In these discussions, we can discern an argument for the proposition that even such seemingly organic elements as "human agency" is culturally and historically determined. The idea that "gender" and "race" are similarly determined has already been addressed. Even a concept like "human rights," which rights are defined in the pure sense as transcending time, space, culture, historical imperatives, and the like, is itself a cultural artifact. In most instances, spotlighting socially constructed aspects of human experience is a common method by which to deconstruct them. Deconstructing concepts that serve to restrict a social group usually results in freeing the members of the group from that particular form of unfreedom. The HCPA, for example, building on the statistical analysis of the HCSA and the line of criminal civil rights laws that preceded the HCSEA, advances the deconstruction of "identity" as the basis of "hate crime" by including more granular categories than any previous American law. If one gives serious attention to the fact that "gender" and "gender identity" are not related categories of persons, despite the apparent similarity, then one can see that categories like "sexual orientation" must theoretically protect heterosexuals in equal measure to homosexuals and "race" must protect Whites equally with Blacks and Browns, and so on. This would seem to put a smile on the face of White Supremacists who may perceive the irony of "hate crime" protections for them, given their history of racialized attacks on Others and their social marginalization—that is, the fact that they are generally "hated" by society. But the fact that the formula of the HCPA seeds the deconstruction of categories generally is not a benefit to dominant groups. In the long term, the HCPA signals the dissolution of the idea of persons-as-categories altogether. When the law applies to every person, it provides specific benefits to no one.

In this sense, the interesting focus of attention may not be the roles we play or the "constructedness" of certain features of identity, or even the way a natural human experience or reaction—an emotion—can be viewed as socially and culturally constructed to a large degree. Any White Supremacist will tell us that deconstructing the concept of "race" does not improve
the situation for people like James Byrd, Jr., or Matthew Shepard. Deconstructing categories of identities not improve the harms that the law was "constructed" to address or the unfreedoms that gave rise to the law. In fact, as the previous sections of the genealogy demonstrate, we may conclude that "hate" is part of the American identity, inextricably entangled with a fundamental national emotivity that is as organic to American independence as it is to Othering.

An anecdote from the Groundbreaking Ceremony for the Martin Luther King-Robert Kennedy Statue, at the Martin Luther King Memorial Park, Indianapolis (IN) in May 1994, the same era as the Crime Bill, illustrates these two ideas—that deconstruction does not always release society from the problem encapsulated in the social construction, nor can such exercises in deconstruction alter the identity of a people. One speaker at the ceremony described a poor minority community where the residents "got sick and tired of seeing their children shot and living in fear," so they fenced in their neighborhood and hired guards, "just like they were rich folks in a planned development." Then, residents were able to sit safely on park benches; "children could walk and play." A resident remarked, "I guess this is freedom in the '90s." The speaker asked, "Is it freedom in the '90s when we have to put up walls between our own people, even as we celebrate walls coming down [in places] from Berlin to South Africa? Is that our [American] freedom? Are we going to live in a time when all of our political dialogue becomes a shouting match?" He said, "If you preach hate, you can get a talk show. If you preach love, you'll get a yawn."

The comment reflects the fact that the emotivity of American identity is founded on equality, and "hate" in the concept of "hate crime" is a method to both enact the emotive feature of American identity and to perpetuate the inequality inherent to American identity. The anecdote also reminds us that the facts on the ground of take precedence over the theoretical ideals: "Our freedom" may require walls. Because "our" equality is theoretical, declared by Jefferson but not properly constituted with the constituting of the nation, "equality" may require policies of inequality—or it may be unachievable.
Moreover, if "our" free speech is nearly any form of expression, including verbal expressions and speech acts, and if expression is so aligned with one's "identity" that it is a form of being, then almost all ways of being are constitutionally protected. Yet being is not treated as constitutionally protected. In the early formation of the country, equality was supposed to protect one's being. But, as noted above, equality was not constituted in the national identity. Thus, statutory law, like the HCPA, can be understood as an attempt to keep pace with this new conceptualization of expression-as-being. Additionally, if free speech is the keystone of national identity, and speech is doing, then enacting inequality in racialized violence like "hate crime" can be understood as an issue of identity.

When Dylan Roof, who murdered the congregants at the Emanuel African Methodist Episcopal Church in Charleston (SC), told investigators that he "had to do it," he is hinting at the imperative of the modern conceptualization of "identity," with reference to the national identity. He lamented the decline of the KKK, stating:

[S]omebody had to do something because, you know, Black people are killing White people every day on the streets, and they rape White women, 100 White women a day. The fact of the matter is what I did is so minuscule to what they're doing to White people every day, all the time...Nobody else is brave enough to do anything about it...It makes me feel bad. I wouldn't say I'm glad I did it...I've done it, so I had to do it.697

For all his mental health problems, Roof was not hearing voices or acting on the instructions of god. He was acting on the sense that a national identity crisis was afoot that he could not longer stand. The crisis he imagined was about skin color. Roof could have used anything to justify a shooting of a particular group. He chose skin color because the "voice" that spoke to him told him the narrative identifying the Others. The threats they present to the In-Group are

beside the point. But the pre-existing narrative gave him a way to explain the crisis. The HCPA attempts to establish a bulwark against the narrative.

**HCPA as a Reflection of Dissonance in American Identity**

As a legal matter, the HCPA rests on a series of questions to be answered in the law:

1. First, who is entitled to enjoy the full panoply of constitutional rights;
2. Second, whether rights exist if they cannot can be exercised; and
3. Third, which of these rights, because they are especially prone to provoke attacks when exercised, require special protections to be exercised fully and freely.

The overriding question is whether the equality envisioned under the first principle, the freedom envisioned under the second principle, and the full citizenship ensured in the third principle have meaning if some individuals are hindered by *un*freedom in social and civic life. As long as there are Others—at least for the purposes of "pursuit of Happiness"—no one is fully free because the democratic principles of the nation are subverted. The national identity is saturated in its own dissonance. Notwithstanding the awkward fit to lofty ideals, the HCPA is the next evolution in resolving the conflicts at the nation's founding. At the beginning of the genealogy, we explored the meaning "hate." Expanding the question to the concept of "hate crime," *What is "it"?* At this point, we can see that the answer doesn't have very much to do with categories of people; it has to do with categories of freedom. The former is a proxy for the latter.
V.D.7. Criminal Civil Rights to Enhanced Criminal Civil Rights

Relics of a Racialized Nation

By the time the Hate Crime Prevention Act (HCPA)\textsuperscript{698} was passed in 2009, the building blocks for its relevant parts had been in place for more than two decades: The language for "hate" criminality, already scattered through the U.S. Code in provisions related to juvenile justice, campus safety, and education, was ripe for clarification. A limited set of personal attributes to define the protected categories of persons (listed in Civil Rights Acts, the HCSA, HCSEA, and VAWA) coupled with existing criminal penalties for civil rights violations under the Civil Rights Acts and VAWA established the law's emphasis on the perniciousness of biased victim selection. The causal link, proved beyond a reasonable doubt, between the selection of a victim based on attribute and the violent crime reframed the action as a criminal, not civil, matter. The critical jurisdictional elements of the HCPA, which connect it to the nation's history of racial prejudice, were partly derived from Supreme Court decisions now thought to have been missteps and partly borrowed from civil rights laws.

In this final section of the genealogy, the HCPA is discussed in detail.

Racialized Emotivity

The HCPA is premised on Congress' Findings that abolishing formal institutional support for slavery did not abolish the deep sense of Otherness and fear of attack for being an Other continues in social life. Because racial (i.e., African American) "bondage" was not de facto eliminated through constitutional means, it is necessary to criminalize attempts to perpetuate

\textsuperscript{698} The title of the HCPA had been used in prior legislation. A grant provision under the 1994 Improving America's Schools Act, titled Hate Crime Prevention authorized funding to local educational agencies and community-based organizations to "assist localities most directly affected by hate crimes" by supporting education and training programs designed to prevent and to reduce the incidence of crimes and conflicts motivated by hate and train teachers and administrators on the causes, effects, and resolutions of "hate crimes or hate-based conflicts." (Pub. L. 103-382, § 4123 (1994).)
the subjugation of individuals identified by any hue of skin and, by extension, other characteristics. Although the HCPA is remedial and therefore technically not symbolic, its core is aimed symbols—"badges"; "relics"—and the HCPA's intended goal is "to the extent possible" to eliminate "incidents" that inherently reference slavery. The HCPA extends protections for several Out-Groups believed to embody certain identifying "badges" that, on their own, provoke attacks against individuals in the group. Attacks on members of these Out-Groups cast a fog of generalized fear, suspicion, disruption, and limited freedom over entire communities to which these individuals belong. The Act attempts to remedy the generalized sensibility of being "hated"—of being preselected for violence because of one's "badge"—indirectly by punishing criminal acts that instill this form of "bondage." Thus, the HCPA is built on a two-prong extrapolation of protections: (1) the "badges" of slavery extend to several individual characteristics; and (2) the harmful effects on individuals extend to communities of Out-Groups. The HCPA intends to eliminate the "relics" of prejudice by punishing the offenders who enact prejudice, enlivening the negative sentiments against Out-Groups. The law has a "fruit of the poisonous tree" logic: Slavery was poisonous, therefore all acts that carry its harmful residues are illegal. The Act is aimed at the impulses to treat Others differently—violently—with no better rationale than the offender's narrative about a hated group, which includes the recognition that subjugating Others was once tacitly or explicitly permitted by the government. The HCPA is a kind of legislative Rolfing of American muscle memory of its complicated history.

The HCPA is situated in a legislative Green Zone between criminal law and constitutional law—between contested ideas about the freedoms in the public arena and the omnivorous concept of private "identity." In its dual protections for individuals and communities, the HCPA's stated intent is linked to several social goals:

1. To demonstrate social repugnance for physical attacks on Others stemming from violent racial discrimination;
2. To balance intransigent forms of violent prejudice with sufficiently severe punishment;

3. To more deeply embed concepts of civil rights in criminal law; and

4. To allow potential victims to fully engage in civil society.

These objectives are sated or implied in the law's Findings, outlined below. Shifts in our understanding of civil wrongs are geared in the HCPA to a portrait of the problem of "hate crimes" as one that affects everyone—not in spite of the fact that the law applies to certain minorities but because of it.

Findings

In the congressional Findings, which serve as a preamble justifying the law's passage, the HCPA touches upon several areas of "serious national" concern related to violent attacks motivated by the identifying characteristics of the victim. The law is not choosy about the criminal acts that trigger its application. The Findings refer generally to "violence" and the text of the statute defines "crime of violence" but "hate crime acts" are defined as offenses.

The definition of "violence" draws from other sections of the U.S. Code. But the provisions relating to "hate crime acts" does not rely on these definitions, creating confusion about what the law actually prohibits. The Act's Definitions (Pub. L. 111-84 § 4703) uses the term "crime of violence," which is defined in 18 U.S.C. § 16 as follows:

§ 16. Crime of violence defined. The term "crime of violence" means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. (Added Pub. L. 98-473, title II, § 1001(a), Oct. 12, 1984, 98 Stat. 2136.)

This means that the HCPA is not limited to (felony and nonfelony) offenses involving physical force—"crimes of violence"—such as crimes involving biological toxins, chemical weapons, drug use, civil disorders (teaching techniques of bomb-making and the like), all of which may cause bodily injury without physical force.

The definition of "bodily injury" for the purposes of "hate crimes" is a hybrid of definitions in other parts of this Title of "serious bodily injury" ("protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty") and "substantial bodily injury" ("deep cuts and serious burns or abrasions; short-term or nonobvious disfigurement;...illness; short-term loss or impairment of the function of a bodily member, organ, or mental faculty; or any other significant injury to the body"). Adapting elements of "serious" and "substantial" suggests that the type of injury is less significant than the fact of an injury.

The affirmative clarification that "solely emotional or psychological harm" cannot suffice for a hate crime further supports the intention to cast a wide net of physical manifestation of a harm, which might include psychological or emotional features:
involving willful\textsuperscript{700} bodily injury or attempts to cause bodily injury using "fire, a firearm, a dangerous weapon, or an explosive or incendiary device."\textsuperscript{701} Congress notes that "violence" disrupts the "tranquility and safety of communities and is deeply divisive."\textsuperscript{702} Although this observation reads like unremarkable political hyperbole, perhaps designed to overcome resistance to hate crime law, the words do more than foreshadow the text of the law itself. Concerns about community tranquility, safety, and divisiveness also reflect the social and political battles that preceded the HCPA, especially in the 1990s and early 2000s. Thus, Congress determined that "existing Federal law is inadequate to address this problem."\textsuperscript{703}

What exactly is "this" problem?

\textbf{|| HCPA, 18 U.S.C. 249 Findings}

Pub. L. 111–84, div. E, § 4702, Oct. 28, 2009, 123 Stat. 2835, provided that: "Congress makes the following findings:

(1) The incidence of violence [rates of occurrence, see HCSA] motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive....

\textsuperscript{700} "Willful" aligns with the highest level of culpability, under penal codes. The Model Penal Code, on which the codes of specific jurisdictions are based, provides four levels of culpability: purposeful, with knowledge, recklessness, and negligence (1985, 2.02(2)). \textit{See also} Michael S. Moore, Responsibility and the Unconscious, 53 S. Cal. L. Rev. 1563, 1579–88 (1980) (describing rationales and causes of criminal acts; observing that intentional acts must cause harm to trigger moral culpability required for guilt).

\textsuperscript{701} 8 U.S.C. § 249(1), (2); \textit{see also} 18 U.S.C. § 249(c) (1) (excluding "emotional or psychological harm" from meaning of "hate crime act").

\textsuperscript{702} Pub. L. 111-84 4702(1).

\textsuperscript{703} Pub. L. 111-84 4702(4).
(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected. ||

In Congress’ Findings, violence is a "disruptive" factor, affecting not simply individuals who are victims but entire communities. The wording implies public safety concerns, as well as an awareness of the negative effects of "hate crime" on community bonds. Congress places importance on "tranquility"—an internal subjective state—that is "savaged" for individuals with the targeted traits. Through this lens, in the prototypical "hate crime," nothing of value is taken—except the generalized freedom from fear that is fundamental to full participation in civic life. Fear and generalized anxiety arising from "hate crime" appear to be among the primary objectives of such crimes. This emphasis on victims and the effect on communities marks another step in the slow progress, launched in the late 1980s, of criminal justice reorientation to the effect of crime on victims and communities. (See Appendix CVRA.) The HCPA is thus a victim-oriented statute.

To be a victim under the HCPA, the individual need not actually share the traits of the group attacked. The offender’s perceptions determine victim status. The law is placed behind the eyes of the offender, to see what he or she sees when formulating the intention to commit the crime. Congress built on the relatively recent formal federal recognition of victims in the law, extending

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704 Am. Psychological Ass’n, Statement on the Hate Crimes Prevention Act, HR 3081, Submitted to the House Judiciary Committee, 105th Cong. 2d sess. 57-839 at 181 (July 22, 1998), available at http://commdocs.house.gov/committees/judiciary/hju57839.000/hju57839_0.htm (noting that "hate crime" negatively affects society as a whole). "[C]ausing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone.” (Oregon v. Plowman, 838 P.2d 558, 563-64 (Or. 1992).)


706 For a review of the rise of crime victim advocacy, see generally Frank J. Weed, Certainty of Justice: Reform in the Crime Victim Movement (1995).

707 This suggests a partial alignment of HCPA-styled legislation with restorative justice approaches to criminal law. Advocates for victims' rights and for the dismantling of the industrial prison complex have rallied for a complete shift from offender-based legal sanctions to victim-oriented legal sanctions in U.S. criminal law.
the law’s acknowledgement beyond family to the wider "community sharing the traits" of the victim—an innovation of the HCPA. That Congress views communities as victimized by "hate crime" does not give community members remedial rights, since legislative Findings do not establish causes of action (rights to sue). Nevertheless, the HCPA thus acknowledges that criminal violations of civil rights keeps entire groups of citizens in a form of latent bondage that makes their individual members unable to fully enjoy the tranquility of safety in public life. Old Jim Crow formulae of intimidation and social control have been adapted to modern culture, in which one "hate crime" serves as a divining rod for implicit threats woven into the experience of Others in public life.

That implicit threats can be made explicit and widely, perpetually disseminated online is a facet of modern culture that adds new significance to "community." Not only does "community" describe a physical location, it also describes "virtual" associations, and associations built on the way a person identifies him or herself. (On the other side of the victim-offender coin, online offender communities strengthen the ability to share "hate" belief systems and to inspire acts targeting hated groups, which in turn magnify and obscure the threats targeted groups experience in daily life.)

Because the "characteristics" of "hate crimes" are distinct from other crimes of violence and occur more frequently than community integrity can sustain, new federal law is needed. What characteristics distinguish "hate crime" from other types of violent crime? These Findings present a complex bundle of elements that make up the "problem" of "hate crime":

(a) an incidence of biased criminal motivations that exceeds what communities can reasonably tolerate;

(b) bias against identity-based traits that have already, historically, been subject to patterns of violence;

(c) violence sparked by mere perceptions of personal traits, even if they are misperceptions;
(d) threats to public safety of all people, not just members of the victimized group;
(e) threats to individual tranquility that negatively affects entire communities;
(f) division and mistrust in communities as a vicarious effect of these threats; and
(g) inadequate protection of these harms in existing law.

This "problem" is what Congress refers to as "violent crimes motivated by bias" for which "greater Federal assistance" is needed.\footnote{708} The language of the HCPA makes violent prejudicial motivation the blueprint of "hate crime."\footnote{709} In understanding the role of narrative, "motivation" is what makes the acts make sense. "Motivation" provides the narrative support for the one's actions. In the structure of the HCPA, narrative support for "hate crime" is found in one's belief system, a bigotry so fundamental it is encoded in every action. Thought and action are merged. Because belief systems are subconscious and therefore, without effort or reflection, cannot be switched off, a "hate criminal's" intention is always present. Biased intention is the offender's

\footnote{708} Pub. L. 111-84 § 4702(3). \textit{See also} 42 U.S.C. § 3716.
Under the Certification Requirements of the HCPA, 18 U.S.C. § 249(b), if any doubt remained about the federal interest in and jurisdiction over "hate crimes," the law states that the government may prosecute cases in which:
(b) (1) (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
(b) (1) (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.


\footnote{709} On a practical level, the courts have sharpened the link between bias and criminal action by applying a but-for standard, under which guilt requires proof that the defendant charged with a "hate crime" would not have acted in the absence of his or her prejudice. \textit{(See, e.g., U.S. v. Maybee, 687 F.3d 1026 (8th Cir. 2012) (finding that driver deliberately and intentionally used "pit maneuver" to run vehicle driven by person of Mexican descent off roadway, causing crash and vehicle immolation); State v. Hennings, 791 N.W.2d 828 (Iowa 2010) (finding bias to be a factual cause of the act with evidence of a causal connection between the defendant's bias and the alleged actions, proved by testimony that defendant referred to the group as "fucking n*****," "stupid monkeys," and suggested to officers that victims deserved to be hit because of their race).)
Criminal action expresses this condition, which is a worldview so fundamental it is
the offender's identity. Thus, "hate crime" reflects a condition—an identity—just as being
targeted for a "hate crime" reflect a condition that is a feature of one's identity.

|| HCPA, 18 U.S.C. 249 Findings

(7) For generations, the institutions of slavery and involuntary servitude were defined by the
race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were
enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the
United States, through widespread public and private violence directed at persons because of
their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating
racially motivated violence is an important means of eliminating, to the extent possible, the
badges, incidents, and relics of slavery and involuntary servitude.||

The problem of "hate crime" is "generational," "institutional," "widespread," and ritualized
in "public and private violence." As detailed above, "hate crime" has constitutional implications.
Congress elaborates on the magnitude of the problem in historical and structural terms.

The congressional findings of the HCPA thrust us into the past, to examine links between
contemporary "racially motivated violence" and the historical antecedents of "hate crime" "both
prior to and after" the end of the "institution of slavery." The constitutional implications are
located not only in the transgressions of the Thirteenth Amendment (which has been extended
to categories of persons other than African-Americans), but also in historical incidents of public
violence—including state officials, quasi-official acts, mobs permitted to act (e.g., discussed
above, under Bull Connor's winking eye), and while utilizing social institutions, including
libraries and courts, instruments of public elections, or engaged in the commerce of everyday
life. Congress explicitly links the phrase "badges, incidents, and relics" to the state-supported permissions for acts creating a sense of unfreedom since the nation's founding.

What are the "badges, incidents, and relics" of slavery? The refer us to "time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States." Although the text of the HCPA encompasses many categories of persons, the final provisions of Congress' Findings articulate the core of the law as "race" and skin color, or national origin and religion to the extent that these latter categories "were regarded as races at the time."  

| HCPA, 18 U.S.C. 249 Findings  
(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States. ||

Congress identifies "racially motivated violence" and "assaults" as incidents manifesting the relics of enslavement—the subjugation, disenfranchisement, and dehumanization, which the Reconstruction Amendments addressed—based on the "badge" of an individual's skin color and

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710 See Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 991-1102 (1999) (arguing that the Supreme Court's treatment of racially motivated searches and seizures is not consistent with the intentions of the Framers of the Fourth Amendment and suggesting nonjudicial doctrinal reforms that accomplish the goal of "treating racial targeting as a type of harm the amendment was intended to avert.").

See also Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 169 (1999) (describing "hate crime" laws as expressing society's "commitment to American values of equality of treatment and opportunity.")
"race," both predicates to slave status.\(^{711}\) (In contrast, slavery was never determined by one's sexual orientation, gender (notwithstanding the valid analogies drawn by feminists), or disability. The concept of "gender identity" (defined in 18 U.S.C. § 249(c) (4)) did not exist at the time of the nation's founding.) Without protection from the violent manifestations of enslavement, certain groups remain in bondage.

Thus, the HCPA can be understood as part civil rights law, part criminal prohibition, and partly an attempt to alter the way that crime is addressed based on a different understanding of "harm." How does the HCPA change legal approaches to harm? This is summarized below.

The HCPA regulates the rationales for crime. The most straightforward and easily digestible innovation of federal ABL is the HCPA's attempt to regulate crime from its rationales—its deepest underpinnings, which perpetuate unfreedom in civic life for targeted Others. (Note that we are talking about the offender's illegal actions, not thought or speech alone.) The law pushes past behavior, intention, and motivation, to reach prejudicial ideological inspiration for a criminal act against an identified Other. This begs the question: Are there "permissible" or rational rationales for crime?\(^{712}\) Money is a permissible rationale for crime.\(^{713}\) Provocation by

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\(^{711}\) The emphasis on race is supported by hate crime statistics. "While we know that all hate crimes are not included in the FBI's statistics, it is useful to note that a review of the data from the past 10 years reveals remarkable stability in the categories across this period. Racial bias continues to be the most frequent bias motivation with 56.0% of the hate crimes in 2005 racially motivated. Approximately similar proportions of the remaining hate crimes in 2005 were motivated by other biases, religious bias, sexual orientation bias and ethnicity and national origin bias." (Committee on House Judiciary Subcommittee on Crime Terrorism and Homeland Security for H.R. 1592, "Hate Crimes," CQ at 12, Apr. 17, 2007 (Statement of Jack McDevitt).)

\(^{712}\) Legal scholars view "ordinary crimes" as those that are random or arise from personal conflicts. (See, e.g., Frederick M. Lawrence, The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes, 93 Mich. L. Rev. 320, 376, 343 (1994) (contending that bias crime laws should not apply to a perpetrator who selects victims from a particular social group only because "he believes that he will better achieve his criminal goals" by targeting that group, and not because he feels hostility toward the group).)

\(^{713}\) The House Committee Report on the federal Hate Crimes Sentencing Enhancement Act states: || In order to constitute a hate crime, the selection of a victim ... must result from the defendant's hate or animus toward any person for bearing one or more of the characteristics set forth in the definition of "hate crime." Any other result would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense. [Thus,] Federal fraud crimes committed against one particular ethnic or religious group due solely to the defendant's belief that all members of that group are
slight or insult is a rational rationale for crime. Even the irrational passion within an intimate partnership can be understood as rational under the law. But passionate hatred of strangers whose only provocation to the offender was their identity is not a rational or permissible rationale for crime. This is an important legal insight previously elided in criminal law, and it reveals a change in the way identity is conceptualized in modern society. As discussed in detail later in this dissertation, the HCPA recognizes that "enlightened" civil society cannot abide unfreedom among its members that arises from features of their identity so essential that harm comes from one's very being—merely from the "act" of existing.

The HCPA regulates crimes that enact slavery-inspired ideology. The findings direct us to the varieties of "institutions" that enforced Black disenfranchisement post-1868 and to the uses of violence to hold the African-American community in bondage to the fear of attack inspired by their "sable" complexions\(^7\) —especially in the South in the decades following Reconstruction when the terrorizing activities of the Ku Klux Klan reached its peak. To impose severe legal punishment as a "means of eliminating the badges, incidents, and relics of slavery" suggests a reversal of the prejudicial uses of social control—generally, against the dominant group (Whites) and specifically those who have not yet given up on the idea that Black people can or should be disenfranchised by the fear of violence. The truculence of ideological bases of prejudice, particularly belief systems based on White supremacy, suggests that "hate crime" offenders might themselves be described as "relics" of slavery. In that sense, removing them from society may be the only way to eliminate slave-inspired prejudice. Given the Black experience with prison and other forms of social control, the imposition of long prison sentences for race-based violence by White supremacist offenders has a tidy circular or karmic logic.

wealthy, absent any hate or animus toward that group, are not hate crimes. (H.R. Rep. No. 103-244, at 5 (1993).) ||

\(^7\) "A Sermon on the Capture of Lord Cornwallis," pamphlet by unknown speaker after the surrender of the British Army at Yorktown in 1781, advertised in the Pennsylvania Journal on May 15, 1782.
This unwarranted exercise of power by the Court [decision in Brown v Bd. of Educ.], contrary to the Constitution, is creating chaos and confusion in the States principally affected. It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. [Desegregation] has planted hatred and suspicion where there has been heretofore friendship and understanding.

—Southern Manifesto (1956)

The HCPA regulates the "racializing" of Out-Groups. By the term "racialize" I mean disintegrating the membranes that divide the categories of potential victims, such that they can all be understood as a form of "race." Thus, the term "race" reverts back to its original meaning of a group or a channel. That the law casts a broad net over several non-race-based categories of persons reflects an attempt to enlarge the civil rights tent. From a bird’s eye view, anyone who’s group is subject to a pattern of Othering experiences the "bondage" of fear in civic life stemming from threats embedded in the social structure that are cued up by differential treatment and lit up by violence. This type of discrimination is like a cultural "moodiness" that is as unpredictable in its enactment against an individual as it is predictable in it overall presence. "Racializing" all Othered groups lays them out on the same spectrum of hate victimization, and in doing so opens the door to such hypermodern phenomena as "intersectionality" and "microaggressions."

The HCPA regulates "micro-intentions." "Hate crime" prosecutions require deeper scrutiny of the offender's decision-making processes. The crime involves victim selection (action, actus) driven by a motivation (the force of an idea) to harm the victim (intent, mens) that is anchored in an ideology of Othering of those represented by the victim, which itself is built on a narrative about the victim’s Out-Group and the offender's In-Group. Traditional criminal law understands "intent" (mens rea) in a simplistic way: Did the offender intend the criminal act? Even incomplete or failed criminal acts or those that miss their target are prosecutable. But the HCPA
transforms the criminal act into an offense in which the agency for the crime exists in the victim. In other words, because it is embedded in the socio-ideological stance of the offender, his or her intentionality permeates every action like a light switch that is always on. All that is needed is a particular victim who is suitable to the offender's "hate."

The HCPA inverts the meaning of discrimination. The law's protected categories are the cutting edge of modern social Out-Groups. But, on a second reading, the labels are utterly nonspecific. They encompass everyone. Find the individual anywhere on the planet who is not a race and a gender, or does not have a national origin or a sexual orientation. The labels are ways of categorizing minority and nonminority alike, but the boundaries between In- and Out-Groups are offender-defined. The law's intentions are both regressive—in that the HCPA relies on a system of categorization to shield individuals from violent bigotry, like its civil rights predecessors—and progressive in its radical inclusivity. The concept of discrimination is transformed in the law to refer to something that encompasses all of us. The HCPA removes the discrimination from antidiscrimination.

What is the common theme among the points outlined above? Each of these objectives hinges on the modern understanding of "identity," discussed throughout this dissertation.

V.D.8. Summary: Permissions to Express "Hate": Identity as Paradox

Symbolic Law for Symbols of "Hate"?

Advocacy groups and researchers understand "hate crimes" to be "mechanisms of power intended to sustain somewhat precarious [social] hierarchies—through violence or threats of violence." The power of "hate crime" is the terror that resonates in the community which shares the attributes of the victim. Because they threaten large swaths of society, "hate crimes" are sometimes described as "a form of terrorism, and they demand a national response."


this way, "hate crimes" do not fit the simple Offender-Victim dyad that the State is authorized to prosecute on behalf of victims. Victims and scholars have noted that the terror that is built into "hate crimes" stems in part from the selection of an individual based on traits that are not within the victim's control. Victims "do not have anything to do with their race, not a whole lot to do with their religion because their parents are the ones who help to determine that, and certainly not their sexual orientation." Yet these immutable attributes are singled out to essentialize the person, making them an Other. Inflicting violence on an Other randomly selected from among all the members of the same group inflicts personal harm as well as symbolic harm of "hatred" for the group and of their vulnerability. "Hate crimes" are thus a harm of greater magnitude than violent crime without a civil rights violation embedded in it, because of "the palpable harm inflicted on the broader target community of the crime and the harm to society at large."

Given this focal point, ABL may work best as a "merely" symbolic law. The attempt to regulate "hate" that is expressed in criminal conduct presents practical impediments in specific cases. The protective wall around the content of our beliefs is high and sturdy, making any attempt to breach it likely to fail. But only to fail for some and only in some ways. For James Byrd, Jr., the symbolism of "hate crime" ideals was not lost; indeed, although his killers were not charged with a hate crime, the symbolism of the crime as one of "hate" provided the coattails on which the HCPA was finally passed. For Matthew Shepard, the fact that no "hate crime" legislation existed in the state where he was murdered, which symbolized the permission to victimize gays with violence in America, similarly invited public and congressional support for ABL.

The law is not designed to address the subtle and complex societal effects that stem from "hate crimes." Yet, when crimes with particularized aims are intended to and able to "terrify people simply because of who they are"—because of the signifiers of their identity—the

718 Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 22 (1999).
potential victims are no longer fully free. If a generalized fear limits one's participation in civic life and the privileges of citizenship, then the cause of this fear threatens the framework of the democracy, including such principles as freedom, citizenship, equality, and rule of law itself. On these grounds, some have argued that ABL is an opportunity for America to grow morally and express its highest social values.

This idea—that the failure to prohibit "hate crime" threatens the democratic features of the national identity and that enacting strong ABL expresses the nation's moral values if not its "constituting values"—presents at least two conundrums for those taking a position in the debate about ABL. If one believes that "hate crime" is really about "hate" (an impassioned negative sentiment for which "hate" is a code word), then regulating this sentiment would be antithetical to the freedoms established in the Bill of Rights. This perspective presents a conundrum of liberality: The argument against ABL is anchored in the hate-crime-as-opinion line of argumentation associated in the literature with liberal viewpoints that support the widest range of expressions—even repugnant ones—entering the "marketplace of ideas." The liberality of this argument against ABL, however, is dubious. As discussed in greater detail in the subsequent sections of this dissertation, "hate" is an emotion not an opinion, and the expression of any opinion coupled with violence is routinely regulated by the government to promote the

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720 Cf. Cong. Rec. S12538 (Oct. 14, 1998) (Statement of Sen. Specter) (stating that "hate crimes" are "antithetical to America, antithetical to the concepts of the melting pot," and fail to distinguish America from undemocratic nations, where hatred for particular groups becomes genocide, such as "Bosnia...Kosovo, and...Africa.").

721 "Hate Crimes Prevention Legislation," Statement of Rep. Johnson (TX), HR 3935 June 7, 2000. See also President Clinton, Statement to Congress on Hate Crimes Legislation (Oct. 13, 1999). President Clinton urged Congress to "do the right thing," stating: ||It has been a year since the murder of Matthew Shepard, and two years since I first proposed to strengthen the Nation's hate crime laws. During this time, hundreds of Americans have been injured or killed, simply because of who they are. In response to this epidemic of violence, people around the country have joined me in calling on Congress to pass this important legislation. Earlier this year, the Senate passed my legislation, which, if enacted, would strengthen current law by making it easier to prosecute crimes based on race, color, religion, and national origin and by expanding coverage to include crimes based on sexual orientation, gender, and disability.|| (Id.) See generally A.C. Ewing, Punishment as a Moral Agency: An Attempt to Reconcile the Retributive and the Utilitarian View, 36 Mind 300 (1927) (arguing that legal punishment offers "a kind of moral education" about wrongful conduct when laws are "substantially just" for the collective and aim to achieve future good if followed).)

722 Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 8 (1999).
public safety that allows very freedoms that liberal-minded opponents of ABL purport to espouse. Moreover, to fail to regulate violent actions stemming from "hate" would be illiberal in a different way: It would be tantamount to permitting prejudice to limit the freedom of the vulnerable groups. The limitation on the freedom of groups vulnerable to "hate crime" is indirect and therefore takes greater effort to measure, but that does not diminish the need for such protections. The conundrum is a question of how to be liberal.

In contrast, if one believes that "hate crime" is really about terrorizing communities, then ABL should be directed at the terror "hate crime" inspires. This perspective tends to be adopted by specific social groups that support ABL because their members are vulnerable to "hate crime." This perspective presents the conundrum in different terms; it is a question of how to sustain liberal democracy. From this viewpoint, the paradox of ABL echoes the debate after 9/11 during which politicians, academics, and the general public wondered whether any democratic nation worth its weight in due process could resort to torture as a tool by which to protect itself. If the terror of "hate crime" makes specific communities of citizens less free than nonminority citizens, then using ABL to protect their freedoms may be effective, even as it theoretically limits freedoms more generally. Protecting democratic principles in some sense threatens those same democratic principles.

These two conundrums both refer to essentially the same thing. The former can be rephrased roughly to mean that "protecting Out-Groups threatens the democratic principles that protect bigots," while the latter can be rephrased roughly to mean that "protecting bigots threatens the democratic principles that protect Out-Groups." Which one is better? The lack of certainty reflects a larger problem: In the late modern era, meanings have been deployed in divergent narratives, such that "protecting democratic principles" or "permitting free expression" may be used with equal validity to support an argument for or against ABL, and indeed for or against the government's use of torture and a number of other contemporary tests of modern democracy. What do these conundrums signify?
Some insights can be found in the case of Texas v. Johnson, 491 U.S. 397 (1989), a landmark case and a classic of Supreme Court reasoning, which involved an arrest of a protestor for burning an American flag outside the RNC convention center in 1984. The Court ruled that the freedom to burn the American flag—a symbol of national freedom and democracy—is protected under the First Amendment. The conundrum is whether the flag was a venerated symbol that should be given special protections from desecration, as was argued by Chief Justice Rehnquist, or whether its desecration is the highest form of American patriotism, since, paradoxically, burning the symbol that allows you to burn the symbol is a profound statement of freedom. The Court's holding at least suggests that burning the flag of freedom is a higher expression of freedom and democracy than banning such acts. Justice Kennedy wrote:

Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

Unlike the question surrounding ABL and "hate crime," in this case, the paradox is clear. One may ponder which act is the greater expression of freedom—burning the symbol or

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723 Texas v. Johnson, 491 U.S. 397 (1989). In the famous flag burning case, Gregory Lee Johnson burned an American flag outside the Republican National Convention center in 1984 in Dallas to protest President Reagan's policies. He was arrested and later convicted of violating state law prohibiting the desecration of a venerated object if such actions were likely to serve as an incitement of others. Johnson was sentenced to one year in prison and ordered to pay a $2,000 fine. Johnson appealed, arguing that his actions were "symbolic speech" protected by the First Amendment. With a narrow majority, the U.S. Supreme Court ruled that statutes prohibiting flag burning represented an unconstitutional violation of free speech.

This sentiment goes against state and congressional attempts to limit desecration the American flag over history. In 1968, for example, Congress passed the Federal Flag Desecration Law after a Vietnam War protest. The law made it illegal to "knowingly" cast "contempt" upon "any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it."

In 1974, however, the Supreme Court held in Spence v. Washington that a person couldn't be convicted for using tape to put a peace sign on an American flag under the First Amendment.

protecting it—but there is no confusion about what the flag represents or what the action was attempting to convey. Without that shared understanding, the case, as well as the burning flag itself, would have been unintelligible. But in the context of "hate crime," it is not as simple as "flag equals freedom." When ABL is portrayed in conflicting ways—e.g., hate-crime-as-expression versus hate-crime-as-terror—these competing meanings signify confusion about the objective reference points. The concepts of "protecting democratic principles" or "permitting free expression" are defined with reference to the sensibility of the person making the argument, not by an outside marker or standard.

Furthermore, ABL cannot be reduced to a single word or idea, like "freedom," in relation to which proponents and opponents can take a position. Without a centralized hub from which arguments are launched, the debates about ABL—along with other features of the national agenda and the national identity—go along on separate tracks without regard to other arguments. This phenomenon of divergent tracks of argumentation operating in dual "realities" is a symptom of the modern condition. The problem, however, is not that meanings collapse; it's that too many meanings are built up. When each voice is operating on its own set of meanings, meanings suffer from their granularity, and usages of terms become hypersubjective, relativized, and in turn can be manipulated. For example, in this environment, one can refer to differing categories of facts—your "facts" and my "facts"—as if the phrase "alternative facts" is not an oxymoron. While it is true that, in a society where there are facts and "alternates" of them, debate becomes impossible. Discourse itself becomes pointless, because the voices are choosing from different buckets of information, and debate is thus beside the point. The phenomenon is disturbing not necessarily because there are differing buckets. Problems arise because one of the buckets does not contain facts or even information, yet the party drawing from it elides that point. In other words, it's not that without shared meaning, we cannot debate. It's that, without sharing, there is no meaning.
The arguments about ABL reflect this phenomenon. To summarize, this dissertation posits that the concept of "hate crime" emerged to describe attacks on personal identity just as the concept of "identity" was itself transforming. The concept of "identity" was influenced by and a driving force in the trend toward increasing granularity and hypersubjectivity in meanings that go beyond those related to identity.
VI. "Hate" and the Hating Haters Who Are Motivated by It

The book by former comedian-cum-Harvard-Fellow Al Franken, now a Senator (D-MN), titled Lies and the Lying Liars Who Tell Them (2003) (subtitled, A fair and balanced look at the Right), was a harbinger of the difficulty with truth that has all but swallowed up normal discourse in contemporary American public life. Focusing on the steroidal growth of right-wing media, Franken describes tactics of (1) verbal repetition of statements without regard to their truth, (2) unimpeded exaggeration and hypocrisy, and (3) tonal affectations in speaking or emphasis in writing that imply what the audience should believe if they want to be "in" on the superiority being purveyed. The passages seem eerily precursive to the current political environment: "[I]nstead of rallying the country around a program of mutual purpose and sacrifice, [the President] cynically used [public anxiety] to solidify his political power and pursue an agenda that panders to his base and serves the interests of his corporate backers." Yet, this complaint reflects the logic of self-interest, and, because the current Administration engages in the same "logic" with impunity (so far), Franken unveils the way that public service itself has inverted: Politicians do not serve the people; representing the People serves them.

Trump is a near-perfect embodiment of this modern inversion. There is an added irony that Trump has installed family members in the White House and in key leadership positions much the way Saddam Hussein (among others) had installed his sons, Uday and Qusay, in the very dictatorial government that the U.S. set out to defeat, in part because of its dictatorial nature. If Americans gave the gift of democracy to the so-called oppressed Brown people in the Middle East, as the second Bush and his cronies crowed, they "gave away the store." We do not need the visual confirmation of the gilded Trump logo emblazoned on the White House to see that democracy at home is eroding. George Washington’s "rope of sand" must be recast in the modern era as populist quicksand, and it is hard to know whether we are at our ankles or our necks.
To the extent that W. and his family have spoken publicly about Trump, they had expressed more consternation about his manner of defeating Jeb than his threat to American democracy. Perhaps this is because to speak on this topic would inevitably lead to the realization that, arguably, George W. Bush is the grandfather of tactical uses of "fake" information: Bush disseminated a falsified intelligence report to garner support for his Operate Iraqi Freedom. And because he was anointed leader, he said, by the God of Christians, he was not obligated to attend to such plebeian matters as proof of weapons of mass destruction before acting as Commander-in-Chief.

But the origins of "fake" narratives are as old as human civilization, when religion was a useful way to make sense of the world and order social groups. The belief in imaginary friends is compelling, because it cannot be disproved yet it need not be affirmatively proven. Borrowing the sanctimonious (literally) references of the Religious Right, Franken describes conversations in which God tells him to write the book. He explains, "Harvard's Kennedy School of Government asked me to serve as a fellow at its Shorenstein Center on the Press, Politics, and Public Policy. After my varied and celebrated career in television, movies, publishing, and the lucrative world of corporate speaking, being a fellow at Harvard seemed, frankly, like a step down. [But God] chose me to write this book." He tells us, "[T]he fact that you are reading this is proof not just of God's existence, but also of His/Her/Its beneficence." (Franken admits he does not know God's "precise" gender.) Bush spoke similarly of a belief that God "made" him president (notwithstanding the arguably unconstitutional interventions of the Supreme Court).

The interposition of god in American policy and the way that such antisecularity has affected American social life suggests the type of context collapse introduced at the beginning of this genealogy. "[S]ystematic accountability for one's utterances and one's actions [must] inform the shared life of a community,"725 otherwise the members of the community cannot know whether

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we share the same reality let along community. Accountability and transparency are supposed to ensure that our narratives align with each other.

When Franken insisted that God told him to write the book, he was somewhere between lying and mockery. Similarly, Trump has found a relatively unassailable position between lying and drveling ignorance. The problem with these indefinite positions is that they allow the speak to evade accountability, and without accountability, we cannot know whether we are in fact engaged in reality-sharing. Without shared reality, there is no democracy. A conflict in narratives is enacted in "hate crime," and as shown in this dissertation, the concept would not have emerged without a breakdown in shared reality.

A failure of shared reality occurs across the spectrum of social life: Politicians "speak with god" at least as often, it seems, as mass murderers. The stereotypical "hate crime" defendant also aligns his or her conduct with "god's will"—with or without specific and personally delivered instructions. Franken's absurdist approach to the erosion of accountability and the misalignment of narrative calls attention to further schisms: Politicians seem more appealing when they proclaim themselves to be God's missionaries; yet violent criminals seem mentally ill. In either case, there is no way to check the veracity of the claims. "Reality" becomes a claim in the same way that "identity" is what one claims. To complicate these dynamics, one's reality is, in turn, shaped by one's identity.

If, as Young explains, narratives are the way we make sense of the world and ourselves, what can we make of "alternative" narratives? The challenges in our contemporary Tower of Babel further inflame the impulses that trigger "hate" and "hate crime." The late modern vertigo, insecurity, social anxiety, and paranoia that Young has described may be manifested in increased crime rates, but more to the point, they may be manifested in crimes of extreme cultural distress, such as "hate crime." If there are insufficient points of entry to check the
veracity of objective facts, the context may collapse. Or, as I suggest, the meanings that shape reality may invert.

One salient similarity of politicians and the mentally ill is that, when referring to God’s instructions, they are both describing "agency" as outside themselves. This is the hypermodern perspective on identity-as-agency that I described in the introduction to the genealogy.

In this final section, I return to the conceptual gymnastics of "haters." The dynamics on which this term is built are the dynamics on which the concept of "hate crime" was built. To review, the slang term "hater" offers an illustration of the contemporary sleight-of-hand in conceptualizing identity-agency. In the previous discussion, I posited that a "hater" is a person who fails to give support to the name-caller. Yet, to be labeled a "hater," one need not feel "hate" or any other emotion. The name-caller's sense of being "hated" is the only emotional activity occurring in this dynamic. But the emotion is not conceived of or described as emanating from the name-caller, nor is it understood as emanating from the "hater." The emotional condition of other individual, the "hater," is unknown and irrelevant. So, where does the emotion encapsulated in the term "hater" come from?

If we imagine emotion as a possession—a res—that is separable from an individual, we are closer to understanding the term "hater"—and in turn the link between the modern conceptualization of "identity" and the concept of "hate crime." As we moved through the genealogy, we saw that possessions eventually became legally transferable as abstractions—as possessory interests. To the extent that one's identity was formed by one's legal interests, transferability allowed people to acquire wealth in new ways. This type of separability and transferability of attributes opened a new universe of possible "identities." One could be as wealthy as a nobleman without being of noble lineage. Until relatively recent history, the focus of this type of identity was property. Eventually such possessory interests must be reduced to real interests, "real estates." In this way, the veracity of these identity interests could be tested.
However, the other category of one's identity could not be transferred or separated from one's Self. This form of identity—one's attributes (15th c. from L. *attribut* meaning "allotted"); *ad-tribut*, to (given to) + indicated, marked, or assigned; "ascribed," i.e., *ad-scribere*, O.Fr. to (given to) + write or written)—were understood as fixed. They were given by one's Creator or perhaps by one's ruler or family, not acquired or even *acquirable*. These forms of identity included one's hair, eye, and skin color, sex, and even one's authority (as king, queen, or nobleman) and gender roles. Whereas wealth expanded one's agency-identity, fixed attributes might limit agency.

In the context of U.S. history, this was the state of affairs with regard to "identity," until the broad sweep of society, including the Founders and the immediate descendants of the Charter Generation, "discovered" that aspects of identity that went along with fixed attributes—including gender roles, socioeconomic status—could be abstracted as well. If they could be imagined and felt as if real by one person through the process of identifying with another person (a fictional person), then these aspects of "identity" were not fixed to concrete estates or physical features. "Identity" was partly a perspective, something one enacted. Nobility, for example, could be not a title but an attitude. Authority was not given or inscribed (i.e., an "attribute" or a "tribute"), it derived from active consent.

The Framers built American democracy on the highest form of authority; paradoxically, the consent to give up individual authority. They envisioned individual liberty in its highest form, again paradoxically, within a collective structure in which liberty is restrained. Without a collective of individuals, there would be no opportunities for competition (and no opportunities to acquire the wealth interests belonging to others). In a government built on abstractions, consent to governance expressed a mutual nobility or dignity between government and citizen, as well as citizen and citizen. In that model, the concomitant rights of citizens were a form of wealth made real only by exercising them. Conceptualizations of "identity" thus emphasized active processes. Property-identity and personal-identity were equally acquirable through
action, through pursuit—for which "Happiness" was the verbal proxy. Thus, identity-agency was written into American identity as a condition of emotivity.

Herein the longing of black men must have respect: the rich and bitter depth of their experience, the unknown treasures of their inner life, the strange rendings of nature they have seen, may give the world new points of view and make their loving, living, and doing precious to all human hearts. And to themselves in these the days that try their souls, the chance to soar in the dim blue air above the smoke is to their finer spirits boon and guerdon for what they lose on earth by being black.

I sit with Shakespeare and he winces not. Across the color line I move arm in arm with Balzac and Dumas.

—W.E.B. Du Bois, The Souls of Black Folk (1903)

So far, attributes of identity are active and separable from fixed formats, like molecules bouncing around in a vacuum. Personal attributes can be separated from property attributes—e.g., nobility from inherited title and property—and recombined with others attributes—e.g., lower socioeconomic classes can share the emotional range and ambitions of higher socioeconomic classes. In these various pursuits, "identity" has undergone two significant transformations: "Identity" has become increasingly granular—perhaps as a way to find new access points for the "Happiness" of wealth and power our national identity promises. Also, "identity" has emphasized agency overall other features of the concept—perhaps because all other features then become "real" possibilities. With more possibilities for "identity," individuals have greater freedom.

The prejudice toward members of lower socioeconomic classes, which is increasingly common in social life and political discourse (and has been manifested in "hate crimes" against
homeless individuals), reflects the transformation of agency-identity into a moral question (analogous to processes of victim blame described early in the genealogy). If we are "active" enough, we can all be Donald Trump.

But this is the fallacy. Even Donald Trump is not what he claims to be as a businessman or a leader, or in terms of his wealth or even brain power, despite his claims to a "very good brain." For all the malleability of modern "identity," thankfully one cannot identify as smart. One cannot claim to be well-read, curious, or educated and sustain it for long under scrutiny. Eventually a five-year-old's vocabulary and a 140-character attention span will be revealed. Thus, some claims, even within a framework teeming with the potentialities of "agency-identity," have to be brought down to earthly "estates" and shown to be real.

Or do they?

Trump demonstrates for us that identifying with a particular trait can sustained as performative-identity. Contemporary conceptualizations of Self can be unreal (lacking fact), even untruthful, without being lies. We can claim in an authentic way to be Charlie Hebdo, because the truth we are telling is the enactment, not the actual Self that the enactment depicts. One's identity might not be a matter of outright deception, but its granularity also applies to its factuality. The cherry-picking of truth in identity" can be analogized to the Hearsay Rule of evidence. The Hearsay Rule ("hear-say" rule) prohibits witnesses, sworn to tell the truth, from saying in court statements they heard outside the courtroom. The prohibition is very narrow and riddled with exceptions. The matter conveyed in the hearsay statement may not be proffered as factual or truthful, but hearsay can be admitted on other grounds. For example, a witness who claims to have heard a suspect say, "I picked up my hunting knife and stabbed him," cannot repeat that piece of hearsay to prove that "I" stabbed "him," but the statement can be offered to show that "I" acknowledged owning a hunting knife. Or, the gleeful boast, "I don't even wait. And when you're a star...[y]ou can do anything...Grab them by the pussy...You can do anything!" cannot be used in court to prove that the speaker in fact grabs women by the crotch.
or that women allow celebrities to "do anything" to them, but it can be used to demonstrate that the speaker believes celebrities are thus privileged and that the speaker believes himself to be one of these celebrities. In the worst light, cherry-picking is a way to avoid accountability for some of the less savory actions and attitudes that make up one's identity. In the best light, slicing "truth" into strips with narrow application may be an attempt to avoid being laden with a stereotypical narrative that attaches to the particular aspect of identity the individual has claimed. Either way, aspects of identity that were once descriptive have lost their fixed (descriptive) meaning, and, in the modern conceptualization of "identity," reflect granular understandings of Self as a curated moment-to-moment process, unfixed and thus deceptive. Modern Self exaggerates attributes that can be demonstrated through action (enactments) or claims (identifying as something) or embodiment (being). By doing so, modern conceptualizations of Self exaggerate unreality.

When "identity" itself can be separated from formerly fixed anchors, what happens to the counterpart—agency? In our example of the slang word "hater," agency is dislodged from its station within the actor. Agency can be conceived as a feature of identity that migrates. When the name-caller claims to be "hated" by another person (the "hater"), he or she is identifying as a "target" or "victim" or "object" of the "hater's" emotivity. (Note that actual internal emotional condition of the "hater" is irrelevant to the dynamic.) Because we are operating within an alternative framework with a new conceptualization of "identity," the "hater's" emotivity (packaged as agency) can be understood as separate from the individual's Self. That is, in a new conceptualization of "identity," the core feature of agency as inherent to an individual is no longer a core feature—or even necessary. Yet, agency unbound from Self does not necessarily result in a lie; nor even mockery. Like the fifty-year-old woman who claimed to be Officer Wilson on national television, which did not raise a fact-checking eyebrow across the country, claiming an experience is a form of truth, as undeniable as a conversation with God.
"Agency" dislodged from identity is odd, even illogical in an old-style understanding of "identity." But it has a central truth that we understand today. Agency unbound from Self is theoretically compatible with our sense of the order of the disorder in social life. But, as suggested above, separating agency and Self can be used to subvert truth or to make truth irrelevant. How?

In this new framework of "identity," objective truth and subjective truth can merge and invert: Objective truth is subsumed in the "truth" of the name-caller's senses. Put differently, the result of the name-caller's claims, which are made real by being claimed, is that subjective "truth" becomes objective in that it is actually felt. How do we state this? "Objective truth" is subjective truth that is claimed to be true. Because examples of this dynamic are increasingly reported in the news and experienced in daily life, the sense that we are experiencing context collapse is not surprising. But, if we carry through the analysis of this dynamic, "collapse" begins to look more like a process of inversion, in which meanings are taken to their extreme and repurposed to describe "new" sensibilities—much like the "torrents of emotion" that were new to Enlightenment readers and experienced as dizzying insights into previously unknown truths about their fellow humans. How does the process of inversion take place and how does it related to the concept of "hate crime"?

To continue, the name-caller's "experiential truth" does not rely on objective confirmation. Like an individual identifying as a gender different from their actual sex, the "truth" is in the claim. This works well for features of identity and social life that do not involve narratives of other individuals. To identify as male with female genitalia does not rely on the affirmation of others. While affirmation of one's identity is a positive feeling (especially for taboo identity traits like transgenderism and LGBTQ+ status) and in a Meadian sense is probably inevitable over time, a "thumb's up" from an objective source isn't wholly necessary for this demonstration of agency-identity. In contrast, for example, to identify as a person of Trumpian wealth requires concrete confirmation socially and legally. This identity claim is (or should be) unsustainable—
unless you are also a person of Trumpian belligerence, which makes people fear crossing you
with factual facts, and pussy-grabbing narcissism, which is a character feature that relieves one
of the burden's of reciprocity in human relationships and raises one's comfort level with
unconfirmable "alternative" versions of facts.

In a process of inversions, describing someone else as a "hater" is the necessary reference
point for the feeling of the name-caller. Furthermore, by identifying as one who is the target of
specific individual(s), the one claiming to be "hated" has usurped the agency of the "hater." The
name-caller has leveraged the agency of the "hater" to claim a personal feature of identity. The
one "hated" is thus describing him or herself through the refraction of the "gaze" of the Other.
The "Odalisque" is now so-called as a consequence of the viewer, who is the agent of the feeling.

When the Odalisque claims the identity, her sense is not that she is an odalisque as much as
it is that she is being odalisqued. How is that process happening? Not by the agency or emotivity
of the viewer. Rather, it is a consequence of the viewer's existence, whose agency is usurped by
the Odalisque. That is why it is irrelevant if the viewer goes away. The viewer can be anyone or
no one. The viewer can have a positive or negative attitude toward the Odalisque or have no
attitude. Like being "hated," being odalisqued only requires the concept of a viewer. The
imagined viewer gives the Odalisque a concept of agency to work with. Agency—the doing of an
identity—is conceptualized by the Odalisque as a process of doing to her. The Odalisque's
identity claims are refracted through the idea of a viewer by "borrowing" the agency inherent to
the other person to do to or think about the Odalisque.

This is not the same as the process psychologists call (Freudian) projection: a defense
mechanism by which one attributes to someone else the uncomfortable negative traits that one
see or feels inside. Why not? Because the feeling that one is being odalisqued or "hated"
(disapproved of) is not a trait. More to the point, the name-caller does not need to believe in the
truth of the emotion or attitude that gives rise to the feeling. Projecting traits or emotions onto
another person at least involves a belief that the projection is true.
This leads to a further complication in the processes associated with this new conceptualization of "identity." When the Odalisque and the name-caller borrow "agency" to make claims about themselves, they make those claims to say that the judgment about them is wrong. In other words, the (imagined) feeling of being "hated" is true, but the "hatred" directed at the name-caller is unjustified. Similarly, in studies of the gaze of the Odalisque, the point is to demonstrate that being objectified does not make one an object. Over time, women proved the point by reclaiming their agency, which, by gazing back, they used to objectify the viewer. Thus, object and subject switch places and merge. This is not an inversion; this is the old-style conceptualization of "identity." Consider Rachel Dolezal: She inverted the meaning of "race" as a fixed or given identity feature. But Dolezal did not attempt to change the meaning of "Black"; Dolezal was not making a postracial argument that "Black" is not a (skin) color. If she were, she might have adopted signifiers of "Black" the way that transgender persons adopt signifiers of their desired gender. She would not have bothered to bronze her skin or darken and curl her hair. Dolezal was aware of the need to "look the part." She was operating on an old-style understanding of "identity"—one in which looks matter because the question of her identity depended on the perceptions of others. Even in an era when people do not have an identity but choose to identify in a particular way, the observable facts make the identity-claims more or less believable. An old-style meaning of "identity" cannot be sustained without the belief of others.

Morimura’s Odalisque takes this further: Not only does the odalisque gaze back, objectifying the viewer, but he embodies a challenge to the very meaning of "odalisque." This Odalisque looks like an odalisque in appearance, but does not take the same (female) form. Moreover, Morimura’s Odalisque borrows the agency of the viewer to objectify himself to demonstrate that he cannot be odalisqued. In this example, the paradox is that the Odalisque is doing to himself that which he claims cannot be done to himself.

In the context of "hate crime," the process is extended even further.
Claims for subjective senses or feelings to be given equal validity with objective facts does not collapse the context or their meanings. These transmigrations in the pathways of fact and feelings, subjectivity and objectivity are not chaotic. Rather, they represent an inversion in the way we understand the relationship among these concepts—subjectivity, feeling, objectivity, fact. One's perception—knowledge in accordance with one's senses or understanding of things (O.Fr. percipere, "to seize or understand"; per meaning "in accordance with" or "by means of")—becomes conception—knowledge developed out of what is brought together or taken together as a whole (O.Fr. concipere, "to create, formulate, devise, imagine"; con meaning "along with" or "together"). A worldview framed by the porous boundaries between perception and conception allows people to formulate reality from their imaginings. One who feels "hated" can manipulate the perception and assert interior knowledge as external reality: feeling becomes fact; an imagined narrative becomes an event; inner perception becomes Self conception. In "hate crime," the offender is said to be motivated by animus for the victim, whose trait(s) represents the identity of a "hated" group. In this way, the "hate crime" also describes something about the offender. If the victim, because of his or her attribute, represents the "container" of motivation for a "hate crime" and the offender acts on that motivations, then in this theoretical model, the agency of victim and offender merge. In other words, the offender conceptualizes "his" motivation as arising from the victim. The subject-offender locates "his" agency in the object-victim. The "hate crime" offender's agency to do violence is conceptualized as a consequence of victim simply being. This not a question of blame. It is the sleight-of-hand in personal agency described elsewhere in this dissertation. The meaning of "agency" (or, in the language of "hate crime" statutes, the meaning of "motivation" or "because of") is thus inverted.

To summarize: Claims for subjective senses or feelings to be given equal validity with objective facts does not collapse the context or their meanings. These transmigrations in the pathways of fact and feelings, subjectivity and objectivity are not chaotic. Rather, they represent an inversion in the way we understand the relationship among these concepts—subjectivity,
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A "hate crime" offender reflects the core conflict of American identity. The classic example, a White Supremacist offender, is enacting the emotivity of Americanism expressed in a "free" speech-act, built upon the Knowledge that pursing "Happiness" as a form of (White) manifest destiny, for which permission which is built into the constituting of the country. Moreover, because national identity is shared, this emotivity defines both offender and victim—but for Out-Groups, the consequences of national identity are quite different. Either way, the offender is simply enacting what is. His motivation is not a result of mental illness (necessarily) anymore than Bush’s presidential colonialist missionary zeal is seen as a result of the voices in his head. ABL should be reframed as regulating an abuse of our national identity. From this perspective, the question for ABL is whether we can or should regulate identity, specifically national identity, or the way one pursues "Happiness." Table 10: Summary, Legal Interventions on Freedoms

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726 The question of whether and how to regulate national identity has many dimensions. One dimension might refer to regulating the expression of national identity. Since national identity is not precisely the same as personal identity, regulating expressions related to this form of identity would not necessarily be a First Amendment issue. But, if analyzed under this constitutional standard, the idea becomes as complicated and multifaceted as origami. Another dimension might refer to regulating the way one pursues "happiness" (whatever that might mean for the individual), which probably would fall under commerce frameworks. A third dimension might refer to regulating access to national identity—that is, access to the benefits of citizenship, such as voting or public education. This is a straightforward question of physical access (e.g., polling stations) or procedural access (i.e., legal representation). Related
summarizes the way that the HCPA and related laws approach the various embodiments of "identity" in "hate crime."

Table 10: Summary, Legal Interventions on Freedoms

<table>
<thead>
<tr>
<th>Victim / Citizen</th>
<th>Offender</th>
<th>Shared (National) Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom from harm</td>
<td>Violation of another's freedom</td>
<td>Core feature, freedom</td>
</tr>
<tr>
<td>↑</td>
<td>Law intervenes to protect individual [e.g., CVRA, Section 241, Section 242]</td>
<td>↑ Law intervenes to ensure free access [e.g., Section 245, CAPA]</td>
</tr>
</tbody>
</table>

Regulation is oriented around the freedoms associates with citizenship, the reduction of divisions that produce inequity, and the equality of liberty necessary to pursue "Happiness"—i.e., the meaning of "national identity," which is not actualized unless and until one can exercise associated rights.

If "hate crime" violates the principles to which American identity aspires, the crime itself reflects an identity crisis.
If "hate crime" is an identity crisis, the ABL can be understood as having a restorative justice thrust. Restorative justice views crime as a breach of community. The offender is responsible, and his or her task is to repair the harm created by that breach, but the community has some soul-searching to do. If the community in some way implied permission for the type of conduct the offender engaged in, then the community has a separate responsibility to change.

Additionally, looking back in the genealogy to early conceptualizations of "authority" as a point of comparison, we can see Franken's sport about an authority as supreme as God or the leader of the free world as mockery that is all the more audacious for its good humor. But his audacity is only as extreme as the oddity he is spotlighting. In a social environment when one's sex is malleable, when identifying as Black is not the same as being Black, when "gender" has been so deconstructed we invented a new term—"gender identity"—(distinct from the feminine referent "gender") to incorporate the personal agency that defines one's performative expression of a sex (which indeed might have subjective "truth" while not being biologically "true"), when subjective truth claims equal stature with actual truth, when reality is not real but virtual—the list of examples presented in this dissertation is not complete—extreme mockery seems appropriate. When academics begin putting quote marks around the word "truth" as if it were ancient terminology not organic to modern discourse, what is extreme about mocking authority—both that of a higher power and that of the leader of the free world, who apparently talk to each other? Our vertigo may have reached an extremity that is unsustainable.

Our orientation to social life may require a reset. Discovering that divisive terms like "race" and divisive attributes like skin color are obsolete ultimately will be transformative. But not until new frameworks emerge to help us manage our understanding of the world and the social dynamics that buffet use through civic and social life. In a Copernican way, we need to leave "home" to reach some basic conclusions we can all share: That is, shedding American identity as we know it, as it was constituted, may be the necessary modern equivalent of discovering that a
journey to the edges of the world does not cause us to fall off, but to arrive back at the place we started.
APPENDICES

Appendix HCPA
Hate Crime Prevention Act 2009
https://www.gpo.gov/fdsys/pkg/PLAW-111publ84/pdf/PLAW-111publ84.pdf
(emphases added)

THURSDAY, JUNE 25, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10:10 a.m., Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.
Present: Senators Feinstein, Schumer, Durbin, Cardin, Klobuchar, Kaufman, Sessions, Hatch, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today the Senate Judiciary Committee is going to address the serious and growing problems of hate crimes. I think the recent events we've seen in this country show that these vicious crimes are a continuing problem. The Senate has before it bipartisan legislation that would help law enforcement respond to this problem. The legislation has been stalled far too long and it's time to act.

The Matthew Shepard Hate Crimes Prevention Act has been pending in the Senate for more than a decade. We've held previous hearings on this bill, the House has held many hearings on it. Both the House and the Senate have voted for this bill, over and over again.


(a) In General.-
(1) Offenses involving actual or perceived race, color, religion, or national origin.-Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person-
   (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
   (B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if-
(i) death results from the offense; or (ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.-
   (A) In general.-Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) [Commerce Clause jurisdiction] or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person-
      (i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
      (ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if-
         (I) death results from the offense; or (II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

   (B) Circumstances described.-For purposes of subparagraph (A), the circumstances described in this subparagraph are that-
      (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim-
         (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
         (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);
         (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
         (iv) the conduct described in subparagraph (A)-(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
         (II) otherwise affects interstate or foreign commerce.

   [Note: The drafters included religion and national origin in both subsections to ensure protections for any groups that do not enjoy the Thirteenth Amendment's prohibition on "badges and incidents of slavery." They are nevertheless covered by sections relying on Commerce Clause powers. Bill Lann Lee, then-Acting Assistant Attorney General for the Civil Rights Division of the Department of Justice, described this overlap as "a belts and suspenders approach" to ensure "there be no shortfall in the coverage of religious-based hate crimes" that might occur without "interstate commerce, as an additional basis to make sure that religious-based hate crimes are absolutely covered." (Hearing on H.R. 3081, supra note 24, at 31 (testimony of Bill Lann Lee). Then-Deputy Attorney General Eric Holder conceded that the power to regulate crimes motivated by religious bias is unsettled, and that this "would enable prosecutors to determine, based on the facts of each case...how best to proceed in light of possible constitutional challenges." The Hate Crimes Prevention Act of 1998: Hearing on S. 1529 before the Senate Comm. on the Judiciary 105th Cong. 65 (1998) statement of Eric H. Holder, Jr. See also Hate Crimes Prevention Act of 1999, H.R. 1802, 106th Cong., 2 (1999) (relying principally on the Commerce Clause and the "badges and incidents" interpretation of the Thirteenth Amendment to extend federal jurisdiction over violent crimes motivated by bias).]
The phrase "whether or not acting under color of law" is intended to clarify that the law is no
longer restricted by 18 U.S.C. § 242, Deprivation of rights under color of law, which makes it a
crime to willfully deprive persons of "any rights, privileges, or immunities secured or protected
by the Constitution or laws of the United States," or to punish a person differently from what is
prescribed for citizens" on account of such person being an alien, or by reason of his color, or
race." The phrasing however mimics section 242’s increased punishments if "bodily injury
results from the acts committed in violation of this section or if such acts include the use,
attempted use, or threatened use of a dangerous weapon, explosives, or fire"; or "if death
results"; or "if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or
an attempt to commit aggravated sexual abuse, or an attempt to kill." (18 U.S.C. 249. See also 18
U.S.C. § 245.)

(3) Offenses occurring in the special maritime or territorial jurisdiction of the United States.-
Whoever, within the special maritime or territorial jurisdiction of the United States, engages in
conduct described in paragraph (1) or in paragraph (2) (A) (without regard to whether that
conduct occurred in a circumstance described in paragraph (2) (B)) shall be subject to the same
penalties as prescribed in those paragraphs.

(4) Guidelines.-All prosecutions conducted by the United States under this section shall be
undertaken pursuant to guidelines issued by the Attorney General, or the designee of the
Attorney General, to be included in the United States Attorneys' Manual that shall establish
neutral and objective criteria for determining whether a crime was committed because of the
actual or perceived status of any person.

(b) Certification Requirement.-
(1) In general.-No prosecution of any offense described in this subsection may be
undertaken by the United States, except under the certification in writing of the Attorney
General, or a designee, that-
(A) the State does not have jurisdiction;
(B) the State has requested that the Federal Government assume jurisdiction;
(C) the verdict or sentence obtained pursuant to State charges left demonstratively
unvindicated the Federal interest in eradicating bias-motivated violence; or
(D) a prosecution by the United States is in the public interest and necessary to
secure substantial justice.

(2) Rule of construction.-Nothing in this subsection shall be construed to limit the authority
of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

[Note: Subsection (a) (4) above and subsection (b) lay out the requirements to establish
federal jurisdiction under the Act.]

(c) Definitions.-In this section-
(1) the term "bodily injury" has the meaning given such term in section 1365(h) (4) of this
title, but does not include solely emotional or psychological harm to the victim;
[Note: 18 U.S.C. 1365(h) (4) states: (4) the term "bodily injury" means-
(A) a cut, abrasion, bruise, burn, or disfigurement;
(B) physical pain;
(C) illness;
(D) impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary.]
(2) the term "explosive or incendiary device" has the meaning given such term in section 232 of this title;

[Note: 18 U.S.C. 232(5) states: the term "explosive or incendiary device" means—
(A) dynamite and all other forms of high explosives,
(B) any explosive bomb, grenade, missile, or similar device, and
(C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.]

(3) the term "firearm" has the meaning given such term in section 921(a) of this title;

[Note: 18 U.S.C. 921(a) (3) states: the term "firearm" means—
(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
(B) the frame or receiver of any such weapon;
(C) any firearm muffler or firearm silencer; or
(D) any destructive device.
Such term does not include an antique firearm.

(4) the term "gender identity" means actual or perceived gender-related characteristics; and

(5) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.

[Note: The wording of the injury covered in the statute does not use the term "crime of violence," which is defined in 18 U.S.C § 16 as follows: "§16. Crime of violence defined. The term "crime of violence" means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. (Added Pub. L. 98–473, title II, §1001(a), Oct. 12, 1984, 98 Stat. 2136.) This means that the HCPA is not limited to (felony and nonfelony) offenses involving physical force—"crimes of violence"—such as crimes involving biological toxins, chemical weapons, drug use, civil disorders (teaching techniques of bomb-making and the like), all of which may cause bodily injury without physical force.

The definition of "bodily injury" for the purposes of "hate crimes" is a hybrid of definitions in other parts of this Title of "serious bodily injury" ("protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty") and "substantial bodily injury" ("deep cuts and serious burns or abrasions; short-term or nonobvious disfigurement;...illness; short-term loss or impairment of the function of a bodily member, organ, or mental faculty; or any other significant injury to the body"). Adapting elements of "serious" and "substantial" suggests that the type of injury is less significant than the fact of an injury. The affirmative clarification that "solely emotional or psychological harm" cannot suffice
for a hate crime further supports the intention to cast a wide net of physical manifestation of a harm, which might include psychological or emotional features.]

(d) Statute of Limitations.-
(1) Offenses not resulting in death.-Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date on which the offense was committed.

(2) Death resulting offenses.-An indictment or information alleging that an offense under this section resulted in death may be found or instituted at any time without limitation.


Amendments

Severability
Pub. L. 111–84, div. E, § 4709, Oct. 28, 2009, 123 Stat. 2841, provided that: "If any provision of this division [enacting this section and section 1389 of this title and sections 3716 and 3716a of Title 42, The Public Health and Welfare, amending this section, enacting provisions set out as notes under this section and section 3716 of Title 42, and amending provisions set out as a note under section 534 and provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28, Judiciary and Judicial Procedure], an amendment made by this division, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this division, the amendments made by this division, and the application of the provisions of such to any person or circumstance shall not be affected thereby."

Rule of Construction
Pub. L. 111–84, div. E, § 4710, Oct. 28, 2009, 123 Stat. 2841, provided that: "For purposes of construing this division [see Severability note above] and the amendments made by this division the following shall apply:

"(1) In general.—Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct [First Amendment rights] unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

"(2) Violent acts.—This division applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of a victim.

"(3) Construction and application.—Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling
governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to-

"(A) plan or prepare for an act of physical violence; or

"(B) incite an imminent act of physical violence against another.

[Note: This section regarding construction sets the standard of scrutiny for constitutional purposes at a "compelling government interest" that is the "least restrictive means" of achieving the interest in preventing and punishing "hate crimes." This is commonly known as the "strict scrutiny," the highest standard for government action, which is used when a governmentally imposed restriction infringes upon a fundamental individual right or when the restriction affects a "suspect classification" or category of people who are recognized as being vulnerable to discrimination in violation of their rights to equal protection under the Constitution. Suspect classes, (as opposed to "quasi-suspect classifications" and classifications that result from "rational" concerns), include skin color, race, nationality, ethnicity, religion, and citizenship. HCPA categories that do not trigger strict scrutiny are gender and sexual orientation (intermediate scrutiny) (see Romer v. Evans 116 S.Ct. 1620 (1996), Lawrence v. Texas, 123 S.Ct. 2472 (2003), Windsor v. United States,133 S.Ct. 2675 (2013)), and disability, which may also include or imply age (rational basis). Gender identity has not been tested yet, but it is likely to fall within the intermediate level of scrutiny. Sexual orientation has been challenged as a strict scrutiny category, and this may in time become the law. The HCPA touches upon both fundamental rights and suspect classes.

The standard applicable under a strict scrutiny analysis has three elements: (1) a compelling government interest in the restriction; (2) narrowly tailored wording designed to achieve that goal; and (3) a demonstration that the restriction must be the least restrictive means of achieving the interest.]

"(4) Free expression.-Nothing in this division shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

"(5) First amendment.-Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

"(6) Constitutional protections.-Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence."

Findings

Pub. L. 111–84, div. E, § 4702, Oct. 28, 2009, 123 Stat. 2835, provided that: "Congress makes the following findings:"

"(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.
[Note: Congressional findings that serve as rationale behind the law—the "whereas" clauses that set the context for the law and the need to pass it—speak to "incidence," meaning "rates," of violence that are "motivated" by the victim's characteristics. That bias exists in the spark of motivation is implied; scholars have debated whether selection might be spurred by a special affinity.]

"(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

[Note: Violence is the "disruptive" factor. Communities are affected. The "tranquility," "safety," and bondedness of the members are negatively affected.]

"(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

"(4) Existing Federal law is inadequate to address this problem.

[Note: Federal law exists to deal with violent crime, but it is not designed to deal with this type of violent crime. Because the crime is different—in its "characteristics," see below—from other violent crimes or occurs at higher rates than community integrity can sustain (see above), new federal law is needed. If it addresses these findings, the new law will target the distinct harms so far identified: (a) greater incidence of biased motivations; (b) events sparked by mere perceptions of personal traits and no other provocation; (c) vulnerable categories of people not previously protected, elaborated in the law according to contemporary knowledge of patterns of Othering; (d) negative affects on community integrity; and (d) threats to public safety aligned to mean "community" safety, which is drawn around the categories of people, not geographical areas or "federally protected activities" —once the boundaries around which "public safety" protections were drawn.]

"(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

[Note: Victims and victims' "survivors" (meaning family, friends, close relations, even when victim is not killed), are already recognized as a protectable category in criminal law. That survivors have certain limited rights as "victims" under criminal law has been established since the victims' rights movement advocated for formal Crime Victims Rights laws. But the "community sharing the traits" of the victim is a new protectable category not yet recognized in federal law. This is another reason this law is different from previous law.]

[Note: The chain of events implicit in the wording of these findings includes both "motivation" and "selection": Offenders are motivated by their internal bias; they select a victim who is believed to fit their bias; the offender engages in a violent act against the victim; the victim is harmed physically by the violence and the community is harmed psychically by the crime. This contemplated chain of events expands the circle of harm beyond any previous law. The question of whether the law is regulating the motivation or the selection process of the offender is moot; the law does not regulate any actor who merely feels motivated, harbors bias, and even selects victims he or she "intends" to harm. Until the actor turns those intentions into actions, no crime occurs.
However, once an offender joins the intentions with steps toward violent action, he or she commits two crimes: the violent act against the individual plus the threat of physical violence and the actual symbolic violence (an oxymoron, perhaps) against the related community and by extension against the victim. The symbolism stems from a flashpoint; it is a public demonstration of the historical violence this country was built upon (in slavery, most notably) but later repudiated (in civil rights type legislation)—a reminder of the failure of the country to adhere to its values in its early formation.

The second "crime" is probably more complex than any other criminal prohibition this country has passed. It approaches an infringement on free speech because it designates certain prejudices as subject to criminal regulation—prejudices toward the protected categories—which is a regulation of the content of one's ideas. But it does not infringe on the speech itself; it regulates the actions associated with the bigoted ideas. In this way, the regulation of the "symbolic" act is a criminal version of the "time, place, and manner" limitations that have long been accepted in First Amendment laws.

"Time, place, and manner" put parameters around a free speech event—such as a rally or a speech on a soapbox—to protect public safety. The language of the HCPA specifics "community safety" as one of its goals. In those terms, the HCPA allows one to have bigoted views and to share them, but not in combination with a criminal act that targets the object of those bigoted views, not at the place where the criminal act occurs, and not in the manner that one carries out the criminal act.

The HCPA's second (symbolic) criminal act inflicts special harms on the community of which the victim was a member. Causation is shown if it can be proven that the offender considered that community's characteristics as a worthy target and believed he or she did target a member of the community. Causation does not require success; the offender's intentions need not be fulfilled. Causation merely requires that the offender caused the series of events that resulted in the harm. The key in this aspect of the HCPA—and a point of criticism of the law—is that the offender's harm of the community is assumed to be actual but vicariously inflicted.

Vicarious harm is recognized in tort law (e.g., vicarious infliction of emotional distress; wrongful death statutes in a different way). (This concept has evolved in tort law going back to the Middle Ages.) Vicarious effects of witnessing violence are increasingly acknowledged in psychology (e.g., veterans harmed by witnessing violence of war) and criminology (e.g., children harmed by witnessing domestic violence). Vicarious harms have not been recognized in criminal law. This is another distinctive feature of the HCPA.

The law does not require—but rather merely assumes—that the community experience "fear" or "apprehension" as a result of the symbolic gesture within the violent criminal act. The assumption can be made concrete by requiring testimony by a community member to fulfill this element. The HCPA would then align with the law prohibiting "assault." "Assault" does not require actual physical contact; it requires merely the apprehension by the target (victim) of unwanted physical contact and circumstances that would make such contact possible or likely between then offender and the victim. Aside from the elements of proof required at trial, the only difference between the structure of "assault" law and the HCPA is that the former requires the offender and victim to be in close physical proximity, while the latter does not. That is why this harm is symbolic; the HCPA is distinctive in recognizing that harm to one who is "like me" is harmful "to me." Again, it is not that harming one like me harms me; it is that harming one who is like me is harmful to me.
Another way to understand the symbolic harm contemplated by the HCPA is that it violates well-established prohibitions against "hate speech." Hate speech comprises acts that are directed against a protected group not to express negative opinions about the group but to express my negative emotions toward them. Free speech allows people to express their beliefs about a group, but not in a way that provokes apprehension or incites others to act violently against members of the groups.

Free speech should be limited to expressing opinions about a group but not to a group. The former is formulated to meet the "opinion" and "content" standards of constitutionally protected speech. The latter is formulated to recognize the harm that comes from violence, even if the violence is intangible. If the cultural norms are shifting, such that the law is shifting to better recognize certain intangible harms—as this thesis posits, as minor point—then the sublet change in the standard of constitutionality for speech must also shift.

The limitations on hate speech derive from long-standing prohibitions against "incitement."

Another way to understand then HCPA and its distinctive features is the examine its fine grained perspective on thought and action. This feature is similar to the law on conspiracy. Under the HCPA, similar to conspiracy, which is also very finely delineated in the law, the offender "enlists" the victim the way the violence that infuses the larger community with fear and apprehension (also the basis of crimes—in assault law). The victim is thus made the tool by which the community is threatened. While this exploitative view of the hate crime act in another context might be strictly seen as parallel to being made an accomplice, in the context where race is the prime focus of the intuition behind the law, it is hard to resist the view that this is another form of enslavement—in this sense, enslaving a Black victim for the purposes of terrorizing or at least "disrupting" the Black community.

"(6) Such violence substantially affects interstate commerce in many ways, including the following:
(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

[Note: Transportation; victims expelled from areas.]

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

[Note: Commercial activity; victims are restricted in free employment and shopping.]

(C) Perpetrators cross State lines to commit such violence.

[Note: Jurisdiction. Offenders enter areas to commit crimes.]

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

[Note: Instrumentalities of interstate commerce facilitate commission of crimes.]

(E) Such violence is committed using articles that have traveled in interstate commerce.
"(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude."

"[Note: "Race," "color," and "ancestry" defined who was held in "bondage, slavery, and involuntary servitude." "Institutions of slavery" permitted "public and private violence" against individuals "because of" their actual or perceived membership in these categories and the punishment of such "racially motivated" attacks is a "means of eliminating the badges, incidents, and relics of slavery." ]"

"(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

"(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

"(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes."

[For definitions of "State" and "local" used in section 4702 of Pub. L. 111–84, set out above, see section 4703(b) of Pub. L. 111–84, set out as a note under section 3716 of Title 42, The Public Health and Welfare.]

[Note: Previous proposals for a federal "hate crime" law were contemplated in the House or Senate or both in 2000 (Sen. Kennedy), 2001 (Rep. Sheila Jackson Lee, HR 74, 107th Cong. 4; S. 19, 107th Cong. 107(a) (2001)), in 2002 (HR 80, 108th Cong.), and in 2003 (HR 259, 109th Cong.).]
Sentencing Commission] may be cited as the 'Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act'."

**42 U.S.C. § 3716 - Support for criminal investigations and prosecutions by State, local, and tribal law enforcement officials**

(a) Assistance other than financial assistance.

(1) In general. At the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that—

(A) constitutes a crime of violence;  
(B) constitutes a felony under the State, local, or tribal laws; and  
(C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws.

(2) Priority. In providing assistance under paragraph (1), the Attorney General shall give priority to crimes committed by offenders who have committed crimes in more than one State and to rural jurisdictions that have difficulty covering the extraordinary expenses relating to the investigation or prosecution of the crime.

(b) Grants.

(1) In general. The Attorney General may award grants to State, local, and tribal law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes.

(2) Office of Justice Programs. In implementing the grant program under this subsection, the Office of Justice Programs shall work closely with grantees to ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.

(3) Application.

[Note: Certification requirements, grant deadlines, and appropriations omitted, found in Pub. L. 111–84, div. E, § 4704.]

**Codification**

This Section was enacted as part of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, and also as part of the National Defense Authorization Act for Fiscal Year 2010, and not as part of title I of the Omnibus Crime Control and Safe Streets Act of 1968 which comprises this chapter.

**Definitions**

[The HCPA], Pub. L. 111–84, div. E, § 4703(b), Oct. 28, 2009, 123 Stat. 2836, provided that:

"In this division [enacting this section and section 3716a of this title and sections 249 and 1389 of Title 18, Crimes and Criminal Procedure, amending section 249 of Title 18, enacting provisions set out as notes under sections 1 and 249 of Title 18, and amending provisions set out as a note under section 534 and provisions listed in a table relating to sentencing guidelines set out under section 994, of Title 28, Judiciary and Judicial Procedure]—

"(1) the term 'crime of violence' has the meaning given that term in section 16 of title 18, United States Code;  
"(2) the term 'hate crime' has the meaning given that term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322; 108 Stat. 2096),"
as amended by this Act [enacting provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28, Judiciary and Judicial Procedure];

"(3) the term 'local' means a county, city, town, township, parish, village, or other general purpose political subdivision of a State; and

"(4) the term 'State' includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States."

[Note: The DOJ website re the HCPA acknowledges the following Acts as part of the rubric of federal "hate crime" laws:


The Shepard Byrd Act makes it a federal crime to willfully cause bodily injury, or attempt to do so using a dangerous weapon, because of the victim’s actual or perceived race, color, religion, or national origin. The Act also extends federal hate crime prohibitions to crimes committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person, only where the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction. The Shepard-Byrd Act is the first statute allowing federal criminal prosecution of hate crimes motivated by the victim’s actual or perceived sexual orientation or gender identity.

Criminal Interference with Right to Fair Housing, 42 U.S.C. § 3631

This statute makes it a crime to use, or threaten to use force to interfere with housing rights because of the victim’s race, color, religion, sex, disability, familial status, or national origin.

Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247

This statute prohibits the intentional defacement, damage, or destruction of religious real property because of the religious nature of the property, where the crime affects interstate or foreign commerce, or because of the race, color, or ethnic characteristics of the people associated with the property. The statute also criminalizes the intentional obstruction by force, or threat of force of any person in the enjoyment of that person’s free exercise of religious beliefs.

Violent Interference with Federally Protected Rights, 18 U.S.C. § 245

This statute makes it a crime to use, or threaten to use force to willfully interfere with any person because of race, color, religion, or national origin and because the person is participating in a federally protected activity, such as public education, employment, jury service, travel, or the enjoyment of public accommodations, or helping another person to do so.

Conspiracy Against Rights, 18 U.S.C. § 241

This statute makes it unlawful for two or more persons to conspire to injure, threaten, or intimidate a person in any state, territory, or district in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or the laws of the U.S.


[Note: Since the HCPA was first introduced, a body of literature has focused on the experience of "hate crime" victimization as distinct from other victimization. "Hate crimes" are said to produce more serious responses from victims, including stronger emotional, psychological, and behavioral effects, including increased risk for depression or post-traumatic stress disorder, when compared to similar crimes that are not hate-motivated. Specifically,
studies have concluded that they have higher levels of fear, behavioral changes, avoidance responses, hypervigilance, anxiety about perceived high-risk situations, or a desire for retaliation against the offender(s). All victims tend to ask "Why me?" and question their perception of the world as a fair and equitable place. "Hate crime" victims also question their own worth.

The reasons that these effects are more severe in bias-crime victims is threefold: (a) victims are generally chosen because of the identity, their membership in a particular group, not because of anything they have done; (b) the violence tends to be greater in "hate crime" attacks than other types of crimes, which instills fear in the victim of future harm; (c) the randomness of violence that is based on membership not behavior coupled with its severity transmits terror to other members of the group, who identify with the original victims, and may be or believe they are interchangeable with the original victims; (d) victims may also experience a secondary form of victimization, which can include stigmatization by the criminal justice system or the public; and (e) reporting the incident to police may not result in a satisfactory outcome, which can heighten feelings of stigmatization or future vulnerability (see, e.g., Berrill and Herek, 1990; Garnets et al., 1990). (See generally Cong. Q. Congressional Testimony, "Hate Crimes," April 17, 2007, p. 13.)

References


Interpretive Notes and Decisions
Reasonable jury could have concluded that defendant forced sedan off highway because of race or national origin of its occupants in violation of 18 USCS § 249(a)(1) because of testimony that defendant directed racial epithets at occupants of sedan and continued to use those epithets while discussing his assault plans. United States v Maybee (2012, CA8 Ark) 687 F3d 1026, reh den, reh, en banc, den (2012, CA8 Ark) 2012 US App LEXIS 18671

Defendant argued that 18 USCS § 249(a)(1) was unconstitutional because it did not require that willfully inflicted injury be motivated by victim's enjoyment of public benefit, as caselaw upholding 18 USCS § 245(b)(2)(B) had held; however, defendant provided no reason why finding of constitutional sufficiency of statute based on two elements established precedent that both elements were necessary to avoid constitutional infirmity.


Certification requirement did not unconstitutionally limit federal power. United States v Hatch (2013, CA10 NM) 722 F3d 1193.

Racial violence provision does not limit its reach to members of formerly enslaved races, but explicitly protects "any person," and thus, it does not run afoul of equal protection principles. United States v Hatch (2013, CA10 NM) 722 F3d 1193.
Hate Crime Prevention Act is constitutional on its face. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

In case in which government alleged that two defendants kidnapped victim and assaulted him on basis of his sexual orientation in violation of Hate Crimes Prevention Act, jurisdiction was supported by Commerce Clause, even though defendants never set foot outside of Commonwealth of Kentucky. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

18 USCS § 249(a)(2) regulates activity that is within power of Congress under Commerce Clause. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

As 18 USCS § 249(a)(2) does not create classes of citizens, but provides neutral protection for all people, it does not give rise to any equal protection concerns on its face. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

Hate Crimes Prevention Act reaches no constitutional conduct restricted by First Amendment. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

Words of 18 USCS § 249(a)(2) convey in common language sufficient notice of conduct that has been prohibited, and it cannot be voided for vagueness on that ground. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.

Because defendants, who were accused of kidnapping their victim and assaulting him on basis of his sexual orientation, showed no fundamental right being burdened by this section, their substantive due process challenge failed. United States v Jenkins (2012, ED Ky) 909 F Supp 2d 758.
Appendix APL [2009] Annotated Public Law HCPA

Appendix APL
Annotated Public Law 111-84, Hate Crime Prevention Act 2009
https://www.gpo.gov/fdsys/pkg/PLAW-111publ84/pdf/PLAW-111publ84.pdf
Public Law 111–84
111th Congress

An Act

To authorize appropriations for fiscal year 2010 for military activities of Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for fiscal year, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “National Defense Authorization Act for Fiscal Year 2010”.

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS

(a) DIVISIONS.—This Act is organized into five divisions as follows:

(1) Division A—Department of Defense Authorizations.
(2) Division B—Military Construction Authorizations.
(3) Division C—Department of Energy National Security Authorizations and Other Authorizations.
(4) Division D—Funding tables.
(5) Division E—Matthew Shepard and James Byrd, Hate Crimes Prevention Act.
DIVISION E—MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

Sec. 4701. Short title.

Sec. 4702. Findings.

Sec. 4703. Definitions.

Sec. 4704. Support for criminal investigations and prosecutions by State, local, and tribal law enforcement officials.

Sec. 4705. Grant program.

Sec. 4706. Authorization for additional personnel to assist State, local, and tribal law enforcement.

Sec. 4707. Prohibition of certain hate crime acts.

Sec. 4708. Statistics.

Sec. 4709. Severability.

Sec. 4710. Rule of construction.

Sec. 4711. Guidelines for hate-crimes offenses.

Sec. 4712. Attacks on United States servicemen.

Sec. 4713. Report on mandatory minimum sentencing provisions.

SEC. 4701. SHORT TITLE.

This division may be cited as the “Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act”.

SEC. 4702. FINDINGS.

Congress makes the following findings:

(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

(4) Existing Federal law is inadequate to address this problem.

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

(6) Such violence substantially affects interstate commerce in many ways, including the following:
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(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity. Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce.

(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct “races”. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

SEC. 4703. DEFINITIONS.

(a) AMENDMENT.—Section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322; 108 Stat. 2096) is amended by inserting “gender identity,” after “gender.”;

(b) THIS DIVISION.—In this division—

(1) the term “crime of violence” has the meaning given that term in section 16 of title 18, United States Code;

(2) the term “hate crime” has the meaning given that term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322; 108 Stat. 2096), as amended by this Act;
(3) the term "local" means a county, city, town, township, parish, village, or other general purpose political subdivision of a State; and

(4) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.

SEC. 4704. SUPPORT FOR CRIMINAL INVESTIGATIONS AND PROSECUTIONS BY STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT OFFICIALS.

(a) ASSISTANCE OTHER THAN FINANCIAL ASSISTANCE.—

(1) IN GENERAL.—At the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that—

(A) constitutes a crime of violence;
(B) constitutes a felony under the State, local, or tribal laws; and
(C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws.

(2) PRIORITY.—In providing assistance under paragraph (1), the Attorney General shall give priority to crimes committed by offenders who have committed crimes in more than one State and to rural jurisdictions that have difficulty covering the extraordinary expenses relating to the investigation or prosecution of the crime.

(b) GRANTS.—

(1) IN GENERAL.—The Attorney General may award grants to State, local, and tribal law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes.

(2) OFFICE OF JUSTICE PROGRAMS.—In implementing the grant program under this subsection, the Office of Justice Programs shall work closely with grantees to ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.

(3) APPLICATION.—

(A) IN GENERAL.—Each State, local, and tribal law enforcement agency that desires a grant under this subsection shall submit an application to the Attorney General at such time, in such manner, and accompanied by or containing such information as the Attorney General shall reasonably require.

(B) DATE FOR SUBMISSION.—Applications submitted pursuant to subparagraph (A) shall be submitted during the 60-day period beginning on a date that the Attorney General shall prescribe.

(C) REQUIREMENTS.—A State, local, and tribal law enforcement agency applying for a grant under this subsection shall—

(i) describe the extraordinary purposes for which the grant is needed;
42 USC 13925 Definitions & Grants. Certification.

42 USC 3716a
Title 20 Education § 7133. Hate crime prevention (a) Grant authorization...under 20 USC s. 7105(2)...to local educational agencies and community-based organizations for the purpose of providing assistance to localities most directly affected by hate crimes (see also 20 U.S.C. 7131).


42 U.S.C. 5663 (a)(9) sentencing programs for juveniles who commit hate crimes.

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(ii) certify that the State, local government, or Indian tribe lacks the resources necessary to investigate or prosecute the hate crime;

(iii) demonstrate that, in developing a plan to implement the grant, the State, local, and tribal law enforcement agency has consulted and coordinated with nonprofit, nongovernmental victim services programs that have experience in providing services to victims of hate crimes; and

(iv) certify that any Federal funds received under this subsection will be used to supplement, not supplant, non-Federal funds that would otherwise be available for activities funded under this subsection.

(4) DEADLINE.—An application for a grant under this subsection shall be approved or denied by the Attorney General not later than 180 business days after the date on which the Attorney General receives the application.

(5) GRANT AMOUNT.—A grant under this subsection shall not exceed $100,000 for any single jurisdiction in any 1-year period.

(6) REPORT.—Not later than December 31, 2011, the Attorney General shall submit to Congress a report describing the applications submitted for grants under this subsection, the award of such grants, and the purposes for which the grant amounts were expended.

(7) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $5,000,000 for each of fiscal years 2010, 2011, and 2012.

SEC. 4705. GRANT PROGRAM.

(a) AUTHORITY TO AWARD GRANTS.—The Office of Justice Programs of the Department of Justice may award grants, in accordance with such regulations as the Attorney General may prescribe, to State, local, or tribal programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in identifying, investigating, prosecuting, and preventing hate crimes.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.

SEC. 4706. AUTHORIZATION FOR ADDITIONAL PERSONNEL TO ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT.

There are authorized to be appropriated to the Department of Justice, including the Community Relations Service, for fiscal years 2010, 2011, and 2012 such sums as are necessary to increase the number of personnel to prevent and respond to alleged violations of section 249 of title 18, United States Code, as added by section 4707 of this division.

SEC. 4707. PROHIBITION OF CERTAIN HATE CRIME ACTS.

(a) IN GENERAL.—Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"$ 249. Hate crime acts

"(a) IN GENERAL.—

"(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or
§242. Deprivation of rights under color of law

§245. Federally protected activities; same language; more categories

§246. Deprivation of relief benefits

Constitutional "rights, privileges, or immunities"

Citizen status; aliens; immigrants

§247. Damage to religious property; obstruction of persons in the free exercise of religious beliefs

§248. Freedom of access to clinic entrances

Violence Against Women and Department of Justice Reauthorization Act of 2005 & 2013

Commerce Clause

PUBLIC LAW 111–84—OCT. 28, 2009 123 STAT. 2839

not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—

(A) IN GENERAL.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

Race and Color

Religion and National Origin in sub. (1) and sub. (2)

Religion

National Origin

Gender

Sexual Orientation

Gender identity: Used in only 4 other sections of USC, two of which are definitions, one of those merely refers to this definition.

Disability:

USC excludes "gender disorders" from definition of disability

FN: "Mirrors § 242 language, which itself mirrors constitutional protections on identity issues"

FN: "Perceived": Places us behind eyes of offender; how he or she sees victim

FN: Significance of perceptions in law and society.

FN: Establishes trigger (because of) for intention and motivation.

FN: Activity of victim irrelevant; existing is enough.

FN: Overlap with criminal sanctions for murder, bodily injury

FN: "Injury" of victim (not belief, not emotion, not feeling of offender) proxy for "hate." Law's emphasis on physical.

FN: "because of"—questions about legally determinate meaning borrowed from RICO statutes
8 USC 1232(b) withholding of removal
"If the AG decides that the alien’s life or freedom would be threatened in that
country because of the alien’s race, religion, nationality, membership in a
particular social group, or political opinion.

8 C.F.R. § 1208.16(b)(2), applicant’s life or freedom would be threatened in a particular
country on account of race, religion, nationality, membership in a particular social
group, or political opinion, the [agency]
shall not require the applicant to provide
evidence that he or she would be singled out
individually for such persecution if: (A) The
applicant establishes that in that country
there is a pattern or practice of persecution
of a group of persons similarly situated to the
applicant on account of race, religion,
nationality, membership in a particular social
group."

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“(I) interferes with commercial or other eco-
nomic activity in which the victim is engaged at
the time of the conduct; or
“(II) otherwise affects interstate or foreign
commerce.

“(3) OFFENSES OCCURRING IN THE SPECIAL MARITIME OR
TERRITORIAL JURISDICTION OF THE UNITED STATES.—Whoever,
within the special maritime or territorial jurisdiction of the United States, engages in conduct described in paragraph (1)
or in paragraph (2)(A) (without regard to whether that conduct
occurred in a circumstance described in paragraph (2)(B)) shall
be subject to the same penalties as prescribed in those para-
graphs.

“(b) CERTIFICATION REQUIREMENT.—
“(1) IN GENERAL.—No prosecution of any offense described
in this subsection may be undertaken by the United States,
except under the certification in writing of the Attorney Gen-
eral, or a designee, that—
“(A) the State does not have jurisdiction;
“(B) the State has requested that the Federal Gover-
ment assume jurisdiction;
“(C) the verdict or sentence obtained pursuant to State
charges left demonstratively unindicted the Federal
interest in eradicating bias-motivated violence; or
“(D) a prosecution by the United States is in the public
interest and necessary to secure substantial justice.

“(2) RULE OF CONSTRUCTION.—Nothing in this subsection
shall be construed to limit the authority of Federal officers,
or a Federal grand jury, to investigate possible violations of
this section.

“(c) DEFINITIONS.—In this section—
“(1) the term ‘bodily injury’ has the meaning given such
term in section 1365(b)(4) of this title, but does not include
solely emotional or psychological harm to the victim;
“(2) the term ‘explosive or incendiary device’ has the meaning
given such term in section 232 of this title;
“(3) the term ‘firearm’ has the meaning given such term
in section 921(a) of this title;
“(4) the term ‘gender identity’ means actual or perceived
gender-related characteristics; and
“(5) the term ‘State’ includes the District of Columbia,
Puerto Rico, and any other territory or possession of the United
States.

“(d) STATUTE OF LIMITATIONS.—
“(1) OFFENSES NOT RESULTING IN DEATH.—Except as pro-
vided in paragraph (2), no person shall be prosecuted, tried,
indicted, or punished for any offense under this section unless the indict-
ment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date
on which the offense was committed.

“(2) DEATH RESULTING OFFENSES.—An indictment or
information alleging that an offense under this section resulted
in death may be found or instituted at any time without limitation.”
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(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"249. Hate crime acts."

SEC. 4708. STATISTICS.

(a) IN GENERAL.—Subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note) is amended by inserting "gender and gender identity," after "race."

(b) DATA.—Subsection (b)(5) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note) is amended by inserting "including data about crimes committed by, and crimes directed against, juveniles" after "data acquired under this section."

SEC. 4709. SEVERABILITY.

If any provision of this division, an amendment made by this division, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this division, the amendments made by this division, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 4710. RULE OF CONSTRUCTION.

For purposes of construing this division and the amendments made by this division the following shall apply:

(1) IN GENERAL.—Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

(2) VIOLENT ACTS.—This division applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of a victim.

(3) CONSTRUCTION AND APPLICATION.—Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the First Amendment to the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to—

(A) plan or prepare for an act of physical violence; or

(B) incite an imminent act of physical violence against another.
(4) **Free expression.**—Nothing in this division shall be construed to allow prosecution based solely upon an individual’s expression of racial, religious, political, or other beliefs or solely upon an individual’s membership in a group advocating or espousing such beliefs.

(5) **First amendment.**—Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

(6) **Constitutional protections.**—Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.

SEC. 4711. GUIDELINES FOR HATE-CRIMES OFFENSES.

Section 249(a) of title 18, United States Code, as added by section 4707 of this Act, is amended by adding at the end the following:

(4) **Guidelines.**—All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be included in the United States Attorneys’ Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.”.

SEC. 4712. ATTACKS ON UNITED STATES SERVICEMEN.

(a) **In general.**—Chapter 67 of title 18, United States Code, is amended by adding at the end the following:

“§ 1389. Prohibition on attacks on United States servicemen on account of service

(a) **In general.**—Whoever knowingly assaults or batters a United States serviceman or an immediate family member of a United States serviceman, or who knowingly destroys or injures the property of such serviceman or immediate family member, on account of the military service of that serviceman or status of that individual as a United States serviceman, or who attempts or conspires to do so, shall—

(1) in the case of a simple assault, or destruction or injury to property in which the damage or attempted damage to such property is not more than $500, be fined under this title in an amount not less than $50 or more than $10,000 and imprisoned not more than 2 years;

(2) in the case of destruction or injury to property in which the damage or attempted damage to such property is more than $500, be fined under this title in an amount not less than $1000 nor more than $100,000 and imprisoned not more than 5 years; and

(3) in the case of a battery, or an assault resulting in bodily injury, be fined under this title in an amount not less
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than $2500 and imprisoned not less than 6 months nor more than 10 years.
“(b) EXCEPTION.—This section shall not apply to conduct by a person who is subject to the Uniform Code of Military Justice.
“(c) DEFINITIONS.—In this section—
“(1) the term ‘Armed Forces’ has the meaning given that term in section 1388;
“(2) the term ‘immediate family member’ has the meaning given that term in section 115; and
“(3) the term ‘United States serviceman’—
“(A) means a member of the Armed Forces; and
“(B) includes a former member of the Armed Forces during the 5-year period beginning on the date of the discharge from the Armed Forces of that member of the Armed Forces.”.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 67 of title 18, United States Code, is amended by adding at the end the following:

"1389. Prohibition on attacks on United States servicemen on account of service."

SEC. 4713. REPORT ON MANDATORY MINIMUM SENTENCING PROVISIONS.

(a) REPORT.—Not later than 1 year after the date of enactment of this Act, the United States Sentencing Commission shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on mandatory minimum sentencing provisions under Federal law.

(b) CONTENTS OF REPORT.—The report submitted under subsection (a) shall include—

(1) a compilation of all mandatory minimum sentencing provisions under Federal law;
(2) an assessment of the effect of mandatory minimum sentencing provisions under Federal law on the goal of eliminating unwarranted sentencing disparity and other goals of sentencing;
(3) an assessment of the impact of mandatory minimum sentencing provisions on the Federal prison population;
(4) an assessment of the compatibility of mandatory minimum sentencing provisions under Federal law and the sentencing guidelines system established under the Sentencing Reform Act of 1984 (Public Law 98–473; 98 Stat. 1987) and the sentencing guidelines system in place after Booker v. United States, 543 U.S. 220 (2005);
(5) a description of the interaction between mandatory minimum sentencing provisions under Federal law and plea agreements;
(6) a detailed empirical research study of the effect of mandatory minimum penalties under Federal law;
(7) a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy; and

Myers-Genealogy of "Hate Crime"

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(8) any other information that the Commission determines
would contribute to a thorough assessment of mandatory min-
imum sentencing provisions under Federal law.

Approved October 28, 2009.

[Note: The drafter included religion and national origin in both subsections to ensure protections for any groups that do not enjoy the Thirteenth Amendment’s prohibition on “badges and incidents of slavery.” They are nevertheless covered by sections relying on Commerce Clause powers. Bill Lann Lee, then-Acting Assistant Attorney General for the Civil Rights Division of the Department of Justice, described this overlap as “a belt and suspender approach” to ensure “there be no shortfall in the coverage of religious-based hate crimes” that might occur without “interstate commerce, as an additional basis to make sure that religious-based hate crimes are absolutely covered.” (Hearing on H.R. 3081, supra note 24, at 31 (testimony of Bill Lann Lee). Then-Deputy Attorney General Eric Holder conceded that the power to regulate crimes motivated by religious bias is unsettled, and that this “would enable prosecutors to determine, based on the facts of each case” “how best to proceed in light of possible constitutional challenges.” The Hate Crimes Prevention Act of 1998; Hearing on S. 1529 before the Senate Comm. on the Judiciary 105th Cong. 63 (1998) statement of Eric H. Holder, Jr.)]

[Note: The phrase “whether or not acting under color of law” is intended to clarify that the law is no longer restricted by 18 USC § 242, Deprivation of rights under color of law, which makes it a crime to willfully deprive persons of “any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to punish a person differently from what is prescribed for citizens” on account of such person being an alien, by reason of his color, or race.” The phrasing however mimics section 242’s increased punishments if “bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire”; or if death results; or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill.” (18 USC § 242. See also 18 USC’s 243.)]

[Note: Section regarding construction sets the standard of scrutiny for constitutional purposes at a “compelling government interest” that is the “least restrictive means” of achieving the interest in preventing and punishing “hate crimes.” This is commonly known as the “strict scrutiny,” the highest standard for government action, which is used when a governmentally imposed restriction infringes upon a fundamental individual right or when the restriction affects a “suspect classification” or category of people who are recognized as being vulnerable to discrimination inviolate of their rights to equal protection under the Constitution. Suspect classes, as opposed to “quasi-suspect classifications” and classifications that result from “rational” concerns, include skin color, race, nationality, religion, or citizenship. HCPA categories that do not trigger strict scrutiny are gender and sexual orientation (intermediate scrutiny)(see Romer v. Evans 116 S.Ct. 1620 (1996), Lawrence v. Texas, 123 S.Ct. 2472 (2003), Windsor v. United States, 133 S.Ct. 2675 (2013)), and disability, which may also include or imply age (rational basis). Gender identity has not been tested yet, but it is likely to fall within the intermediate level of scrutiny. Sexual orientation has been challenged as a strict scrutiny category, and this may in time become the law. The HCPA touches upon both fundamental rights and suspect classes. The standard applicable under a strict scrutiny analysis has three elements: (1) a compelling government interest in the restriction; (2) narrowly tailored wording designed to achieve that goal; and (3) a demonstration that the restriction must be the least restrictive means of achieving the interest.]
HATE CRIMES STATISTICS ACT

Remarks in House
   Enact (H.R. 2455), 19840 [22JY], 19845 [23JY]-19846 [22JY]
Texts of
   H.R. 2455, provisions, 19841 [22JY]

Cong. Rec. Index uses of “hate crime” or related terms begins in 1985:
   BIAGGI, MARIO (a Representative from New York) -- Hate Crime, New York (NY) Post (excerpt), 19844 [22JY]
   Hate Crimes, Washington (DC) Post (excerpt), 19844 [22JY]
   Hate Crime: International Network of Children of Jewish Holocaust Survivors (excerpt), 19845 [22JY]
   SIMON, PAUL (a Senator from Illinois) -- Antisemitism: hate groups, 24501 [20SE]
   Prejudice: growth of hate groups, 24784 [24SE]
   CIVIL LIBERTIES -- Transcripts: Hate Groups: 20/20, ABC News, 24784-24786 [24SE]
   CRIME & CRIMINALS -- Hate Crimes Statistics Act (H.R. 2455); Comm. on the Judiciary, 19845 [22JY]; 19840 [22JY]; 19845 [23JY]-19846 [22JY]
   Hate Crime Statistics Act: enact (H.R. 1171), 2846 [20FE]
   JEWS -- Iowa: hate groups, 38563 [19DE]
   MIKULSKI, BARBARA (a Senator from Maryland) -- Remarks on Religion: stop hate crimes (H.R. 665), 1712 [4FE]
   RELIGION -- Remarks in House on H.R. 775, combat proliferation of hate crimes against religious property, 1624 [31JA]
Appendix Self-Evident [1776] Declaration of Independence 1776

Appendix Self-Evident
The Declaration of Independence 1776
**Introduction**

Asserts as a matter of Natural Law the ability of a people to assume political independence; acknowledges that the grounds for such independence must be reasonable, and therefore explicable, and ought to be explained.

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**In CONGRESS, July 4, 1776.**

The unanimous Declaration of the thirteen United States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

---

**Preamble**

Outlines a general philosophy of government that justifies revolution when government harms natural rights.

"Suffering while evils are sufferable" echoes Patrick Henry's famous Liberty or Death speech, imposing colonists to shame off their apathy.

---

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

---

**Indictment**

A bill of particulars documenting the king's "repeated injuries and usurpations" of the Americans' rights and liberties.

Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to
them and formidable to tyrants only.
He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.
He has dissolved Representative Houses repeatedly, for opposing with manly firmness of his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.
He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.
He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.
He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.
He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people and eat out their substance.
He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.
He has affected to render the Military independent of and superior to the Civil Power.
He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:
For quartering large bodies of armed troops among us:
For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States:
For cutting off our Trade with all parts of the world:
For imposing Taxes on us without our Consent:
For depriving us in many cases, of the benefit of Trial by Jury:
For transporting us beyond Seas to be tried for pretended offences:
For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies
For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments:
For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.
He has abdicated Government here, by declaring us out of his jurisdiction.
Protection and waging War against us. 
He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people. 
He is at this time transporting large Armies of foreign 
Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty and Perfidy 
scarcely paralleled in the most barbarous ages, and totally 
unworthy the Head of a civilized nation. 
He has constrained our fellow Citizens taken Captive on the high 
Seas to bear Arms against their Country, to become the 
executioners of their friends and Brethren, or to fall themselves 
by their Hands. 
He has excited domestic insurrections amongst us, and has 
endeavoured to bring on the inhabitants of our frontiers, the 
merciless Indian Savages whose known rule of warfare, is an 
undistinguished destruction of all ages, sexes and conditions. 
In every stage of these Oppressions We have Petitioned for 
Redress in the most humble terms: Our repeated Petitions have 
been answered only by repeated injury. A Prince, whose character 
is thus marked by every act which may define a Tyrant, is unfit to 
be the ruler of a free people.

<table>
<thead>
<tr>
<th>Denunciation</th>
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<tbody>
<tr>
<td>This section essentially finished the case for independence. The conditions that justified revolution have been shown.</td>
</tr>
<tr>
<td>Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.</td>
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<table>
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<tr>
<th>Conclusion</th>
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<tr>
<td>The signers assert that there exist conditions under which people must change their government, that the British have produced such conditions, and by necessity the colonies must throw off political ties with the British Crown and become independent states. The conclusion contains, at its</td>
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<tr>
<td>We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.</td>
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core, the Lee Resolution that had been passed on July 2.

<table>
<thead>
<tr>
<th>Signatures</th>
<th>The fifty-six signers of the Declaration represented the new states (from north to south):</th>
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</table>
| The first and most famous signature on the engrossed copy was that of John Hancock, President of the Continental Congress. Two future presidents, Thomas Jefferson and John Adams, and a father and great-grandfather of two other presidents, Benjamin Harrison, were among the signatories. Edward Rutledge (age 26), was the youngest signer, and Benjamin Franklin (age 70) was the oldest signer. | - New Hampshire: Josiah Bartlett, William Whipple, Matthew Thornton  
- Massachusetts: Samuel Adams, John Adams, John Hancock, Robert Treat Paine, Elbridge Gerry  
- Rhode Island: Stephen Hopkins, William Ellery  
- Connecticut: Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott  
- New York: William Floyd, Philip Livingston, Francis Lewis, Lewis Morris  
- New Jersey: Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark  
- Pennsylvania: Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross  
- Delaware: George Read, Caesar Rodney, Thomas McKean  
- Maryland: Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton  
- North Carolina: William Hooper, Joseph Hewes, John Penn  
- South Carolina: Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., Arthur Middleton  
- Georgia: Button Gwinnett, Lyman Hall, George Walton |

**References**

Virginia Declaration of Rights 1776
- Virginia Declaration of Rights (George Mason's Draft, 20–26 May 1776)  
- Virginia Declaration of Rights (Committee Draft, 27 May 1776)  
Virginia Declaration of Rights (Final Draft, 12 June 1776).
A Declaration by the Representatives of the UNITED STATES OF AMERICA in General Congress assembled.

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights; that among these are Life, Liberty and the pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the governed; that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government; laying its foundation on such Principles and Institutions as their Wisdom shall direct. Nor应当 be changed for Light and transient Causes, and accordingly all Experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the form they are in accustomed to.

They are accustomed, but when a long train of abuses and usurpations, pursuing invariably the same Object, annuls by progressive steps the means of a redress, the people shall have the Right to alter or to abolish it, and to institute new Government. The history of the present King of Great Britain is a history of repeated Invasions of our Property; a history of every大大小小 of procedures, among which appears no other in the list, than the right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such Principles and Institutions as their Wisdom shall direct.

He has refused to pass certain Laws for the support and protection of Industry.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a Right inseparable to them and provable to be theirs only;
Above, a copy of the Declaration of Independence written out by Thomas Jefferson

Below, pages of drafts of the Declaration
he has refused his assent to laws the most wholesome and necessary for the public good;
he has forbidden his governors to pass laws of immediate and pressing importance,
under the coordinate powers as, he has delayed their operation, till his assent should be obtained;
and when so obtained, he has acted contrary to them.

he has refused to pass other laws for the accommodation of large districts of people
under the same situation of the legislative; he has refused to pass laws for the public welfare, a right
exercisable in the欧美.

he has used his power to injure his enemies;
he has refused for a long time, after repeated requests, to give instructions to his officers
and to supply them with public supplies for their public service.

he has prevented the population of these states; for that purpose
he has obstructed the navigation of the rivers of states.

he has regulated trade and commerce; he has kept among us in times of peace standing armed forces in states.

he has exercised his power to enter into alliances or sources of officers to harass our people.
he has kept among us in times of peace standing armed forces in states.

he has refused assent to laws for establishing judiciary powers.
he has made judges dependent on his will alone.

he has created a multitude of new offices, of great expense to the states, for the increased of his power.

he has combined with others to render the military independent of and superior to the civil power.

he has used his power to construct a fleet and
for quartering large bodies of armed troops among us;
for protecting them by a mock-trial from punishment for any crime;
for depriving us of the benefits of trial by jury.
abolishing our most precious duties

for taking away our charters. Gathering fundamentally the forms of government

for suspending our own legislatures & declaring themselves invested with powers to

dereciliate us in all cases whatsoever.

In futility we at the public liberty we against, not

he has abdicated government him, withdrawing his governor, & declaring we out

of his allegiance & protection.

he has plundered our seas, ravaged our coasts, burnt our towns & desolated the

lives of our people;

he is at the time transporting large armies of foreign mercenaries to complete

our conquests, and he has

a tyra.

he has endeavored to bring on the inhabitants of our provinces the merciless Indian

savage, whose known rule of warfare is an indiscriminate destruction of

all ages, sexes & conditions of existence.

he has incited treasonable insurrections of our fellow citizens, with the

abominable of our property.

he has bought and sold, on account of human nature itself, violating its most in-

credibly, liberty in the persons of a distant people who never sold him, expelling & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.

the political warfare, the oppression of which powers, is the warfare of the

Christian king of Great Britain, determined to keep open markets where MEN should be bought & sold. he has prostituted his negative

for suppressing every legislative attempt to prohibit or restrain this

determination, taking up a parcel of MEND, should be brought to

a reasonable commerce; and that this assemblage of horrors might not be a fact

of distinguished die, he is now exciting those every people to rise in arms

amongst us, and to purchase that liberty of which he has deprived them,

by imposing taxes upon whom he also distributed them: the paying

ten crimes committed against the liberties of our people, with crimes

which he urges them to commit against the lives of another.


in every stage of these oppressions we have petitioned for redress in the most humble

forms; our repeated petitions have been answered by repeated injuries; a prince

whose character is thus marked by every act which may define a tyrant, is unfit

to be the ruler of a people who mean to be free. future ages will scarce believe
A Declaration by the Representative of the United States of North America now sitting in Congress at Philadelphia, setting forth the dignity and respectability of their taking up arms.

It was fit for the citizens, who had been more oppressed and wronged than any other people, to arm themselves, that the spirit of liberty might not be extinguished. It was necessary for the happiness of the whole community, that the government should be strong and efficient. A strong government is necessary to the safety and prosperity of the nation.

The Declaration of Independence was a mighty blow to the authority of the British government. It was a declaration of freedom, of the right of the people to govern themselves. It was a declaration of the right of the people to resist oppression and tyranny.

It was a declaration of the right of the people to resist oppression and tyranny.

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Appendix Magna Carta [1215] Magna Charta Liberatum (1215, 1216, 1217, 1226, 1297, 1640)

Appendix Magna Carta
Magna Charta Liberatum 1215
reissued 1216, 1217, 1297; reinscribed 1640; numbering by Blackstone c. 1765
Magna Carta


With this confirmation, Magna Carta, penned in Latin on parchment (animal skin) and shown here, was entered on the statute rolls of England more than 700 years ago and became the foundation document of English common law.

Presented courtesy of David M. Rubenstein
Magna Carta 1215

Preamble:
John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishop, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings. Know that, having regard to God and for the salvation of our soul, and those of all our ancestors and heirs, and unto the honor of God and the advancement of his holy Church and for the rectifying of our realm, we have granted as underwritten by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry, archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of Master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple in England), and of the illustrious men William Marshal, earl of Pembroke, William, earl of Salisbury, William, earl of Warenne, William, earl of Arundel, Alan of Galloway (constable of Scotland), Waren Fitz Gerold, Peter Fitz Herbert, Hubert De Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert of Roppesley, John Marshal, John Fitz Hugh, and others, our liegemen.

1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

2. If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe "relief", he shall have his inheritance by the old relief, to wit, the heir or heirs of an earl, for the whole barony of an earl by L100; the heir or heirs of a baron, L100 for a whole barony; the heir or heirs of a knight, 100s, at most, and whoever owes less let him give less, according to the ancient custom of fees.

3. If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.

4. The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we have committed the wardship of the lands of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waster of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible for the issues to us or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to anyone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.
5. The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, fishponds, stanks, mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and wainage, according as the season of husbandry shall require, and the issues of the land can reasonable bear.

6. Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. Neither we nor our bailiffs will seize any land or rent for any debt, as long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

10. If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.

11. And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

12. No scutage not aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

13. And the city of London shall have all it ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moreover cause to be summoned generally, through our sheriffs and bailiffs, and others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

15. We will not for the future grant to anyone license to take an aid from his own free tenants, except to ransom his person, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

16. No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.
17. Common pleas shall not follow our court, but shall be held in some fixed place.
18. Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following; We, or, if we should be out of the realm, our chief justiciar, will send two justiciaries through every county four times a year, who shall alone with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.
19. And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that day, as many as may be required for the efficient making of judgments, according as the business be more or less.
20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.
21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense.
22. A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.
23. No village or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.
24. No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.
25. All counties, hundred, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.
26. If anyone holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed us, it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfill the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.
27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the Church, saving to every one the debts which the deceased owed to him.
28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.
29. No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.
30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.
31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.
32. We will not retain beyond one year and one day, the lands those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.
33. All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.
34. The writ which is called praecipe shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.
35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.
36. Nothing in future shall be given or taken for awrit of inquisition of life or limbs, but freely it shall be granted, and never denied.
37. If anyone holds of us by fee-farm, either by socage or by burage, or of any other land by knight's service, we will not (by reason of that fee-farm, socage, or burgage), have the wardship of the heir, or of such land of his as if of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight's service. We will not by reason of any small serjeancy which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight's service.
38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law", without credible witnesses brought for this purposes.
39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.
40. To no one will we sell, to no one will we refuse or delay, right or justice.
41. All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.
42. It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as if above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy- reserving always the allegiance due to us.
43. If anyone holding of some escheat (such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us than he would have done to the baron if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.
44. Men who dwell without the forest need not henceforth come before our justiciaries of the forest upon a general summons, unless they are in plea, or sureties of one or more, who are attached for the forest.
45. We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.
46. All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long continued possession, shall have the wardship of them, when vacant, as they ought to have.
47. All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be followed with regard to river banks that have been placed "in defense" by us in our time.
48. All evil customs connected with forests and warrens, foresters and warreners, sheriffs and
their officers, river banks and their wardens, shall immediately by inquired into in each county
by twelve sworn knights of the same county chosen by the honest men of the same county, and
shall, within forty days of the said inquest, be utterly abolished, so as never to be restored,
provided always that we previously have intimation thereof, or our justiciar, if we should not be
in England.
49. We will immediately restore all hostages and charters delivered to us by Englishmen, as
sureties of the peace of faithful service.
50. We will entirely remove from their bailiwicks, the relations of Gerard of Athee (so that in
future they shall have no bailiwick in England); namely, Engelard of Cigogne, Peter, Guy, and
Andrew of Chanceaux, Guy of Cigogne, Geoffrey of Martigny with his brothers, Philip Mark with
his brothers and his nephew Geoffrey, and the whole brood of the same.
51. As soon as peace is restored, we will banish from the kingdom all foreign born knights,
crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the
kingdom's hurt.
52. If anyone has been dispossessed or removed by us, without the legal judgment of his peers,
from his lands, castles, franchises, or from his right, we will immediately restore them to him;
and if a dispute arise over this, then let it be decided by the five and twenty barons of whom
mention is made below in the clause for securing the peace. Moreover, for all those possessions,
from which anyone has, without the lawful judgment of his peers, been disseised or removed, by
our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or
which as possessed by others, to whom we are bound to warrant them) we shall have respite
until the usual term of crusaders; excepting those things about which a plea has been raised, or
an inquest made by our order, before our taking of the cross; but as soon as we return from the
expedition, we will immediately grant full justice therein.
53. We shall have, moreover, the same respite and in the same manner in rendering justice
concerning the disafforestation or retention of those forests which Henry our father and Richard
our brother afforested, and concerning the wardship of lands which are of the fief of another
(namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by
knight’s service), and concerning abbeys founded on other fiefs than our own, in which the lord
of the fee claims to have right; and when we have returned, or if we desist from our expedition,
we will immediately grant full justice to all who complain of such things.
54. No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any
other than her husband.
55. All fines made with us unjustly and against the law of the land, and all amercements,
imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be
done concerning them according to the decision of the five and twenty barons whom mention is
made below in the clause for securing the pease, or according to the judgment of the majority of
the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and
such others as he may wish to bring with him for this purpose, and if he cannot be present the
business shall nevertheless proceed without him, provided always that if any one or more of the
aforesaid five and twenty barons are in a similar suit, they shall be removed as far as concerns
this particular judgment, others being substituted in their places after having been selected by
the rest of the same five and twenty for this purpose only, and after having been sworn.
56. If we have disseised or removed Welshmen from lands or liberties, or other things, without
the legal judgment of their peers in England or in Wales, they shall be immediately restored to
them; and if a dispute arise over this, then let it be decided in the marches by the judgment of
their peers; for the tenements in England according to the law of England, for tenements in
Wales according to the law of Wales, and for tenements in the marches according to the law of
the marches. Welshmen shall do the same to us and ours.
57. Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard our brother, and which we retain in our hand (or which are possessed by others, and which we ought to warrant), we will have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the foresaid regions.

58. We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

59. We will do towards Alexander, king of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our own barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly king of Scots; and this shall be according to the judgment of his peers in our court.

60. Moreover, all these aforesaid customs and liberties, the observances of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distract and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country desires it, swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to everyone who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if any one of the five and twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is entrusted, to these twenty five barons, if perchance these twenty five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty five had concurred in this; and the said twenty five shall swear that they will faithfully observe all that is
aforsaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such things has been procured, let it be void and null, and we shall never use it personally or by another.

62. And all the will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, archbishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandulf as touching this security and the concessions aforesaid.

63. Wherefore we will and firmly order that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand - the above named and many others being witnesses - in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.
Appendix 1st Amt [1791] First Amendment, Bill of Rights 1789

Amendment I.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[Note: The Bill of Rights makes civil rights paramount, as the rights of the People who select their own governing body, to the "rights" or powers of the government. The First Amendment ensures that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by word or act their faith therein," as Justice Robert Jackson wrote in the 1943 case West Virginia v. Barnette. And as Justice William Brennan wrote in New York... ]
Times Co. v. Sullivan in 1964, the First Amendment provides that "debate on public issues ... [should be] ... uninhibited, robust, and wide-open."

[Note: The First Amendment originally addressed only federal government action. Jefferson believed that the Amendment denied the power of Congress "to controul the freedom of the press," but nonetheless thought one should exist in the States. (Letter to Abigail Adams 1804, quoted in Dennis v. United States, 341 U.S. 494, 341 U.S. 522, n.4 (concurring opinion).) The distinction between governments was eliminated with the adoption of the Fourteenth Amendment, which made all amendments applicable to the States, including First Amendment restrictions. (See, e.g., Gitlow v. New York, 268 U.S. 652, 268 U.S. 666; Schneider v. State, 308 U.S. 147, 308 U.S. 160; Bridges v. California, 314 U.S. 252, 314 U.S. 268; Edwards v. South Carolina, 372 U.S. 229, 372 U.S. 235.)

But, years after the ratification of the Fourteenth Amendment, the Supreme Court in United States v. Cruikshank (1876) still held that the First and Second Amendment did not apply to state governments. Not until the 1920s, in a series of decisions, did the Supreme Court interpret the Fourteenth Amendment to "incorporate" most portions of the Bill of Rights, making these portions, for the first time, enforceable against the state governments.]

[Note: The U.S. Constitution, signed on Sept. 17, 1787, it did not contain the freedoms now outlined in the Bill of Rights (effective Dec. 15, 1791). The Bill of Rights is a laundry list of basic guaranteed individual rights vis a vis the government that limit federal and state powers, reflecting the dissatisfaction among the populace with the weak protections on governmental overreach of the Constitution. The Founders drafted to Bill of Rights to restrain the government's ability to interfere in the private daily lives of citizens. Many of the Framers viewed their inclusion as unnecessary. Virginia was the last to ratify it, giving the bill the majority needed to pass. The first Congress submitted 12 amendments (drafted by James Madison) to the states, 10 of which were ratified:

• 1st Amendment guarantees freedom of religion, speech, and the press and grants the right to petition for redress and to assemble peacefully. Without this provisions, the government could establish a national religion, protesters could be silenced, the press could not criticize government, and citizens could not mobilize for social change.
• 2nd Amendment guarantees the right of the people to keep and bear arms.
• 3rd prohibits the quartering of soldiers in private dwellings in peacetime.
• 4th protects against unreasonable search and seizure.
• 5th establishes grand-jury indictment for serious offenses, protects against double jeopardy in criminal cases, and prohibits compelling testimony by a person against himself.
• 6th establishes the rights of the accused to a speedy trial and an impartial jury and guarantees the right to legal counsel and to the obtaining of witnesses in his favor.
• 7th preserves the right to trial by jury in serious civil suits and prohibits double jeopardy in civil cases.
• 8th prohibits excessive bail and cruel and unusual punishment.
• 9th states that enumeration of certain rights in the Constitution does not mean the abrogation of rights not mentioned.
• 10th reserves to the states and people any powers not delegated to the federal government.]
Case References

1943 West Virginia v. Barnette (Justice Robert Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by word or act their faith therein.")

1964 New York Times Co. v. Sullivan (Justice William Brennan, First Amendment provides that "debate on public issues ... [should be] ... uninhibited, robust, and wide-open.")

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West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

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Melton v. Young, 465 F.2d 1332 (6th Cir. 1972)
Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir. 2001)
Scoville v. Board of Education of Joliet Township High School District 204, 425 F.2d 10 (7th Cir. 1970)
Settle v. Dickson County School Board, Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995)
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Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989)
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Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999)
Lacks v. Ferguson Reorganized School District R-2, 147 F.3d 718 (8th Cir. 1998)
Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir. 2001)
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Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989)
West v. Derby Unified School District No. 260, 206 F.3d 1358 (10th Cir. 2000)

Assembly
Supreme Court Case Summaries
Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990)
Lee v. Weisman, 505 U.S. 577 (1992)

Lower Court Case Summaries
Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir. 2000)
Hsu v. Roslyn School District, 85 F.3d 839 (2nd Cir. 1996)

[Note: Limited freedom does not cover giving away military secrets to an enemy, scream in
the library or shout over a bullhorn in the middle of the night; lie under oath or traffic in
obscenity or child pornography; print untruths that damage someone's reputation; protest in a
manner that violates another's freedom or life.
  Time, place and manner restrictions apply.
  Still debated are flag-burning, hard-core rap and heavy-metal lyrics, tobacco advertising,
hate speech, pornography, nude dancing, solicitation and various forms of symbolic speech.
Many would agree to limiting some forms of free expression, as seen in the First Amendment
Center's State of the First Amendment survey reports.
  http://www.firstamendmentcenter.org/about-the-first-amendment ]

[Note: Court rationales have included the following benefits as freedoms:
  - to judge the difference between good ideas and bad ones by providing a protected, public
  space in which competing ideas can prove their worth — and within which all ideas can coexist.
  - to hear all sides of every issue and to make our own judgments without government
  interference or control.
  - to enjoy a climate that allows us as individuals to speak and write our minds, worship as we
  choose, gather for peaceful purposes and ask the government to right the wrongs we see in
  society.
  - to debate, to disagree, to learn and to grow. While those who created the First Amendment
  could never have envisioned the appeal of Eminem, 50 Cent or Marilyn Manson, they clearly
  envisioned what freedom means.]
1. Institutional Vandalism
   A. A person commits the crime of institutional vandalism by knowingly vandalizing, defacing or otherwise damaging:
      
      i. Any church, synagogue or other building, structure or place used for religious worship or other religious purpose;
      ii. Any cemetery, mortuary or other facility used for the purpose of burial or memorializing the dead;
      iii. Any school, educational facility or community center;
      iv. The grounds adjacent to, and owned or rented by, any institution, facility, building, structure or place described in subsections (i), (ii) or (iii) above;
      
      Or, any personal property contained in any institution, facility, building, structure, or place described in subsections (i), (ii) or (iii) above.

   B. Institutional vandalism is punishable as follows:
      
      • Institutional vandalism is a _______ misdemeanor if the person does any act described in subsection A which causes damage to, or loss of, the property of another.
      • Institutional vandalism is a _______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of five hundred dollars.
      • Institutional vandalism is a _______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of one thousand five hundred dollars.
      • Institutional vandalism is a _______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of five thousand dollars.
In determining the amount of damage to, or loss of, property, damage includes the cost of repair or replacement of the property that was damaged or lost.

2. Bias-Motivated Crimes
   A. A person commits a Bias-Motivated Crime if, by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals, he violates Section _______ of the Penal code (insert code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and or other appropriate statutorily proscribed criminal conduct).

   B. A Bias-Motivated Crime under this code provision is a _______ misdemeanor/ felony (the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense).

3. Civil Action for Institutional Vandalism and Bias-Motivated Crimes
   A. Irrespective of any criminal prosecution or result thereof, any person incurring injury to his person or damage or loss to his property as a result of conduct in violation of Sections 1 or 2 of this Act shall have a civil action to secure an injunction, damages or other appropriate relief in law or in equity against any and all persons who have violated Sections 1 or 2 of this Act.

   B. In any such action, whether a violation of Sections 1 or 2 of this Act has occurred shall be determined according to the burden of proof used in other civil actions for similar relief.

   C. Upon prevailing in such civil action, the plaintiff may recover:
      i. Both special and general damages, including damages for emotional distress;
      ii. Punitive damages; and/or
      iii. Reasonable attorney fees and costs.

   D. Notwithstanding any other provision of the law to the contrary, the parent(s) or legal guardian(s) of any unemancipated minor shall be liable for any judgment rendered against such minor under this Section.

4. Bias Crime Reporting and Training
   A. The state police or other appropriate state law enforcement agency shall establish and maintain a central repository for the collection and analysis of information regarding Bias-Motivated Crimes as defined in Section 2. Upon establishing such a repository, the state police shall develop a procedure to monitor, record, classify and analyze information relating to crimes apparently directed against individuals or groups, or their property, by reason of their actual or perceived race, color, religion, national origin, sexual orientation or gender. The state police shall submit its procedure to the appropriate committee of the state legislature for approval.

   B. All local law enforcement agencies shall report monthly to the state police concerning such offenses in such form and in such manner as prescribed by rules and regulations adopted by state police. The state police must summarize and analyze the information received and file an annual report with the governor and the appropriate committee of the state legislature.

   C. Any information, records and statistics collected in accordance with this subsection shall be available for use by any local law enforcement agency, unit of local government, or state agency, to the extent that such information is reasonably necessary or useful to such agency in
carrying out the duties imposed upon it by law. Dissemination of such information shall be subject to all confidentiality requirements otherwise imposed by law.

D. The State police shall provide training for police officers in identifying, responding to, and reporting all Bias-Motivated Crimes.

References


(a) Rights of Crime Victims.—A crime victim has the following rights:
   (1) The right to be reasonably protected from the accused.
   (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
   (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
   (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
   (5) The reasonable right to confer with the attorney for the Government in the case.
   (6) The right to full and timely restitution as provided in law.
   (7) The right to proceedings free from unreasonable delay.
   (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
   (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
   (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

[Note: Subsections (7), (9), and (10) were added when the original Victims' Rights and Restitution Act of 1990 was repealed in Title 42 and replaced with this Section 237 under Title 18.]

(b) Rights Afforded.—
   (1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a) (3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to
the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.—
(A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.
   (i) In general. These rights may be enforced by the crime victim or the crime victim’s lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).
   (ii) Multiple victims. In a case involving multiple victims, subsection (d) (2) shall also apply.

(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.

(c) Best Efforts To Accord Rights.—
(1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations.—
(1) Rights. The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.
(5) Limitation on relief. In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—
(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and
(C) in the case of a plea, the accused has not pled to the highest offense charged.
This paragraph does not affect the victim’s right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter:
(1) Court of appeals. The term "court of appeals" means (A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or (B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.
(2) Crime victim. (A) In general. The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.
(B) Minors and certain other victims. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.
(3) District court; court. The terms "district court" and "court" include the Superior Court of the District of Columbia.

(f) Procedures To Promote Compliance.
(1) Regulations. Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.
(2) Contents.—The regulations promulgated under paragraph (1) shall—
(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;
(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;
(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and
(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

References in Text

The Federal Rules of Appellate Procedure, referred to in subsec. (d) (3), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The date of enactment of this chapter, referred to in subsec. (f) (1), is the date of enactment of Pub. L. 108–405, which was approved Oct. 30, 2004.

Prior Provisions


Amendments

2015—Subsec. (a) (9), (10). Pub. L. 114–22, § 113(a) (1), added pars. (9) and (10).

Subsec. (d) (3). Pub. L. 114–22, § 113(c) (1), inserted "In deciding such application, the court of appeals shall apply ordinary standards of appellate review." before "In no event shall".

Pub. L. 114–22, § 113(a) (2), inserted ", unless the litigants, with the approval of the court, have stipulated to a different time period for consideration" after "after the petition has been filed".

Subsec. (e). Pub. L. 114–22, § 113(a) (3), substituted "For the purposes of this chapter: for "For the purposes of this chapter, the term", designated remainder of existing provisions as par. (2) and inserted par. heading, in par. (2), inserted subpar. (A) designation, heading, and "The term" before "'crime victim' means" and inserted subpar. (B) designation and heading before "In the case", and added pars. (1) and (3).

2009—Subsec. (d) (5) (B). Pub. L. 111–16 substituted "14 days" for "10 days".


Effective Date of 2015 Amendment

Pub. L. 114–22, title I, § 113(c) (2), May 29, 2015, 129 Stat. 241, provided that: "The amendment made by paragraph (1) [amending this section] shall apply with respect to any petition for a writ of mandamus filed under section 3771(d) (3) of title 18, United States Code, that is pending on the date of enactment of this Act [May 29, 2015]."

Effective Date of 2009 Amendment


Short Title of 2004 Amendment

Pub. L. 108–405, title I, § 101, Oct. 30, 2004, 118 Stat. 2261, provided that: "This title [enacting this chapter and sections 10603d and 10603e of Title 42, The Public Health and Welfare, repealing section 10606 of Title 42, and enacting provisions set out as a note under this section] may be cited as the 'Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act'."

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- A "best efforts" standard for Federal law enforcement agencies to accord crime victims with enumerated rights;
- A specific representative to identify and provide certain services to crime victims, including medical care, counseling, and police protection; general information regarding the corrections process, including information about work release, furlough, and probation; and notifications about developments in the case pretrial and post-conviction.
- State funding for rape kits; and
- An extension of the Victims of Crime Act of 1984 deadline for establishing a State victim compensation program.]

Reports on Assertion of Crime Victims' Rights in Criminal Cases
Pub. L. 108–405, title I, § 104(a), Oct. 30, 2004, 118 Stat. 2265, provided that: "Not later than 1 year after the date of enactment of this Act [Oct. 30, 2004] and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached."

[Note: The 1984 Victim Compensation and Assistance Act read as follows:

Chapter XIV - Victim Compensation and Assistance - Victims of Crime Act of 1984:

1. Establishes within the Treasury the Crime Victims Fund. Provides that the Fund consist of: (1) most fines collected in Federal criminal cases; (2) penalty assessments on convicted persons; and (3) proceeds of all forfeitures (appearance bonds, bail bonds and collateral) in Federal criminal cases.

2. Directs the Attorney General to make grants to qualified State programs for the compensation of victims of crime.
3. Specifies criteria for a State plan to qualify for grants, including that the program: (1) offer compensation for medical expenses, loss of wages, and funeral expenses; (2) condition compensation or cooperation with law enforcement officials; (3) would not use Federal funds to supplant State funds; and (4) does not discriminate against nonresident victims.

In 1984, the Office for Victims of Crime (OVC) was established under 28 CFR § 0.91: "Under a delegation by the Attorney General (DOJ Order No. 1079-84, Dec. 14, 1984), the Assistant Attorney General and the Director are responsible for providing national leadership to encourage improved treatment of victims by implementing the recommendations of the President’s Task Force on Victims of Crime and the Attorney General’s Task Force on Family Violence, and by administering the Crime Victims Fund and the Federal Crime Victim Assistance Program, established under the Victims of Crime Act of 1984, title II, chapter XIV, of Public Law 98-473, 42 U.S.C. 10601 et seq., 98 Stat. 2170 (Oct. 12, 1984)."

[Note: Current civil law for crime victims relates primarily to compensation and restitution under Title 42:

- § 10601 - Crime Victims Fund
- § 10602 - Crime victim compensation
- § 10603 - Crime victim assistance
- § 10603a - Child abuse prevention and treatment grants
- § 10603b - Compensation and assistance to victims of terrorism or mass violence
- § 10603c - Compensation to victims of international terrorism
- § 10603d - Crime victims legal assistance grants
- § 10603e - Crime victims notification grants
- § 10604 - Administrative provisions
- § 10605 - Establishment of Office for Victims of Crime
- § 10607 - Services to victims
- § 10608 - Closed circuit televised court proceedings for victims of crime]
[Note: New victim laws in 1990 addressed children, victim witnesses (affecting testimony procedures in court), and juvenile offenders who had been victims:

Victims of Child Abuse Act of 1990

Subtitle A: Improving Investigation and Prosecution of Child Abuse Cases - Requires the Director of the Office of Victims of Crime to make grants to develop multidisciplinary child abuse investigation and prosecution programs. Enumerates program criteria, including requirements identifying an appropriate site for counseling child victims of sexual and serious physical abuse and neglect, referring cases to such counseling center within 24 hours, minimizing the number of interviews the child victim must attend, requiring that all interviews and meetings with a child victim occur at the counseling center, designating a director for the multidisciplinary program, and assigning volunteers or staff advocates to each child's family.
Requires the Director to make grants to provide technical assistance and training to attorneys and others instrumental to the criminal prosecution of child abuse cases in State or Federal courts.

Subtitle D: Federal Victims' Protections and Rights - Amends the Federal criminal code to allow in a proceeding involving an alleged offense against a child or involving a child witness, the attorney for the Government, the child's attorney, or the guardian ad litem to apply (at least five days before trial date) for a court order that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television (TV).

Authorizes the court to order that such testimony be taken by closed-circuit TV if it finds that the child is unable to testify in open court because: (1) of the child's fear; (2) there is substantial likelihood that the child will suffer emotional trauma, supported by expert testimony; (3) the child suffers a mental or other infirmity; or (4) conduct by the defendant or defense counsel causes the child to be unable to continue testifying.

Requires the court to support on the record any findings on the child's inability to testify in open court. Permits the court, in determining whether the impact on an individual child of one or more of such factors is so substantial as to justify such an order, to question the minor in chambers or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child's attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

Specifies that: (1) if the court orders the taking of testimony by television, the attorney for the Government and the defense attorney shall be present in the room with the child and the child shall be subject to direct cross-examination; and (2) the only other persons allowed to be present are the child's attorney or guardian ad litem, those persons necessary to operate the closed-circuit equipment, and other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

Requires that: (1) the child's testimony be transmitted by closed-circuit TV into the courtroom for the defendant, jury, judge, and public view; (2) the defendant be provided with the means of private, contemporaneous communication with his attorney during the testimony; and (3) the closed-circuit TV transmission relay the defendant's image into the room in which the child is testifying.

Sets forth requirements with respect to competency examinations for child witnesses.

Sets forth provisions with respect to confidentiality of information involving a child in connection with a criminal proceeding. Authorizes the court: (1) on motion by any person, to issue an order protecting a child's name or other information concerning the child in the course of the proceedings if the court determines that disclosure would be detrimental to the child; and (2) to allow disclosure to anyone to whom disclosure is necessary for the welfare and well-being of the child.

Grants the child victim or witness the same right to submit victim impact statements prior to sentencing as prescribed for an adult. Directs that child victims or witnesses be assisted by their court appointed guardian ad litem in preparing victim impact statements.

Encourages the use of multidisciplinary teams designed to assist child victims or child witnesses. Delineates the role of such teams.

Authorizes the court to appoint a guardian ad litem or a witness to a crime involving abuse or exploitation to protect the best interests of the child. Sets forth guidelines with respect to criteria in choosing, and the duties of, such guardian.

Grants a child testifying in or attending a judicial proceeding the right to be accompanied by an adult attendant to provide emotional support to the child, subject to certain restrictions. Directs that the image of the child attendant, for the time the child is testifying or being deposed, be recorded on videotape.
Authorizes the court, in any proceeding where a child is called to give testimony, to designate the case as being of special public importance and to expedite the action. Requires the court to ensure a speedy trial and, in deciding whether or not to grant a continuance, to take into account the child’s age and the potential adverse impact the delay may have on the child’s well-being.

Declares that no statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under age 18 shall preclude such prosecution before the child reaches age 25. Provides for extension of the period of limitations with respect to civil actions arising out of the same occurrence and in which the child is the victim.

Authorizes the court to permit the child to use anatomical dolls, puppets, drawings, or any other demonstrative device to assist in testifying.

Sets penalties for knowing or intentional violation of the privacy of child victims and child witnesses.

Requires a person who, while engaged on Federal land or in a federally operated or contracted facility in one of specified professional capacities or activities (including health care provider, social worker, teacher, child care worker, law enforcement officer, foster parent, and commercial film processor) learns of facts that give reason to suspect an incident of child abuse, to report the suspected abuse as soon as possible to a designated agency. Makes the failure to report a misdemeanor. Provides immunity for good faith reporting and associated actions.

Requires that such professionals receive periodic training in the obligations to report, as well as in the identification of abused and neglected children.

Subtitle G: Treatment for Juvenile Offenders Who Are Victims of Child Abuse or Neglect - Authorizes the Administrator to make grants to public and nonprofit private organizations to develop, establish, and support projects which: (1) provide treatment to juvenile offenders who are victims of child abuse or neglect and to their families; (2) provide transitional services (including individual, group, and family counseling) to such offenders to strengthen family relationships and encourage the resolution of intrafamily problems related to the abuse or neglect, to facilitate their alternative placement, or to prepare juveniles aged 16 and older to live independently; and (3) carry out research and evaluation of treatment and transitional services provided with grants made under this Act. Sets forth priorities for awarding grants. Authorizes appropriations.

[Note: In 1996 and 1997, a Crime Victims Rights Amendment to the U.S. Constitution was proposed. The 1997 version read as follows:

S. J. RES. 6, 105TH CONGRESS 1ST SESSION
Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.
IN THE SENATE OF THE UNITED STATES
January 21, 1997
Mr. KYL (for himself, Mrs. FEINSTEIN) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary
JOINT RESOLUTION
Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
ARTICLE.--

"Section 1. Each victim of a crime of violence and other crimes that Congress may define by law, shall have the rights to notice of and not to be excluded from all public proceedings relating to the crime; to be heard, if present, and to submit a written statement at a public pre-trial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; to the rights described in the preceding portions of this section at a public parole proceeding, or at a non-public parole proceeding to the extent they are afforded to the convicted offender; to notice of a release pursuant to a public or parole proceeding or an escape; to a final disposition of the proceedings relating to the crime free from unreasonable delay; to an order of restitution from the convicted offender; to consideration for the safety of the victim in determining any release from custody; and to notice of the rights established by this article; however, the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of the victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice.

"Section 2. The victim shall have standing to assert the rights established by this article. However, nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction; to obtain a stay of trial; or to compel a new trial. Nothing in this article shall give rise to a claim of damages against the United States, a State, a political subdivision, or a public official; nor provide grounds for the accused or convicted offender to obtain any form of relief.

"Section 3. The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases.

"Section 4. The rights established by this article shall be applicable to all proceedings that begin on or after the 180th day after the ratification of this article.

"Section 5. The rights established by this article shall apply in all federal and state proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and collateral proceedings such as habeas corpus, and including proceedings in any district or territory of the United States not within a state." ]

Appendix HCSA
Hate Crimes Statistics Act 1990

An Act to provide for the acquisition and publication of data about crimes that manifest prejudice based on certain group characteristics.

28 U.S.C. § 534 Hate Crime Statistics Act (as amended)
(a) This Act may be cited as the 'Hate Crime Statistics Act'.
(b) (1) Under the authority of section 534 of title 28, United States Code, the Attorney General shall acquire data, for each calendar year, about crimes that manifest evidence of prejudice based on race, [gender and gender identity,] religion, [disability,] sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.


[Note: Data on crimes motivated by the victim's disability was added to the HCSA in 1994 under the Violent Crime Control and Law Enforcement Act, also known as the Crime Bill, and the FBI started gathering data for this category on January 1, 1997. The 2009 HCPA (HR 2647 s 4708) added "gender and gender identity." Without adding "age" as a new possible "hate crime" category, the HCPA (HR 2647 s 4708) required data collection for "crimes committed by, and crimes directed against, juveniles."]

[Note: Federal legislation requires law enforcement to track statistics about reported hate crimes, including the number of hate crimes per jurisdiction; the type of crime that accompanied the hate crime; the demographics of the people involved (victim and offender; hate crimes by and against juveniles; among other things. The Hate Crime Statistics Act, 28 U.S.C. § 534 (1990), was amended several times over the years, most recently to include provisions for tracking crimes involving prejudice against "gender and gender identity" ]

[Note: The International Association of Chiefs of Police (IACP) add to the definition of a "hate crime" crimes against "a society," which seems to refer to terrorism, and "age" as a category. This definition is influential to the IACP's empirical research, which is nationally disseminated.]
[Note: The factors that prevent reporting of hate crimes in the data collection "complicate the Attorney General's efforts to publish a meaningful annual report on hate crimes under the Hate Crime Statistics Act (HCSA). While the HCSA does not specify any particular method of data collection, the Attorney General delegated the duty of collecting hate crime statistics to the Director of the FBI who, in turn, assigned this responsibility to the FBI's UCR program. The FBI assembles the information provided by state and local agencies and annually publishes a national hate crime statistics report which is available from the FBI in printed form on its website (http://www.fbi.gov/ucr/hatecm.htm)." (Fed. Reg. (62)222 at 61549 (Nov. 18, 1997).)

In 1997, to replace the laconic UCR program, the FBI began phasing in NIBRS, which allowed more flexibility and detail in collecting information about whether or not an incident is a hate crime.

In 1997, the Bureau of Justice Statistics of the DOJ also added questions regarding hate crime to the National Crime Victimization Survey (NCVS) to gather a national estimate of the "overall extent of hate crimes." (Fed. Reg. (62)222 at 61549 (Nov. 18, 1997).)]

(2) The Attorney General shall establish guidelines for the collection of such data including the necessary evidence and criteria that must be present for a finding of manifest prejudice and procedures for carrying out the purposes of this section.

[Note: In light of the uneven definitions used to determine whether a given crime constituted one motivated by "hate" after the Attorney General directed the FBI to add a category for "hate crime" in the UCR Program in 1990, the DOJ provides training to law enforcement to improve the uniformity of data collection, to increase reporting rates, and to sensitize law and enforcement and victims services to the special responses needed in the aftermath of crime, particularly "hate crime."]

(3) Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. As used in this section, the term 'sexual orientation' means consensual homosexuality or heterosexuality. This subsection does not limit any existing cause of action or right to bring an action, including any action under the Administrative Procedure Act or the All Writs Act [5 U.S.C. §§ 551 et seq. or 28 U.S.C. § 1651].

[Note: This "no cause of action" (COA) provision limits the use of the HCSA to its intended purpose of data collection. Such "no COA" clauses are typical in instances where Congress intends to guide policy not create a legal protection.]

(4) Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of an individual victim of a crime.

(5) The Attorney General shall publish an annual summary of the data acquired under this section, including data about crimes committed by, and crimes directed against, juveniles.

(c) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section through fiscal year [2002 and beyond].

[Note: Under the 1996 Church Arson Prevention Act, the sunset clause was removed from the original HCSA, making the collection of "hate crime" data a permanent part of the UCR.]

[Note: As late as 2000, reporting was voluntary. "Because hate crime reporting by law enforcement agencies is voluntary under Federal law, experts believe the data do not completely
describe the number and nature of hate crimes that occur nationally." (Federal Register, Vol. 65, No. 122 (Jun. 23, 2000).)

BJS funded a project that resulted in the report Improving the Quality and Accuracy of Bias Crime Statistics Nationally: An Assessment of the First Ten Years of Bias Crime Data Collection. The project included a review of national hate crime trends, a summary of results from a national law enforcement survey regarding officer attitudes about hate crime, and several other sources. The compilation of these data sources gives key insight into how hate crime reporting can be improved and how hate crime data should be interpreted. Electronic copies of the full report and an executive summary can be found at www.dac.neu.edu/cj/.

Sec. 2. (a) Congress finds that—
(1) the American family life is the foundation of American Society,
(2) Federal policy should encourage the well-being, financial security, and health of the American family,
(3) schools should not de-emphasize the critical value of American family life.

(b) Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality."


Summary of Amendments

After its initial passage, the HCSA was amended as follows:

• The Church Arson Prevention Act, which was signed into law in July 1996, removed the sunset clause from the original statute and mandated that the collection of hate crime data become a permanent part of the UCR Program.
• In 2009, Congress further amended the Hate Crime Statistics Act by passing the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act [Section 4708 of House Resolution 2647]. The amendment includes the collection of data for crimes motivated by bias against a particular "gender and gender identity."
• In 2009, Congress further amended the HCSA by passing the HCPA [Section 4708 of House Resolution 2647]. Although age-based categories are not protected under the HCPA, the amendment nevertheless includes the collection of data for "crimes committed by, and crimes directed against, juveniles."
• The FBI has been implementing changes required under the 2009 HCPA to collect these data in the future. (FBI, "About Hate Crime Statistics," downloadable at http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-about-hate-crime).]
References


Appendix CAPA
Church Arsons Prevention Act of 1996
originally issued 1988

Church Arsons Prevention Act, 18 U.S.C. § 247
18 U.S. Code § 247 - Damage to religious property; obstruction of persons in the free exercise of religious beliefs
(a) Whoever, in any of the circumstances referred to in subsection (b) of this section—
   (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; or
   (2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person’s free exercise of religious beliefs, or attempts to do so;
—shall be punished as provided in subsection (d).

[Note: The language draws from civil rights protections, but its emphasis on religion is misleading. The law was prompted by the bombings of Black churches in the South during the Civil Rights era. Threatening conduct to intimidate or harass and thus interfere with a person's "enjoyment of that person's free exercise of religious beliefs" would have been covered in other statutes, but crimes against religious sites motivated by animus toward certain "racial, or ethnic" groups that give the property its characteristics would not.]

(b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

(c) Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished as provided in subsection (d).

(d) The punishment for a violation of subsection (a) of this section shall be—
   (1) if death results from acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, a fine in accordance with this title and imprisonment for any term of years or for life, or both, or may be sentenced to death;
   (2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation
is by means of fire or an explosive, a fine under this title or imprisonment for not more that 40 years, or both;
(3) if bodily injury to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, a fine in accordance with this title and imprisonment for not more than 20 years, or both; and
(4) in any other case, a fine in accordance with this title and imprisonment for not more than one year, or both.

(e) No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or his designee that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice.

[Note: CAPA was originally intended solely to facilitate Federal investigations and prosecutions of these crimes. The 1996 version amended the original 1988 version of 18 U.S.C. § 247, which established federal jurisdiction over crimes of religious vandalism in excess of $10,000 by expanding federal jurisdiction. To eliminate the statute's restrictive Commerce Clause requirements and significant damages threshold, which had been obstacles to federal prosecutions, bipartisan sponsors, including John Conyers (D-MI), the primary advocate for "hate crime" law, redesigned CAPA's jurisdictional requirements.]

(f) [Definition.] As used in this section, the term "religious real property" means any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship.

(g) [Statute of Limitations.] No person shall be prosecuted, tried, or punished for any noncapital offense under this section unless the indictment is found or the information is instituted not later than 7 years after the date on which the offense was committed.


Short Title
Pub. L. 104–155, §1, July 3, 1996, 110 Stat. 1392, provided that:
"This Act [amending section 247 of this title and section 10602 of Title 42, The Public Health and Welfare, enacting provisions set out as a note under section 247 of this title, and amending provisions set out as a note under section 534 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Church Arson Prevention Act of 1996'."

Amendments

1996—Subsec. (a). Pub. L. 104–155, § 3(1), substituted "subsection (d)" for "subsection (c) of this section" in concluding provisions.
Subsec. (b). Pub. L. 104–155, § 3(3), added subsec. (b) and struck out former subsec. (b) which read as follows: "The circumstances referred to in subsection (a) are that—
"(1) in committing the offense, the defendant travels in interstate or foreign commerce, or uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce; and
"(2) in the case of an offense under subsection (a) (1), the loss resulting from the defacement, damage, or destruction is more than $10,000."
Subsec. (c). Pub. L. 104–155, § 3(2), added subsec. (c). Former subsec. (c) redesignated (d).
Subsec. (d). Pub. L. 104–294, § 605(r), which directed the substitution of "certification" for "notification" in subsec. (d), was repealed by Pub. L. 107–273, § 4002(c) (1).
Subsec. (e). Pub. L. 104–155, § 3(2), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (d) (2). Pub. L. 104–155, § 3(4) (C), added par. (2). Former par. (2) redesignated (3).
Subsec. (d) (3). Pub. L. 104–155, § 3(4) (A), (B), redesignated par. (2) as (3), inserted "to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section," after "bodily injury" and substituted "20 years" for "ten years". Former par. (3) redesignated (4).
Subsec. (d) (4). Pub. L. 104–155, § 3(4) (B), redesignated par. (3) as (4).
Pub. L. 104–155, § 3(2), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).
Subsec. (f). Pub. L. 104–155, § 3(2), (5), redesignated subsec. (e) as (f), inserted "including fixtures or religious objects contained within a place of religious worship" before the period, and substituted "religious real property" for "religious property" in two places.
Subsec. (g). Pub. L. 104–155, § 3(6), added subsec. (g).

1994—Subsec. (c) (1). Pub. L. 103–322, § 320103(d) (1), inserted "from acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill" after "death results".
Pub. L. 103–322, § 60006(d), inserted ", or may be sentenced to death" after "or both".
Subsec. (c) (2). Pub. L. 103–322, § 320103(d) (2), struck out "serious" before "bodily" and inserted "from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire" after "injury results".
Subsec. (e). Pub. L. 103–322, § 320103(d) (3), amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "As used in this section—
"(1) the term 'religious real property' means any church, synagogue, mosque, religious cemetery, or other religious real property; and
"(2) the term 'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."
**Congressional Findings**

Pub. L. 104–155, § 2, July 3, 1996, 110 Stat. 1392, provided that:

"The Congress finds the following:

"(1) The incidence of arson or other destruction or vandalism of places of religious worship, and the incidence of violent interference with an individual’s lawful exercise or attempted exercise of the right of religious freedom at a place of religious worship pose a serious national problem.

"(2) The incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominantly African-American congregations.

"(3) Changes in Federal law are necessary to deal properly with this problem.

"(4) Although local jurisdictions have attempted to respond to the challenges posed by such acts of destruction or damage to religious property, the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions.

"(5) Congress has authority, pursuant to the Commerce Clause of the Constitution, to make acts of destruction or damage to religious property a violation of Federal law.

"(6) Congress has authority, pursuant to section 2 of the 13th amendment to the Constitution, to make actions of private citizens motivated by race, color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, violations of Federal criminal law."

**[Note: CAPA expanded then-existing Federal criminal jurisdiction and facilitated prosecutions for increased penalties for attacks on churches, temples, and other houses of worship, established a loan guarantee recovery fund for rebuilding, and, recognizing that data collection efforts complement criminal prosecutions of hate crime offenders, included a continuing mandate for the HCSA.]**
Public Law 100-346
100th Congress

An Act

To amend chapter 13 of title 18, United States Code, to impose criminal penalties for
damage to religious property and for obstruction of persons in the free exercise of
religious beliefs.

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,

SECTION 1. CRIMINAL PENALTIES FOR DAMAGE TO RELIGIOUS PROP-
ERTY AND FOR OBSTRUCTION OF PERSONS IN THE FREE
EXERCISE OF RELIGIOUS BELIEFS.

Chapter 13 of title 18, United States Code, is amended by adding
at the end the following new section:

§ 247. Damage to religious property; obstruction of persons in the
free exercise of religious beliefs

(a) Whoever, in any of the circumstances referred to in subsection (b) of this section—
(1) intentionally defaces, damages, or destroys any religious
real property, because of the religious character of that prop-
erty, or attempts to do so; or
(2) intentionally obstructs, by force or threat of force, any
person in the enjoyment of that person’s free exercise of reli-
gious beliefs, or attempts to do so;
shall be punished as provided in subsection (c) of this section.

(b) The circumstances referred to in subsection (a) are that—
(1) in committing the offense, the defendant travels in inter-
state or foreign commerce, or uses a facility or instrumentality
of interstate or foreign commerce in interstate or foreign com-
merce; and
(2) in the case of an offense under subsection (a)(1), the loss
resulting from the defacement, damage, or destruction is more
than $10,000.

(c) The punishment for a violation of subsection (a) of this section
shall be—
(1) if death results, a fine in accordance with this title and
imprisonment for any term of years or for life, or both;
(2) if serious bodily injury results, a fine in accordance with
this title and imprisonment for not more than ten years, or
both; and
(3) in any other case, a fine in accordance with this title and
imprisonment for not more than one year, or both.

(d) No prosecution of any offense described in this section shall
be undertaken by the United States except upon the notification in
writing of the Attorney General or his designee that in his judgment
a prosecution by the United States is in the public interest and
necessary to secure substantial justice.

(e) As used in this section—
Appendix Manifesto [1956] Southern Manifesto on Integration, March 12, 1956

Appendix Manifesto
Southern Manifesto on Integration, March 12, 1956
Also referred to as The Southern Manifesto on Civil Rights
Constitutional Record, 84th Cong. 2d Sess., Vol. 102, part 4, GAO 4459-4460 (1956)
a resolution signed by 19 Senators and 77 members of the House of Representatives, condemning and encouraging states to resist the 1954 U.S. Supreme Court decision integrating public schools in Brown v. Board of Education

The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.

The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power. They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.

We regard the decision of the Supreme Court in the school cases as clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the states and the people.

The original Constitutional does not mention education. Neither does the Fourteenth Amendment nor any other amendment. The debates preceding the submission of the Fourteenth Amendment clearly show that there was no intent that it should affect the systems of education maintained by the states.

The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.

When the [Fourteenth] amendment was adopted in 1868, there were 37 states of the Union. Every one of the 26 states that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same law-making body which considered the Fourteenth Amendment.

As admitted by the Supreme Court in the public school case (Brown v. Board of Education), the doctrine of separate but equal schools "apparently originated in Roberts v. City of Boston (1849), upholding school segregation against attack as being violative of a state constitutional guarantee of equality." This constitutional doctrine began in the North—not in the South—and it was followed not only in Massachusetts but in Connecticut, New York, Illinois, Indiana, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania and other northern states until they,
exercising their rights as states through the constitutional processes of local self-government, changed their school systems.

[Note: In 1958 the Court revisited the Brown decision in Cooper v. Aaron, asserting that the states were bound by the ruling and affirming that its interpretation of the Constitution was the "supreme law of the land."]

In the case of Plessy v. Ferguson in 1896 the Supreme Court expressly declared that under the Fourteenth Amendment no person was denied any of his rights if the states provided separate but equal public facilities. This decision has been followed in many other cases. It is notable that the Supreme Court, speaking through Chief Justice Taft, a former President of the United States, unanimously declared in 1927 in Lum v. Rice that the "separate but equal" principle is "* * * within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."

This interpretation, restated time and again, became a part of the life of the people of many of the states and confirmed their habits, customs, traditions and way of life. It is founded on elemental humanity and common sense, for parents should not be deprived by Government of the right to direct the lives and education of their own children.

Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.

This unwarranted exercise of power by the court, contrary to the Constitution, is creating chaos and confusion in the states principally affected. It is destroying the amicable relations between the white and Negro races that have been created through ninety years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.

Without regard to the consent of the governed, outside agitators are threatening immediate and revolutionary changes in our public school systems. If done, this is certain to destroy the system of public education in some of the states.

With the gravest concern for the explosive and dangerous condition created by this decision and inflamed by outside meddlers.

We reaffirm our reliance on the Constitution as the fundamental law of the land.

We decry the Supreme Court's encroachments on rights reserved to the states and to the people, contrary to established law and to the Constitution.

We commend the motives of those states which have declared the intention to resist forced integration by any lawful means.

We appeal to the states and people who are not directly affected by these decisions to consider the constitutional principles involved against the time when they too, on issues vital to them, may be the victims of judicial encroachment.

Even though we constitute a minority in the present congress, we have full faith that a majority of the American people believe in the dual system of government which has enabled us to achieve our greatness and will in time demand that the reserved rights of the states and of the people be made secure against judicial usurpation.

We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation.

In this trying period, as we all seek to right this wrong, we appeal to our people not to be provoked by the agitators and troublemakers invading our states and to scrupulously refrain from disorder and lawless acts.
Signed by:
Members of the United States Senate:
Alabama-John Sparkman and Lister Hill.
Arkansas-J. W. Fulbright and John L. McClellan.
Florida-George A. Smathers and Spessard L. Holland.
Louisiana-Allen J. Ellender and Russell B. Lono.
Mississippi-John Stennis and James O. Eastland.
North Carolina-Sam J. Ervin Jr. and W. Kerr Scott.
South Carolina-Strom Thurmon and Olin D. Johnston.
Texas-Price Daniel.
Virginia-Harry F. Bird and A. Willis Robertson.

Members of the United States House of Representatives:
Tennessee-James B. Frazier Jr., Tom Murray, Jere Cooper, Clifford Davis.
Texas-Wright Patman, John Dowdy, Walter Rogers, O. C. Fisher.

[Note: The "fruit" mentioned in the opening line could not have been intended to harken back to the 1939 poem by songwriter Abel Meeropol, later recorded by Billie Holiday as a song, titled "Strange Fruit" about lynching. Yet there is an irony in the historical fact that the Meeropols, a Jewish couple who were sympathetic to Communist ideals, were the adoptive parents of the two sons of Julius and Ethel Rosenberg (Robert and Michael). The 1953 Rosenberg executions, for conspiring to commit espionage against the U.S. by transmitting documents related to weapons technology and the atomic bomb in a case prosecuted by Roy Cohn in 1951, was part of the "Red Scare" that fueled the McCarthy Hearings (along with the "Lavender Scare").]
Appendix The Compact [1620] The Mayflower Compact 1620

 Appendix The Compact
 The Mayflower Compact 1620
We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia;

Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid:

And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and
convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

[41 signatures]

[Note: The Compact arose as a measure of security against anarchy or mutiny by the "Strangers" among the tiny group of colonists who arrived on the shores of the New World in September 1620. The Mayflower's passenger list separated the passengers into "Saints" and "Strangers," to distinguish members of the England Separatist Church from others. The "Pilgrimes" fathers feared they would be unable to control the Strangers once the group had gone ashore, and these elders had not been given authority to establish a colony where they landed. They had been reluctant to deboard the ship and set foot on North American soil. They were off-course from the intended destination at the established Virginia colony (mistakenly believed to be near what is now known as Provincetown Harbor, far to the north and west of the mouth of the Hudson River). Yet, deteriorating weather conditions made it dangerous to continue searching for their intended port.

They established their authority by drafting and signing the Mayflower Compact before leaving the ship. The document formed a "body politic" of the 41 males who were "Saints" of the separatist group, that was envisioned as a "body" separate from each of them—like the stock company in which they had invested to make the journey on the merchant ship. The signatories served as the initial government of the colony by electing a governor, enacting laws, and admitting others to membership as they saw fit.

The Separatists fled southwestern England after the new Archbishop of York, with the King's approval, began scrutinizing their conformity with the monarch's required religious practices, driving their worship underground. Scrooby, Nottinghamshire, was the epicenter of the separatist movement, led by William Brewster, the local postmaster, who held clandestine religious services in a large manor house. The congregation interpreted a devastating flood in January 1607 as a sign of God's disapproval, which prompted a large group to secretly book passage from the Lincolnshire port of Boston to the New World. The ship's captain turned them in to the Archbishop, and they were imprisoned.

Their rejection of the Church of England may explain why they were never granted a formal charter from the kind, despite repeated efforts over the years. The Mayflower Compact continued to serve as the basis of government until the small colony was merged with Massachusetts Bay Colony in 1691. (Jack E. Maxfield, "A Comprehensive Outline of World History" 601-605 (2009), available at http://enx.org/content/col10595/1.3/.)

[Note: The Compact adapts what would have been a familiar structure of a church covenant to civil purposes. Affirming the colonists' loyalty to King James I, the White males form an official body, understood to be separate from them individually and guided by the consent of the community.

The Compact has been viewed as an early iteration of the social contract. Its significance is the nugget of U.S. government it provided in the idea of the consent of the governed for the U.S. Constitution.]
Appendix Quaker Petitions [1688; 1696] Germantown (PA) Quaker Petition

Against Slavery 1688

Appendix Quaker Petitions
Germantown Quaker Protest 1688
resolutions of The Germantown Mennonites, February 18, 1688
and
Merion Petition 1696
by Cadwalader Morgan

This is to the monthly meeting held at Richard Worrell's:

These are the reasons why we are against the traffik of men-body, as followeth:

Is there any that would be done or handled at this manner? viz., to be sold or made a slave for all the time of his life? How fearful and faint-hearted are many at sea, when they see a strange vessel, being afraid it should be a Turk, and they should be taken, and sold for slaves into Turkey. Now, what is this better done, than Turks do? Yea, rather it is worse for them, which say they are Christians; for we hear that the most part of such negers are brought hither against their will and consent, and that many of them are stolen.

[Note: Reference to "Turks" is common misattribution of Barbary pirates, who had established outposts on the coast of North Africa and for hundreds of years had plundered ships.]
Now, though they are black, we cannot conceive there is more liberty to have them slaves, as it is to have other white ones. There is a saying, that we should do to all men like as we will be done ourselves; making no difference of what generation, descent, or colour they are. And those who steal or rob men, and those who buy or purchase them, are they not all alike? Here is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of the body, except of evil-doers, which is another case. But to bring men hither, or to rob and sell them against their will, we stand against. In Europe there are many oppressed for conscience sake; and here there are those oppressed which are of a black colour. And we who know that men must not commit adultery some do commit adultery in others, separating wives from their husbands, and giving them to others: and some sell the children of these poor creatures to other men. Ah! do consider well this thing, you who do it, if you would be done at this manner and if it is done according to Christianity!

[Note: In My Bondage and My Freedom, Frederick Douglass 1855, wrote: "The practice of separating children from their mother, and hiring the latter out at distances too great to admit of their meeting, except at long intervals, is a marked feature of the cruelty and barbarity of the slave system. But it is in harmony with the grand aim of slavery, which, always and everywhere, is to reduce man to a level with the brute. It is a successful method of obliterating from the mind and heart of the slave, all just ideas of the sacredness of the family, as an institution." ]

You surpass Holland and Germany in this thing. This makes an ill report in all those countries of Europe, where they hear of [it], that the Quakers do here handel men as they handel there the cattle. And for that reason some have no mind or inclination to come hither.

[Note: The slave trade was protected at this time by the British crown. Ship owners, captains, and virtually every other merchant or participant in the trade, other than abducted slaves, enjoyed large profits by bringing kidnapped natives of Africa to the Caribbean islands and mainland colonies. Even colonists against slavery believed that it was necessary for economic growth in the colonies, and that it was justified, usually on religious grounds, as "harmless" because Africans were from an "uncivilized" culture. William Penn, founder of Pennsylvania, himself a Quaker, once proudly declared that Philadelphia had received 10 slave ships in one year. But the German-Dutch Quaker settlers were unaccustomed to slaves in their European towns, where it had been abolished by about 1500. They understood the value of shipping in a labor force, given the shortage of manpower, but they objected to other Friends and their British neighbors profiting from the work of slaves. ]

And who shall maintain this your cause, or plead for it? Truly, we cannot do so, except you shall inform us better hereof, viz.: that Christians have liberty to practice these things. Pray, what thing in the world can be done worse towards us, than if men should rob or steal us away, and sell us for slaves to strange countries; separating husbands from their wives and children. Being now this is not done in the manner we would be done at; therefore, we contradict, and are against this traffic of men-body.

And we who profess that it is not lawful to steal, must, likewise, avoid to purchase such things as are stolen, but rather help to stop this robbing and stealing, if possible. And such men ought to be delivered out of the hands of the robbers, and set free as in Europe. Then is Pennsylvania to have a good report, instead, it hath now a bad one, for this sake, in other countries; Especially whereas the Europeans are desirous to know in what manner the Quakers do rule in their province; and most of them do look upon us with an envious eye. But if this is done well, what shall we say is done evil?
If once these slaves (which they say are so wicked and stubborn men,) should join themselves fight for their freedom, and handel their masters and mistresses, as they did handel them before; will these masters and mistresses take the sword at hand and war against these poor slaves, like, as we are able to believe, some will not refuse to do? Or, have these poor negers not as much right to fight for their freedom, as you have to keep them slaves?

Now consider well this thing, if it is good or bad. And in case you find it to be good to handel these blacks in that manner, we desire and require you hereby lovingly, that you may inform us herein, which at this time never was done, viz., that Christians have such a liberty to do so. To the end we shall be satisfied on this point, and satisfy likewise our good friends and acquaintances in our native country, to whom it is a terror, or fearful thing, that men should be handelled so in Pennsylvania.

This is from our meeting at Germantown, held ye 18th of the 2d month, 1688, to be delivered to the monthly meeting at Richard Worrell’s.

Garret Henderich,  
Derick op de Graeff,  
Francis Daniel Pastorius,  
Abram op de Graeff

Source Book and Bibliographical Guide for American Church P. G. Mode, ed.

[Note: The 1688 Germantown Quaker Petition Against Slavery, drafted by Francis Daniel Pastorius and signed by him along with three others on behalf of the Germantown Meeting of the Religious Society of Friends, is said to be the first protest against African-American slavery made by a religious body in the English colonies. "It was also the first American public document to protest slavery and one of the first written public declarations of universal human rights." (The First American Public Document to Protest Slavery and One of the First Written Public Declarations of Universal Human Rights (April 1688), http://historyofinformation.com/expanded.php?id=4157.]

Merion Petition 1696  
by Cadwalader Morgan

Friends,
There was something before me concerning the buying of Negroes. (first the scarcity of the hands here and how difficult they were to be had) I thought If I bought such of them as were good It would be some help to me and that I could with more ease Leave my calling to go to Meeting, And I have been enquiring for some, and did find for one, In the mean while his Consideration of it came before me. If I should have a bad one of them, that must be corrected, or would Run away, or when I went from home, and leave him with a woman or maid, and he should desire or seek to comitt wickedness, if such a thing happened that it would be more Loss and Trouble to me, than any outward gain could countervail.  
And I was in Perplexity concerning it, And I could find no satisfaction through Enquiries of men. (Some advised me to buy and others to forbear.)
Then I desired of ye Lord, that he would make it known to me whether it was his will if I should buy of them or no, And I should do it however it would be as to worldly things. And it was not Long before he made it known unto me That I should not be Concerned with them. And afterwards I had no freedom to buy or take any of them upon any account. And being I understandt that there are divers yt who are not fully satisfied concerning it. I could no less than make known how it was with me upon this accound, And I can say that I have nothing in my heart against any particular yt who buys them. But I would have them Consider this thing before the Lord to know his will therein. And yt worldly gain should not have place in the thing, But that we should Remember Abraham who at ye Command of ye Lord was ready to offer up his onely Son Isaac, who was a great deal nearer to him that bond-servants can be. It has been thus with me about two years ago, at which time I had not heard of others writing abt. it, and If I could write my self, I had written it more at Large when it came to me.

Merion 28th of ye 5th moneth 1696. Cadwalader Morgan
Appendix 3/5s [1787] Three-Fifths Clause, Art. 1, s. 2 of the Constitution 1787

Despite the circumlocution, slavery was sanctioned throughout the Constitution. Five provisions dealt directly with slavery:

Art. I, sec. 2, par. 3. The three-fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that any "direct tax" levied on the states could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing each state's contribution.

Art. I, sec. 9, par. 1. This clause prohibited Congress from banning the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" before the year 1808. Awkwardly phrased and designed to confuse readers, the clause prevented Congress from ending the African slave trade before 1808 but did not require Congress to ban the trade after that date. The clause was a significant exception to the general power granted to Congress to regulate all foreign and interstate commerce.

Art. I, sec. 9, par. 4. This clause declared that any "capitation" or other "direct tax" had to take into account the three-fifths clause. It ensured that, if a head tax were ever levied, slaves would be taxed at three-fifths the rate of whites. The "direct tax" portion of this clause was redundant, because that was provided for in the three-fifths clause.

Art. IV, sec. 2, par. 3. The fugitive slave clause prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners "on demand."

Art. V. This article prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these five provisions gave the South a strong claim to "special treatment" for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the electoral college—to support that claim. Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to "suppress Insurrections" and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for other reasons as well. The most prominent indirect protections of slavery were:
Art. I, sec. 8, par. 15. The domestic insurrections clause empowered Congress to call "forth the Militia" to "suppress Insurrections," including slave rebellions.

Art. I, sec. 9, par. 5, and Art. I, sec. 10, par. 2. These clauses prohibited federal or state taxes on exports and thus prevented an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton.

Art. II, sec. 1, par. 2. This clause provided for the indirect election of the President through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the President.

Art. IV, sec. 4. In the domestic violence provision of the guarantee clause, the United State government promised to protect states from "domestic Violence," including slave rebellions.

Art. V. By requiring a three-fourths majority of the states to ratify any amendment to the Constitution, this article ensured that the slaveholding states would have a perpetual veto over any constitutional changes.
Appendix 13th Amt [1865] Thirteenth Amendment 1865

Abolishing Slavery and Involuntary Servitude

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[Notes:]
Origin and Purpose
When President Lincoln deployed his war powers to free slaves in January 1863, declaring that "all persons held as slaves within said designated [rebelling] States, and parts of States, are, and henceforward shall be free," no one was sure his authority could be legitimately used in this way. The authority to do so was not explicitly written into the Constitution. Optimism and a commitment to a "New Birth of Freedom" were the imperatives that impelled the government toward abolishing slavery.

Most believed that the effect of the Emancipation Proclamation would be short-lived, extending only to the point at which seceded states were restored to the Union. The power of Congress was also deemed to be limited to regulate against this "peculiar institution." Both the Executive and the Legislative branches agreed that a constitutional amendment would offer a permanent solution. (Initially, the amendment was stalled by a failure to obtain the necessary two-thirds vote in the House of Representatives. But before February 1, 1865, the states received copies of the new amendment, and it was ratified by the end of the year.) Senator Trumbull, one of the 13th Amendment's sponsors, asserted that the amendment would "take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strifes." The Supreme Court agreed in a subsequent case, noting that the Thirteenth Amendment was "self-executing without any ancillary legislation, [and on] its own unaided force and effect it abolished slavery, and established universal freedom." 1

New Birth of Freedom
The second founding of the United States was said to follow the so-called Reconstruction Amendments to Constitution, the 13th, 14th, and 15th Amendments, ratified after the Civil War, when the egalitarian fervor of abolitionists and their supporters that followed the Union victory had not yet become mired in Southern defiance or hampered by Northern fatigue.

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The Thirteenth Amendment has been held inapplicable in a wide range of situations involving "services which have from time immemorial been treated as exceptional":
- Contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment. (Robertson v. Baldwin, 165 U.S. 275, 282 (1897).)
- Duties that individuals owe the government, "such as services in the army, militia, on the jury, etc.," is not covered. (Butler v. Perry, 240 U.S. 328, 333 (1916) ("the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results," id. at 332); (Selective Draft Law Cases, 245 U.S. 366 (1918) (conscription into military). "[A]s we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." [Id. at 390. See also During the Vietnam War (an undeclared war) the Court, upholding a conviction for burning a draft card, declared that the power to classify and conscript manpower for military service was "beyond question." (U.S. v. O'Brien, 391 U.S. 367, 377 (1968). See also U.S. v. Holmes, 387 F.2d 781, 784 (7th Cir. 1968) ("the power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency"), cert. denied, 391 U.S. 936 (1968) (Justice Stewart concurring and Justice Douglas dissenting).)
- A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained. (Butler v. Perry, 240 U.S. 328 (1916).)
- Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment. (UAW v. WERB, 336 U.S. 245 (1949).)
[Note: The word "slavery" does not appear in the Constitution, but the practice is present in the backdrop to its negotiated provisions. Also several provisions by discussing "free Persons" imply that other Persons may be "unfree":

- The Three-Fifths Compromise (in Article I, Section 2) allocated Congressional representation based "on the whole Number of free Persons" and "three fifths of all other Persons."[10]
- Under the Fugitive Slave Clause (Article IV, Section 2), "[n]o person held to service or labour in one state" would be freed by escaping to another.
- Article I, Section 9 allowed Congress to pass legislation to outlaw the "Importation of Persons", but not until 1808.
- For purposes of the Fifth Amendment, however—which states that, "No person shall ... be deprived of life, liberty, or property, without due process of law”—slaves were understood as property. Although abolitionists used the Fifth Amendment to argue against slavery, it became part of the legal basis for treating slaves as property with Dred Scott v. Sandford (1857).]

[Note: For the language of the Thirteenth Amendment, Congress borrowed from the Northwest Ordinance (1787). However, unlike the Ordinance, the Amendment applies throughout the nation. (Bailey v. Alabama, 219 U.S. 219, 240 (1911) (noting that the 13th Amendment gave the words "unrestricted application within the United States.").] [Note: Debates on the proposed Thirteenth Amendment show that its supporters were lobbying for and expected the Enforcement Clause to extend federal authority well beyond simple abolition. The Constitution, as understood in this refined frame, was designed to accommodate new individual rights as society developed, such that a citizen's privileges or immunities "are not and cannot be fully defined in their entire extent and precise nature" in a single document, according to Senator Jacob Howard at the time of their debate. Senators of the Thirty-Eighth and Thirty-Ninth Congresses focused on the nation's core commitments and the manifold failures to live up to them. The Amendment embedded national ideals into enforceable, constitutional rights.]

[Note: "Involuntary servitude" meant a condition by which the victim is forced to work for the defendant by the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." (United States v. Kozminski, 487 U.S. 931 (1988). Compulsion of servitude through "psychological coercion," the Court ruled, is not prohibited by these statutes.)]

References


Appendix NWO [1787] Northwest Ordinance 1787

Appendix NWO
Northwest Ordinance, July 13, 1787
An Ordinance for the government of the Territory of the United States northwest of the River Ohio.

Section 1. Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec 2. Be it ordained by the authority aforesaid, That the estates, both of resident and nonresident proprietors in the said territory, dying intestate, shall descent to, and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; and there shall in no case be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance, of property.

Sec. 3. Be it ordained by the authority aforesaid, That there shall be appointed from time to time by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1,000 acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings, every six months, to the Secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in 500 acres of land while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless
disapproved of by Congress; but afterwards the Legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or townships to represent them in the general assembly: Provided, That, for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty five; after which, the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; Provided, also, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The Legislative Council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the Council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the Governor shall appoint a time and place for them to meet together; and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house
of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the president of congress, and all other officers before the Governor. As soon as a legislature shall be formed in the district, the council and house assembled in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not voting during this temporary government.

Sec. 13. And, for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

Art. 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The
utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Art. 4. The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and, in no case, shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Art. 5. There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due North, to the territorial line between the United States and Canada; and, by the said territorial line, to the Lake of the Woods and Mississippi. The middle State shall be bounded by the last mentioned direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line, drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line:

Provided, however, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And, whenever any of the said States shall have 60,000 free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government:

Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

Art. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted:
Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23rd of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

[Note: Congress wrote the Ordinance for the Government of the territory of the United States Northwest of the river Ohio foreshadowing the Bill of Rights in its natural rights sections, establishing legal and property rights (fee simple ownership, meaning held in perpetuity with unlimited power to sell or give away—lauded as called the "first guarantee of freedom of contract in the United States"), trial by jury, bans on ex post facto laws, excessive fines, and cruel punishment, religious tolerance (compatible with Madison's views on pluralistic sects), and encouragement for education: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."]

[Note: The contains a fugitive slave clause, requiring slaves to be returned to their masters. In the 1820s, pro-slavery settlers attempted to legalize slavery in two of the Northwest Territory states, but failed. An "indentured servant" law allowed some slaveholders to bring slaves into the Territory in that status, and they could not be bought or sold. Southern states supported the establishment of the Territories without slavery, because that removed competition to farm and market tobacco, a major commodity. The crops were so labor-intensive that it could not be profitable without slave labor.]

[Note: James Madison lobbied for Art. IV, Sec. 3 of the Constitution, giving Congress power over territories and the power to admit new states, because it provided the necessary authority for the Northwest Ordinance (adopted in 1787 under the Articles of Confederation and re-adopted after the Constitution was implemented). (See John S. Baker, Jr. "The Establishment Clause as Intended: No Preference among Sects and Pluralism in a Large Commercial Republic," in Bill of Rights: Original Meaning and Current Understanding 41, 49-50 (Eugene W. Hickok, Jr. ed. 1991) (discussing Madison’s involvement in creating the Northwest Ordinance).]]

[Note: The Ordinance required all unsettled lands to be ceded to the federal government and established the public domain, followed the relinquishing of all such claims over the territory by the states. These territories were to be administered (temporarily) by Congress, with the intent of their eventual admission as newly created states, rather than under the jurisdiction of the individually sovereign original states, following the terms of the Articles of Confederation.]

[Note: The Ordinance defined future use of the natural navigation, transportation, and communication routes, anticipating future acquisitions beyond the Northwest Territories, and established federal policy over these areas of governance.]
Appendix 14th Amt [1868] Fourteenth Amendment 1868

Appendix 14th Amt
Fourteenth Amendment 1868
SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States [Privileges and Immunities Clause]; nor shall any State deprive any person of life, liberty, or property, without due process of law [Due Process Clause]; nor deny to any person within its jurisdiction the equal protection of the laws [Equal Protection].

[Note: Written by President Lincoln's political heirs after his assassination, the Amendment was intended to ensure the national commitment to equality in due process was effectuated at the state level, by providing federal checks on state action, as part of the framework by which the country would enjoy a "new birth of freedom" (promised in Lincoln's Gettysburg Address). The section was drafted by John Bingham, an Ohio congressman who served on the military commission that tried the Lincoln assassination conspirators, to correct the flawed direction]
that the country had taken. During ratification debates, House Speaker Schuyler Colfax said the 14th Amendment would become "the gem of the Constitution," because "it is the Declaration of Independence placed immutably and forever" there.]

[Note: Prior to the ratification of the Fourteenth Amendment and the development of the incorporation doctrine, the Supreme Court in 1833 held in Barron v. Baltimore that the Bill of Rights applied only to the federal, but not any state governments, until after the ratification of the Fourteenth Amendment and incorporation doctrine recognized by the Supreme Court in United States v. Cruikshank (1876).]

[Note: Under the amendment, all persons born in the United States were automatically deemed citizens—including ex-slaves—and citizens were guaranteed "equal protection of the laws." The citizenship provisions responded to the most politically divisive cases of the era. Under common law, free persons born within a state or nation were deemed citizens. But, in the Dred Scott case (Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)), Chief Justice Taney ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) white persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, [and who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. (60 U.S. (19 How.) at 406, 418.) Freed slaves fell into neither of these categories, and States could not give U.S. Citizenship to their citizens. Thus, even free men descended from slaves residing legally in one of the states at the date of ratification of the Constitution were ineligible for citizenship. (60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).) Congress subsequently repudiated this concept of citizenship, first in section 1 of the Civil Rights Act of 1866 ("That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27) and then in section 1 of the Fourteenth Amendment. In doing so, Congress set aside the Dred Scott holding, and restored the traditional precepts of citizenship by birth. (United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).) The Fourteenth Amendment closed the citizenship gap.]

[Note: Based on the first sentence of section 1, ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside") the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship. (United States v. Wong Kim Ark, 169 U.S. 649 (1898).) Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States. (Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1896).]

[Note: In the Slaughterhouse Cases (1873), the U.S. Supreme Court held that the only privileges that the Fourteenth Amendment protected against state encroachment were those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." (83 U.S. at 78, 79.)
Privileges of national citizenship had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. But the Slaughter-House Cases reduced the Privileges or Immunities Clause to a superfluous reiteration of a prohibition already operative against the states; a "practical nullity." Within five years of the amendment's ratification, in the Slaughter-House Cases (83 U.S. (16 Wall.) 36, 71, 77–78 (1873)), the Court evaluated a Louisiana statute that conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the privileges or immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each state at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference, by limiting state laws "abridging" these privileges.

According to the Court, however, such an interpretation would have "transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them," and that the "one pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Based on these conclusions, the Court held that none of the alleged rights violations were derived from the butchers' national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one that "belong to the citizens of the States as such." Despite the broad language of this clause, the Court held that the privileges and immunities of state citizenship had been "left to the State governments for security and protection" and had not been placed by the clause "under the special care of the Federal government." (83 U.S. at 78, 79.)

[Note: Justice Bradley in his dissent in the Slaughter-House Cases (83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873)), tentatively transformed ideas embodying the social compact and natural rights into constitutionally enforceable limitations upon government. (Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . .") The consequence was that the states in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property.]

[Note: "What induced the Court to overcome its fears of increased judicial oversight and of upsetting the balance of powers between the Federal Government and the states was state remedial social legislation, enacted in the wake of industrial expansion, and the impact of such
legislation on property rights. The added emphasis on the Due Process Clause also afforded the Court an opportunity to compensate for its earlier nullification of much of the privileges or immunities clause of the Amendment. Legal theories about the relationship between the government powers and private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. In the meantime, however, the Slaughter-House Cases and Munn v. Illinois had to be overruled at least in part.

About twenty years were required to complete this process, in the course of which two strands of reasoning were developed. The first was a view advanced by Justice Field in a dissent in Munn v. Illinois (110 U.S. 516, 528, 532, 536 (1884)), namely, that state police power is solely a power to prevent injury to the "peace, good order, morals, and health of the community." ("It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects."

[Note: A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).]

"Having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of laissez faire economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, "liberty" became synonymous with governmental non-interference in the field of private economic relations. As a result of the Depression, however, the laissez faire approach to economic regulation lost favor to the dictates of the New Deal." [GPO]

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

[Note: No serious effort by Congress was made to use § 2, and the only judicial attempt was rejected. (See Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946).) ]

SECTION 3. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection
or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each House, remove such disability.

**SECTION 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**SECTION 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix HCSEA
Hate Crime Sentencing Enhancement Act 1994

28 U.S.C. 994, note, Direction to United States Sentencing Commission
Regarding Sentencing Enhancements for Hate Crimes

(a) Definition.--In this section, "hate crime" means a crime in which the defendant
intentionally selects a victim, or in the case of a property crime, the property that is the object of
the crime, because of the actual or perceived race, color, religion, national origin, ethnicity,
gender, disability, or sexual orientation of any person.

(b) Sentencing Enhancement.--Pursuant to section 994 of title 28, U.S. Code, the US Sentencing
Commission shall promulgate guidelines or amend existing guidelines to provide sentencing
enhancements of not less than 3 offense levels for offenses that the finder of fact at trial
determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United
States Sentencing Commission shall ensure that there is reasonable consistency with other
guidelines, avoid duplicative punishments for substantially the same offense, and take into
account any mitigating circumstances that might justify exceptions.


[Note: Originally introduced as separate legislation by Rep. Charles Schumer (D-NY) and
Sen. Dianne Feinstein (D-CA), this measure was enacted into law as Section 280003 of the
Stat. 1796. Short title, see 42 U.S.C. 13701 note.) The provision directed the United States
Sentencing Commission to provide a sentencing enhancement of "not less than 3 offense levels
for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate
crimes." The provision defined a hate crime as "a crime in which the defendant intentionally
selects a victim, or in the case of a property crime, the property that is the object of the crime,
because of the actual or perceived race, color, religion, national origin, ethnicity, gender,
disability, or sexual orientation of any person." This measure, the Federal counterpart for state
hate crime penalty-enhancement statutes, applies, inter alia, to attacks and vandalism which
occur in national parks and on other Federal property.]
In May 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress. This amendment took effect on November 1, 1995.

[Note: The House Committee Report on the federal Hate Crimes Sentencing Enhancement Act states:

In order to constitute a hate crime, the selection of a victim ... must result from the defendant's hate or animus toward any person for bearing one or more of the characteristics set forth in the definition of "hate crime." Any other result would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense. [Thus,] Federal fraud crimes committed against one particular ethnic or religious group due solely to the defendant's belief that all members of that group are wealthy, absent any hate or animus toward that group, are not hate crimes.

H.R. Rep. No. 103-244, at 5 (1993).]

Appendix FPA
Federally Protected Activities 1968

18 U.S.C. § 245. Federally protected activities

(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is necessary to secure substantial justice, which function of certification may not be delegated.

[Note: The emphasis on the stasis of jurisdiction in section (a) (1) reflects the scuffle between State and Federal control over certain areas of regulation. With regard to civil rights, which generally involves privileges of citizenship, the battles were not formal or legalistic. They were on-the-ground battles at the sites where integration and other enforced equality was initiated, and the first paragraph of this 1968 statute is careful to place jurisdictional concerns up front, while avoiding a definition that spells out the jurisdiction of each entity.]

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
[Note: The protections are against intimidation arising from violent acts or threats of violence.]

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

[Note: The protections are available equally to anyone; they not limited to particular categories of persons.]

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;
(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;
(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;
(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;
(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance;

[Note: The list reflects rights and privileges of national citizenship. The activities listed above—voting, receiving any benefit provided by the federal government, applying for or holding a job in a federal government agency, serving as a juror, or receiving federal assistance—are the federally protected activities. The right to vote is viewed as attendant to citizenship and thus under the jurisdiction of Congress to protect with "appropriate legislation" under its limited police power.]

[Note: The doctrine of state action requires that an individual suing for a violation of his or her constitutional rights allege that the offending action was undertaken by the state or an entity in sufficiently close nexus with the state in terms of its character or, more often, its actions (such as, a business offering lodging to travelers or a restaurateur), to be deemed quasi-state action. The doctrine originated after the Reconstruction era Federal Civil Rights Acts, under which any activity by the government of a state, any of its components or employees (like a sheriff), who uses the "color of law" (claim of legal right) to violate an individual's civil rights. Such "state action" gives the person whose rights have been violated by a governmental body or official the right to sue that agency or person for damages.

The clip below, from a 1909 Report reviewing U.S. statutes in the early formation of the U.S. Code as we now know it, acknowledges the then-existing limitations on congressional power to protect voting rights.

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VIII PENAL CODE OF THE UNITED STATES.

OFFENSES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

It has been decided that section 5507, Revised Statutes, is unconstitutional, on the ground that the power of Congress to legislate upon the right of voting at State elections rests upon the fifteenth amendment and is limited to prohibitions against discriminations on account of race, color, or previous condition of servitude, and is further limited to prohibitions of such discriminations by the United States, or States and their officers or others claiming to act under color of laws within the inhibition of the amendment.
The provision 5507 did not survive into the next iteration of US Statutes.]

or

(2) any person because of his race, color, religion or national origin and because he is or has been—

[Note: The protections in this subsection apply to categories—race, color, religion, or national origin—that have been subject to patterns of discrimination in the US, and require a broad reading of the Thirteenth Amendment to rest on that jurisdiction.]

(A) enrolling in or attending any public school or public college;
(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or
Note: The activities listed above—attending public school, receiving any benefit provided by a state government, applying for or holding a job in state government, organizing labor forces, serving as a juror, crossing state lines or engaging in commerce that does so, or using any facility related to travel, dining, cultural life, entertainment, that holds itself out to be for the public (not a private club)—involve an individual’s participation in state civic life and thus tend to be the activities that intersect with attempts to discriminate against the groups listed above.

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

Note: The sections of law governing riots and civil disorder under Title 18 are designed to regulate even private actors. This authority stems from the Commerce Clause.

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

Note: These provisions emphasize that they apply to every actor, and they prohibit intimidation of people who are aiding minorities in the exercise of their rights. This expands the circle of individuals who may be prosecuted under this provision beyond the immediate "hater" on "hated" scenario.

—shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Note: These penalties are associated with the highest levels of injury, from aggravated sexual assault to death of the victim, which need not be completed. They were expanded and increased as part of the 1994 Crime Bill, among other things, to include capital punishment.

As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of
physical violence upon any individual or against any real or personal property in furtherance of a riot.

[Note: This sentence is one of the most important of this Section 245. The language defines the meaning of assembling for peaceful protest, for example, to exclude incitement, which is a reminder of what the law has always said. The language makes the same distinction between speech that is free and "lawful" and speech that is incitement and therefore unlawful: "riot" or "physical violence" against person or property. This sentence, buried deep in the provision that is titled for the activities that are federally protected, carves out difference between free speech, under Supreme Court standards, and speech that is not constitutionally protected.]

Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

[Note: This provision states that Section 245 does not reach small establishments or those that are occupied by the owner. This excludes rooming houses or property owners who rent rooms to travelers, which would have been common in the decades following WWII and even later.]

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(d) For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.


Amendments


1994—Subsec. (b). Pub. L. 103–322, §330016(1) (L), substituted "shall be fined under this title" for "shall be fined not more than $10,000" before ", or imprisoned not more than ten years" in concluding provisions.
Pub. L. 103–322, §330016(1) (H), substituted "shall be fined under this title" for "shall be fined not more than $1,000" before ", or imprisoned not more than one year" in concluding provisions.

Pub. L. 103–322, §320103(c) (4)–(6), in concluding provisions, inserted "from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill," after "death results" and substituted "shall be fined under this title or imprisoned for any term of years or for life, or both" for "shall be subject to imprisonment for any term of years or for life".

Pub. L. 103–322, §320103(c) (3), which provided for amendment identical to Pub. L. 103–322, §330016(1) (L), above, was repealed by Pub. L. 104–294, §604(b) (14) (C).

Pub. L. 103–322, §320103(c) (2), as amended by Pub. L. 104–294, §604(b) (37), inserted "from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire" after "bodily injury results" in concluding provisions.

Pub. L. 103–322, §320103(c) (1), which provided for amendment identical to Pub. L. 103–322, §330016(1) (H), above, was repealed by Pub. L. 104–294, §604(b) (14) (C).

Pub. L. 103–322, §60006(c), in concluding provisions, inserted ", or may be sentenced to death" before ". As used in this section".

1988—Subsec. (a) (1). Pub. L. 100–690 substituted ", the Deputy" for "or the Deputy" and inserted ", the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General" after "Deputy Attorney General".

Fair Housing [Act of 1968]

Pub. L. 90–284, title I, §101(b), Apr. 11, 1968, 82 Stat. 75, provided that: "Nothing contained in this section [enacting this section] shall apply to or affect activities under title VII of this Act [sections 3601 to 3619 of Title 42, The Public Health and Welfare]."

Riots or Civil Disturbances, Suppression and Restoration of Law and Order; Acts or Omissions of Enforcement Officers and Members of Military Service Not Subject to This Section

Pub. L. 90–284, title I, §101(c), Apr. 11, 1968, 82 Stat. 75, provided that: "The provisions of this section [enacting this section] shall not apply to acts or omissions on the part of law enforcement officers, members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any State or the District of Columbia,
not covered by such section 101(9), or members of the Armed Forces of the United States, who are engaged in suppressing a riot or civil disturbance or restoring law and order during a riot or civil disturbance."

**Referred to in Other Sections**
This section is referred to in section 1202 of this title.


"Through its innovative jurisprudence, the Supreme Court finally spurred Congress to completion of its legislative work by providing criminal standards aimed at protecting precisely and effectively the exercise of the most varied civil rights. Thus, after two years of debate in Congress, the Civil Rights Act of 1968 was passed.

U.S. Cases using term "federally protected activities";
DEPARTMENT OF TAXATION and FINANCE OF NEW YORK, et al., Petitioners v. MILHELM ATTEA and BROS., INC., etc., et al., 512 U.S. 61 (Jun. 13, 1994) (leaving unanalyzed claim NY state scheme interfered with federally protected activities of Indian traders who sell goods at wholesale to reservation Indians (citing Warren Trading Post, 380 U.S., at 691) as improper interference "with tribal self-government or federal authority over Indian affairs").]"
Appendix FABL-R [1870] Federal Criminal Civil Rights (FCCR) "Conspiracy" and "Under Color of Law" From Reconstruction Era

Appendix FABL-R
Federal Criminal Civil Rights 1870
From Reconstruction Era
defining federal jurisdiction over interference with civil rights
"Conspiracy" and "Under Color of Law"


If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having exercised the same; or

[Note: Section 241 originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140, An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes. "In furtherance of its chief end of assuring the right of Negroes to vote, it provided in §§ 2 and 3 that it should be a misdemeanor for any 'person or officer' wrongfully to fail in a duty imposed on him by State law to perform or permit performance of acts necessary to registering or voting. In § 4 interference with elections by private persons was made a similar offense." (U.S. v. Williams et al., 341 U.S. 7 (1951).) The Supreme Court made much of the distinction between the application of Section 241 and § 242:

"When Congress wished to protect from State action interests guaranteed by the Fourteenth Amendment, it described them in § 17 as rights 'secured or protected' by the Constitution. But in § 6 the narrower phrase 'granted or secured' is used to define the interests protected from interference by individuals. When Congress wanted to reach action by State officers, the explicit reference in § 17 to 'color' of State law demonstrates that Congress knew how to make this purpose known. Similarly, reference in §§ 2 and 3 to 'persons or officers' indicates that Congress was able explicitly to draft a section applicable to persons acting in private and official capacities alike. In contrast, § 6 was made applicable simply to 'persons.' Nothing in its terms indicates that color of State law was to be relevant to prosecution under it." (Id.)]
Myers-Genealogy of "Hate Crime"

[Note: The federal offense of conspiracy requires action or decision-making by more than one person. Formulating ABL using conspiracies addresses Ku Klux Klan activities and other mob action. Conspiring does not require that any harm come to the victim. Preplanning or an agreement to act by two or more persons is all that is required, typically by sharing the same goal but even a vague meeting of the minds. An individual may not be guilty of "conspiring" at all. However, the gap presented by this requirement for a conspiracy to trigger the protections under this act were addressed in a 1909 recommendation for a revision to the law that would encompass individual acts. (U.S. Rev. Stats. s 19.) Using "threats" and "intimidation" as the goal of the conspiratorial action against the victim sets a foundation for symbolic acts, which skirts near free speech protections. Although this clause is phrased in terms of intent of offender, the effects hint at the subjective experience of the victim. The intent is all that is required, but the sense of intimidation certainly is part of the equation, especially when measuring harm in court.]

[Note: Conspiracies are agreements prohibited because they involve a plan to commit some act condemned by law either as a separate federal offense or for purposes of the conspiracy statute. This statute is one of the earliest conspiracy statutes, and the only surviving such statute that governs civil right violations. Formulating ABL using conspiracies addresses Ku Klux Klan activities and other mob action. Also, conspiring does not require that any harm come to the victim(s). Preplanning or an agreement to act by two or more persons is all that is required, typically by sharing the same goal but even a vague meeting of the minds. In contrast, an individual may not be guilty of "conspiring" at all. The gap presented by this requirement for a conspiracy to trigger the protections under this act were addressed in a 1909 recommendation for a revision to the law that would encompass individual acts. (U.S. Rev. Stats. s 19.) Using "threats" and "intimidation" as the goal of the conspiratorial action against the victim sets a foundation for symbolic acts, which skirts near free speech protections. Although this clause is phrased in terms of intent of offender, the effects hint at the subjective experience of the victim. The intent is all that is required, but the sense of intimidation certainly is part of the equation, especially when measuring harm in court.]

If two or more persons to go in disguise on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

[Note: This provision originally read:
Sec. 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.' 16 Stat. 140, 141.]

[Note: The reference to "disguise on the highway" sounds anachronistic to the modern ear. But this clause is aimed at KKK activity and captures any cases that do not fulfill the conspiracy provision. To wear a disguise is to associate with another as much as going together "on the
highway” or "on the premises of another.” To wear a disguise is in essence a bond that forms the conspiracy, regardless of the preplanning. The provision reaches back to the Anti-mask statute of the early 20th century.]

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.


[Note: US Supreme Court cases passed during Reconstruction, around the time the Fifteenth Amendment was adopted, granted Congress latitude in protecting citizens' rights against any "deprivation" from any source, that is, by public or private actors. The Court implied congressional power to legislate for the free exercise of every right conferred by the Constitution. (U.S. v. Cruikshank, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874) (circuit opinion by Justice Bradley); U.S. v. Cruikshank, 92 U.S. 542, 555–56 (1876); U.S. v. Reese, 92 U.S. 214, 217–18 (1876); Ex parte Yarbrough, 110 U.S. 651, 665-66 (1884) (finding Section 241 constitutional; expanding implied congressional power to prohibit a private actor's discriminatory interference with another citizen's right to vote in federal elections to broader congressional power to protect from discrimination the exercise of constitutional rights generally).
That latitude was then reigned in by James v. Bowman, 190 U.S. 127 (1903) (holding Enforcement Act of 1870, ch. 114, sec. 5, 16 Stat. 140, Rev. Stat. § 5507 unconstitutional), which remained the standard until a successful challenge in 1941.]

**Historical and Revision Notes**


[Note: The early version of federal ABL was drafted in the 1909 U.S.C., under Chapter 321 Crimes, Ch 3 Offenses Against the Elective Franchise and Civil Rights of Citizens, sections 19 to 26. This section followed Ch 1 of Chapter 321, Offenses Against the Existence of the Government, and Ch 2 Offenses Against Neutrality [serving a foreign government], and preceded sections regarding offenses against governmental functioning (Ch 4 Offenses Against the Operation of the Government, Ch 5 Offenses Relating to Official Duties, Ch 6 Offenses Against Public Justice, etc.) This provision was originally intended to protect integrity of voting and other processes. The core was enfranchisement, not individual protections.]

Clause making conspirator ineligible to hold office was omitted as incongruous because it attaches ineligibility to hold office to a person who may be a private citizen and who was convicted of conspiracy to violate a specific statute. There seems to be no reason for imposing such a penalty in the case of one individual crime, in view of the fact that other crimes do not carry such a severe consequence. The experience of the Department of Justice is that this unusual penalty has been an obstacle to successful prosecutions for violations of the act.
Mandatory punishment provision was rephrased in the alternative.

Minor changes in phraseology were made.

**Amendments**

Effective Date of 1996 Amendment: Amendment by section 604(b) (14) (A) of Pub. L. 104–294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

Short Title of 1996 Amendment: Pub. L. 104–155, § 1, July 3, 1996, 110 Stat. 1392, provided that:

"This Act [amending section 247 of this title and section 10602 of Title 42, The Public Health and Welfare, enacting provisions set out as a note under section 247 of this title, and amending provisions set out as a note under section 534 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Church Arson Prevention Act of 1996'."1996—Pub. L. 104–294, § 607(a), substituted "any State, Territory, Commonwealth, Possession, or District" for "any State, Territory, or District" in first par.


1994—Pub. L. 103–322, § 330016(1) (L), substituted "They shall be fined under this title" for "They shall be fined not more than $10,000" in third par.

Pub. L. 103–322, § 320201(a), substituted "person in any State" for "inhabitant of any State" in first par.

Pub. L. 103–322, § 320103(a) (2)–(4), in third par., substituted "results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both" for "results, they shall be subject to imprisonment for any term of years or for life".

Pub. L. 103–322, § 320103(a) (1), which provided for amendment identical to Pub. L. 103–322, § 330016(1) (L), above, was repealed by Pub. L. 104–294, § 604(b) (14) (A). Pub. L. 103–322, § 60006(a), substituted ", or may be sentenced to death." for period at end of third par.

1988—Pub. L. 100–690 struck out "of citizens" after "rights" in section catchline and substituted "inhabitant of any State, Territory, or District" for "citizen" in text.

1968—Pub. L. 90–284 increased limitation on fines from $5,000 to $10,000 and provided for imprisonment for any term of years or for life when death results.

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Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap,
aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.


[Note: Section 242 was part of legislation related to Section 241. "In the course of passage through Congress several sections were added which had a larger purpose. One of them, § 17, was derived from the Civil Rights Act of 1866, 14 Stat. 27, and was designed to 'secure to all persons the equal protection of the laws.'" (U.S. v. Williams et al., 341 U.S. 7 (1951), quoting Senator Stewart at the time he proposed the amendment, Cong.Globe, 41st Cong., 2d Sess., 3480 (1870).)]

[Note: "[Not] until the early 1960s—under President Kennedy—[did] the Justice Department became marginally more active in enforcing this and other civil rights laws. It also was in this period that the historically reluctant Federal Bureau of Investigation took on the lead role in investigating all kinds of civil rights cases." (http://trac.syr.edu/tracreports/civright/107/.) The Civil Rights Division of the DOJ admitted to Congress that "only a very small number of [civil rights] cases ever resulted in a prosecution, [because] 'victims of most official misconduct cases tend to be unsympathetic while the defendants often are well respected members of the community,'" which taxes the investigative resources to ensure the prosecutorial efforts can overcome the local biases. (Id.)]

[Note: Acts under "color of any law" include acts not only done by federal, state, or local officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority; provided that, in order for unlawful acts of any official to be done under "color of any law," the unlawful acts must be done while such official is purporting or pretending to act in the performance of his/her official duties. This definition includes, in addition to law enforcement officials, individuals such as Mayors, Council persons, Judges, Nursing Home Proprietors, Security Guards, etc., persons who are bound by laws, statutes ordinances, or customs. (FBI, "Federal Civil Rights," summarized at http://www.fbi.gov/about-us/investigate/civilrights/federal-statutes.)

Describing the problem captured by the phrase "under color of law," the capacity for "[p]olice officers, prison guards and other government officials" to "improperly abuse the rights of individual Americans" was recognized at the early formation of the country. To address these abuses, a young Congress approved 18 U.S.C. 242, making it a crime to "deprive any person of their rights under color of law" just after the Civil War.]

[Note: Under the civil law version of this statute, the doctrine of state action requires that the action was undertaken by the state or an entity in close nexus with the state (such as, a business offering lodging or a restaurateur), to be deemed quasi-state action. Federal Civil Rights Acts bar activity by the government of a state, any of its components or employees (like a sheriff), who uses the "color of law" (claim of legal right) to violate an individual's civil rights.

Like Section 242, Section 1985(3) specifies "the motivation required 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.'" This language is, of course,
similar to that of § 1 of the Fourteenth Amendment, which in terms speaks only to the States, and judicial thinking about what can constitute an equal protection deprivation has, because of the Amendment’s wording, focused almost entirely upon identifying the requisite 'state action' and defining the offending forms of state law and official conduct. A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. See, e.g., United States v. Harris, 106 U.S. 629, 643, 1 S.Ct. 601, 612, 27 L.Ed. 290. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." (Griffin v. Breckenridge, 403 U.S. 88 (1971))

**Historical and Revision Notes**


Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

A minor change was made in phraseology.

**Amendments**

Effective Date of 1996 Amendment: Amendment by section 604(b) (14) (B) of Pub. L. 104–294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

1996—Pub. L. 104–294, §607(a), substituted "any State, Territory, Commonwealth, Possession, or District" for "any State, Territory, or District".


1994—Pub. L. 103–322, §330016(1) (H), substituted "shall be fined under this title" for "shall be fined not more than $1,000" after "citizens,"

**[Note:** Punishment varies from a fine or imprisonment of up to one year, or both, and if bodily injury results or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined or imprisoned up to ten years or both, and if death results, or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death. FBI, "Federal Civil Rights," summarized at http://www.fbi.gov/about-us/investigate/civilrights/federal-statutes.]
Pub. L. 103–322, §320201(b), substituted "any person in any State" for "any inhabitant of any State" and "on account of such person" for "on account of such inhabitant."

Pub. L. 103–322, §320103(b) (2)–(5), substituted "bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both" for "bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life". Pub. L. 103–322, §320103(b) (1), which provided for amendment identical to Pub. L. 103–322, §330016(1) (H), above, was repealed by Pub. L. 104–294, §604(b) (14) (B).

Pub. L. 103–322, §60006(b), inserted before period at end ", or may be sentenced to death".

1988—Pub. L. 100–690 inserted "and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both;" after "or both;".

1968—Pub. L. 90–284 provided for imprisonment for any term of years or for life when death results.

[Note: Between 1866 and 1875, Congress passed five major pieces of civil rights legislation, supported by and in support of the 13th, 14th, and 15th Amendments, which are quoted below. These and other related legislation were severely hampered by the Supreme Court decisions over the next 100 years, and by the early 20th century, civil rights measures had all but failed. Greater control had been left to individual states, which did little to improve the treatment of Blacks. Southern states abused civil rights and allowed private actors to do so with impunity. The federal government did not seek expanded powers to enforce civil rights laws after 1900, until the 1950s, as the Civil Rights movement began to take clear shape. Nevertheless, the text of these sections has been considered by Congress five times in which minor changes of phraseology were made over successive revisions. Yet the substance of the laws remained the same.

Criminal Civil Rights Legislation: Comparative Table of Successive Phraseology

Material deleted by next subsequent revision shown in brackets. Material added or substituted in revision shown in italics

Act of April 9, 1866, 14 Stat. 27
SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.
[Note: In United States v. Rhodes, a circuit judge used 13th Amt section 2 to uphold Civil Rights Act of 1866. In order to "abolish slavery" and "guard...against the recurrence of the evil," Section 2 "authorizes congress to select...the means that might be deemed appropriate to the end... .The judge defined the constitutional "end" as the prevention of slavery itself. "Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment." The court, however, preserved a role for the judiciary to police the outer boundaries of the Section 2 power.]

Act of May 31, 1870, 16 Stat. 141. 144
SEC. 6. And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this Act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

[Because of the rearrangement and simplification of the clauses of s. 6 in the Revision of 1874-1878, certain changes cannot conveniently be shown by brackets and italics. They are immaterial.]

SEC. 17. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this Act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court. (341 U.S. 70, n1.)

Revised Statutes of 1874-1878
SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States. (341 U.S. 70, n2.)

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any right, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.
SEC. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 20. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

Section 51. Conspiracy to injure persons in exercise of civil rights.—If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

52. Depriving citizens of civil rights under color of State laws.—Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Title 18, United States Code, as revised in 1948
s. 241. Conspiracy against rights of citizens
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured— They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

s. 242. Deprivation of rights under color of law
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both. ]
[Williams, Mr. Justice DOUGLAS, dissenting. Sections 19 [241] and 20 [242] [of the Criminal Code] have different origins. Section 20 came into the law as § 2 of the Act of April 7, 1866, 14 Stat. 27, while § 19 first appeared as § 6 of the Act of May 31, 1870, 16 Stat. 141. We reviewed the history of § 20 in Screws v. United States, 325 U.S. 91, 98-100. The legislative history makes plain that § 20 was an antidiscrimination measure designed to protect Negroes in their newly won rights. It was enacted before the Fourteenth Amendment became effective. But after that date it was reenacted as § 17 of the Act of May 31, 1870, 16 Stat. 144; and in 1874 the prohibition against 'the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States' was introduced. R.S. § 5510. From this history there can be no doubt, as we stated in Screws v. United States, supra, 325 U.S. at page 100, 65 S.Ct. at pages 1034, 1035, and § 20 is 'one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure.' If that be true—if 'rights, privileges, or immunities secured or protected by the Constitution and laws of the United States' as used in § 20 are not restricted to rights which the Federal Government can secure against interference by private persons—it is difficult to understand why 'any right or privilege secured to him by the Constitution or laws of the United States', as used in § 19, is so restricted.

It is true that a part of the purpose of § 19 (which, as I have said, originated as § 6 of the Act of May 31, 1870, 16 Stat. 141) was to give sanction to the right to vote which was guaranteed by the Fifteenth Amendment, recently adopted. That is made plain from the congressional debates. Cong. Globe, Pt. 4, 41st Cong., 2d Sess., pp. 3607 et seq. Yet the rights which § 19 protected were not confined to voting rights; and one who reads the legislative history finds no trace of a suggestion that the broadening of the language of § 19 to include 'any right or privilege secured' by the Constitution or laws of the United States was aimed only at those rights 'secured' by the Federal Government against invasion by private persons.

The distinction now urged has not been noticed by students of the period. Thus Flack, in Adoption of the Fourteenth Amendment (1908) p. 223, wrote, 'The bill as passed by the Houses was signed by the President May 31, 1870, and so became a law, and was, therefore, the first law for the enforcement of the Fourteenth and Fifteenth Amendments.' And see Mr. Justice Roberts in Hague v. C.I.O., 307 U.S. 496, 510, 59 S.Ct. 954, 961, 83 L.Ed. 1423. If the drastic restriction now proposed for § 19 had been part of the architectural scheme for the Act of May 31, 1870, it is difficult to imagine that some trace of the purpose would not have been left in the legislative history. What we find points indeed the other way. Senator Pool of North Carolina, who introduced the section from which § 19 evolved, indicated that it was his purpose to extend the protection of the new provision to the Fourteenth as well as to the Fifteenth Amendment. 3 It has, indeed, long been assumed that § 19 had a coverage broad enough to include all constitutional rights. Thus in United States v. Mosley, 238 U.S. 383, 387, 35 S.Ct. 904, 905, 59 L.Ed. 1365, Mr. Justice Holmes observed that § 19 'dealt with Federal rights, and with all Federal rights.' There is no decision, prior to that of the Court of Appeals in this case, which is opposed to that view. Fourteenth Amendment rights have sometimes been asserted under § 19 and denied by the Court. That was true in United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588. But the denial had nothing to do with the issues in the present case. The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals. See Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. The Cruikshank case, like others, involved wrongful action by individuals who did not act for a state nor under color of state authority. As the Court in the Cruikshank case said, 'The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it * * * add anything to the rights which one citizen has under the Constitution against another.' 92 U.S. pp. 554—555, 23 L.Ed. 588. There is implicit in this holding, as Mr.
Justice Rutledge observed in the Screws case, supra, 325 U.S. at page 125, note 22, 65 S.Ct. at page 1047, 89 L.Ed. 1495, that wrongful action by state officials would bring the case within § 19. For the Court in the Cruikshank case stated, 'The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.'

Section 19 has in fact been applied to the protection of rights under the Fourteenth Amendment. See United States v. Hall, 26 Fed.Cas. page 79, No. 15,282; United States v. Mall, 26 Fed.Cas. page 1147, No. 15, 712; Ex parte Riggins, C.C., 134 F. 404, writ dismissed, 199 U.S. 547, 26 S.Ct. 147, 50 L.Ed. 303. Those attempts which failed did so not because § 19 was construed to have too narrow a scope, but because the action complained of was individual action, not state action. See, e.g., United States v. Powell, C.C., 151 F. 648, affirmed, 212 U.S. 564; Po e v. United States, 5 Cir., 109 F.2d 147.

While it is true, as Mr. Justice Rutledge stated in the Screws case, that there is no difference between §§ 19 and 20 so far as the 'basic rights guarded' are concerned, the coverage of the two sections is not coterminous. The difference is not merely in the fact that § 19 covers conspiracies and § 20 substantive offenses. Section 20 extends only to those who act 'under color' of law, while § 19 reaches 'two or more persons' who conspire to injure any citizen in the enjoyment of any right or privilege secured to him by the Constitution, etc. The reach of § 20 over deprivations of rights protected from invasion by private persons is therefore in this one respect less than that of § 19. But that is no comfort to respondents in the present case. It certainly cannot be doubted that state officers, or those acting under color of state law, who conspire to wring confessions from an accused by force and violence, are included in 'two or more persons' within the meaning of § 19. As we hold in No. 365, Williams v. United States, 71 S.Ct. 576, decided this day, such an act deprives the accused of the kind of trial which the Fourteenth Amendment guarantees. He is therefore denied the enjoyment of that right, within the meaning of § 19.

In Screws v. United States, supra, we relieved § 20 of the risk of unconstitutionality by reason of vagueness. We held that 'a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.' 325 U.S. p. 103, 65 S.Ct. at page 1036, 89 L.Ed. 1495. The same analysis does like service here, as evidenced both by the construction of § 19 and the charge to the jury in this case.

A conspiracy by definition is a criminal agreement for a specific venture. It is 'a partnership in crime.' United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253, 60 S.Ct. 811, 858, 84 L.Ed. 1129. As stated by Mr. Justice Holmes in Frohwerk v. United States, 249 U.S. 204, 209, 39 S.Ct. 249, 251, 63 L.Ed. 561, an 'intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it.' The trial court in its charge to the jury followed the ruling in the Screws case and gave precise application to this concept in avoidance of any claim of unconstitutionality of § 19 on the grounds of vagueness. The court, after explaining to the jury what rights, enumerated in the indictment, were guaranteed under the Fourteenth Amendment, gave numerous charges on the element of intent. The following is typical:

'In order to convict under this indictment, it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving the complaining witnesses of those rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States, which are enumerated in the indictment, while acting under color of the laws of the State of Florida.]

[Note: The Transactional Records Access Clearinghouse (TRAC) examined DOJ data for the enforcement rates by U.S. Attorneys of Section 242. TRAC states that the DOJ Civil Rights Division typically has received roughly 12,000 complaints annually of civil rights violations from individual citizens and the FBI. After initial review, approximately one-quarter are pursued.
further, netting approximately 100 placed before federal grand juries each year. Of this number, only a small fraction are prosecuted.

TRAC's analysis showed "declined to file charges" were issued in 98.7% of the cases, even when investigative agencies (primarily the FBI) had concluded there were violation of 18 U.S.C. 242. Of the 230 dispositions at end of FY 2004, TRAC found that 227 had been declined, meaning they were never prosecuted. Only 3 were prosecuted, resulting in 3 convictions. Although geographical variation is expected, since U.S. Attorneys are semi-autonomous in their authority to determine exclusively how federal law will be applied. Nevertheless, Assistant U.S. Attorneys must explain every decision made about how or whether to proceed with a particular case.

TRAC reported:

|| [T]he record shows that 51 of the 94 federal judicial districts were active, with each processing -- declining, prosecuting, or otherwise handling -- 200 or more such matters. Among these 51 districts with a substantial number of relevant matters there were two in which every single referral from the investigative agencies, 100% of them, were declined. The two districts were California East (Sacramento) and Illinois Central (Springfield). In addition, there were seventeen districts which processed 200 or more official abuse matters where virtually all, 99% or higher, were rejected. Here are these districts. They are listed in numerical order, with the busiest districts first, along with their principal cities. Texas South (Houston), Louisiana East (New Orleans), Texas West (San Antonio), Texas East (Tyler), Texas North (Fort Worth), California North (San Francisco), Pennsylvania West (Pittsburgh), Rhode Island (Providence), Georgia North (Atlanta), District of Columbia (Washington), New York North (Syracuse), New York West (Buffalo), Tennessee East (Knoxville), Louisiana Middle (Baton Rouge), Utah (Salt Lake), Washington West (Seattle), and Alabama Middle (Montgomery). In more actively enforced regions, "overall declination rates for the whole period ranged somewhere between 92.0% to 96.0 %. These districts, again listed in order of the number of matters handled, included the following. Florida South (Miami), Indiana South (Indianapolis), New Jersey (Newark), Tennessee West (Memphis), New Mexico (Albuquerque), Georgia Middle (Macon), Arkansas East (Little Rock), Illinois North (Chicago), Kentucky West (Louisville), and Tennessee Middle (Nashville). At the other end of this very minimal enforcement scale were four districts where the declination rates for official abuse matters during the whole period were substantially lower, although in each of these areas the total number of cases disposed of was relatively small. The districts where a larger proportion of referrals resulted in a prosecution were New York South (Manhattan), Puerto Rico (San Juan), New York East (Brooklyn), and North Carolina West (Ashville). (http://trac.syr.edu/tracreports/civright/107/.)||
The TRAC analysis of the decision-making by U.S. Attorneys and Assistant U.S. Attorneys showed that 69% of declined cases were rejected for one of four reasons:
- Lack of evidence of criminal intent;
- Minimal federal interest;
- No federal offense evident; or
- Weak or insufficient admissible evidence.

"Most of the remaining 22% were not pursued on the basis of an "agency request" or "per instructions from the Department of Justice." (http://trac.syr.edu/trareports/civright/107/.)]
246, 248, 42 U.S.C. 3631, 42 U.S.C. 14141


No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

[Note: Limited to state action; not applicable to private citizens.]

(June 25, 1948, ch. 645, 62 Stat. 696.)

Historical and Revision Notes

[Note: 1875 Act to protect all citizens in their civil and legal rights, (Ch 114, s 4):]

Words "be deemed guilty of a misdemeanor, and" were deleted as unnecessary in view of definition of misdemeanor in section 1 of this title.
Words "on conviction thereof" were omitted as unnecessary, since punishment follows only after conviction.

Minimum punishment provisions were omitted. (See reviser's note under section 203 of this title.)

Minor changes in phraseology were made.

Federal Rules Of Civil Procedure
Jurors, see rule 47, Title 28, Appendix, Judiciary and Judicial Procedure.

Federal Rules Of Criminal Procedure
Grand jury, see rule 6, Appendix to this title. Trial jurors, see rule 24.

Cross References
Bribery of public officials and witnesses, see section 201 of this title.
Civil rights generally, see section 1981 et seq. of Title 42, The Public Health and Welfare.
Exclusion or excuse from jury service, see section 1863 of Title 28, Judiciary and Judicial Procedure.
Grand jurors, number of and summoning additional jurors, see section 3321 of this title.
Juries generally, see section 1861 et seq. of Title 28, Judiciary and Judicial Procedure.
Manner of drawing jurors, see section 1864 of Title 28. Qualifications of jurors, see section 1861 of Title 28. Summoning jurors, see section 1867 of Title 28.

18 U.S.C. § 244 Discrimination against person wearing uniform of armed forces
Whoever, being a proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, or Possession of the United States, causes any person wearing the uniform of any of the armed forces of the United States to be discriminated against because of that uniform, shall be fined under this title.


Historical and Revision Notes
Words "guilty of a misdemeanor", following "shall be", were omitted as unnecessary in view of definition of "misdemeanor" in section 1 of this title. (See reviser's note under section 212 of this title.)
Changes were made in phraseology.

1949 Act: This section [section 5] substitutes, in section 244 of title 18, U.S.C., "any of the armed forces of the United States" for the enumeration of specific branches and thereby includes the Air Force, formerly part of the Army. This clarification is necessary because of the establishment of the Air Force as a separate branch of the Armed Forces by the act of July 26, 1947.

Amendments
1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $500".
1949—Act May 24, 1949, substituted "any of the armed forces of the United States" for enumeration of the specific branches.

Cross References
Uniforms, wearing without authority, see section 702 of this title

Whoever directly or indirectly deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible in whole or in part by any Act of Congress appropriating funds for work relief or relief purposes, on account of political affiliation, race, color, sex, religion, or national origin, shall be fined under this title, or imprisoned not more than one year, or both.


Amendments
1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $10,000".

(a)Prohibited Activities.—Whoever—
(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b)Penalties.

(c) Civil Remedies.—
(1) Right of action.—
(A)In general.—Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a) (1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a) (2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.
(B) Relief.

* * *

(2) Action by attorney general of the United States.—

(A) In general.—

If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief.—In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1) (B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent...

(3) Actions by State Attorneys General.—

(A) In general.—

If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief.—

In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2) (B).

(d) Rules of Construction.—Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.—As used in this section:

(1) Facility.—The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.—The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate.—The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.—The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.—The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility,
and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State.—The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.


Amendments


Subsec. (b). Pub. L. 103–322, § 330023(a) (3), in concluding provisions, inserted ", notwithstanding section 3571," before "be not more than $25,000".

Effective Date of 1994 Amendment


Effective Date

Pub. L. 103–259, § 6, May 26, 1994, 108 Stat. 697, provided that: "This Act [see Short Title note below] takes effect on the date of the enactment of this Act [May 26, 1994], and shall apply only with respect to conduct occurring on or after such date."

Short Title

Pub. L. 103–259, § 1, May 26, 1994, 108 Stat. 694, provided that: "This Act [enacting this section and provisions set out as notes under this section] may be cited as the 'Freedom of Access to Clinic Entrances Act of 1994'."

Severability of Provisions

Pub. L. 103–259, § 5, May 26, 1994, 108 Stat. 697, provided that: "If any provision of this Act [see Short Title note above], an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any other person or circumstance shall not be affected thereby."

Congressional Statement of Purpose

Pub. L. 103–259, § 2, May 26, 1994, 108 Stat. 694, provided that: "Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act [see Short Title note above] to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services."

FACE References

FBI Summary of FACE, https://www.fbi.gov/investigate/civil-rights
"Freedom of Access to Clinic Entrances (FACE) Act Violations"
Violations Beginning in the mid-1980s, the United States witnessed a dramatic escalation in the number of acts of violence and harassment directed towards reproductive health care providers and clinics. These incidents, typically in the form of blockades, arson, use of chemical irritants, bomb threats, death threats, stalking, and vandalism, continued well into the next decade. In 1993, the first murder of a reproductive health care provider occurred. Dr. David Gunn, a physician who provided abortion services, was murdered during an anti-abortion protest at a clinic in Pensacola, Florida.

In response to the alarming trend of increasing violence, the U.S. Congress enacted the Freedom of Access to Clinic Entrances (FACE) Act, Title 18 U.S.C. Section 248, in 1994. Often referred to by its acronym, the FACE Act makes it a federal crime to injure, intimidate, or interfere with those seeking to obtain or provide reproductive health care services — including through assault, murder, burglary, physical blockade, and making threatening phone calls and mailings. This law also prohibits damaging or destroying any facility because reproductive health services are provided within.

Since the passage of the FACE Act, the number of violent crimes committed against reproductive health care providers and facilities has dramatically decreased. The FBI and its local, state, tribal, and federal law enforcement partners aggressively pursue all violations of the statute for eventual prosecution by local United States Attorney’s Offices and/or the Department of Justice Civil Rights Division in Washington, D.C.

In addition to the FACE Act, other frequently considered federal statutes in FACE Act investigations include:

• Arson or Bombing, Title 18 U.S.C. Section 844(h);
• Mail Threats/Threatening Communications, Title 18 U.S.C. Section 875(c);
• Interstate Threats, Title 18 U.S.C. Section 876(c); and
• Use of Firearm During the Commission of a Federal Violation, Title 18 U.S.C. Section 924(c).

Violators of the FACE Act are subject to criminal penalties, including imprisonment and fines. The severity of the punishment demands upon the nature of the offense and whether or not the person who committed the crime is a repeat offender.

It should be noted the FACE Act does not criminalize the lawful exercise of one's constitutional rights. For instance, it is not a violation to protest peacefully outside of a reproductive health care facility, including such actions as carrying signs, chanting, singing hymns, distributing literature, and shouting as part of First Amendment protected activities — as long as no threats are communicated and facility access is in no way impeded.

42 U.S.C. § 3631 Criminal Interference With Right to Fair Housing

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in
section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under title 18 or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under title 18 or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under title 18 or imprisoned for any term of years or for life, or both.


Amendments

1996—Pub. L. 104–294, § 604(b) (27), substituted "under title 18" for "under this title" wherever appearing in closing provisions.


1994—Pub. L. 103–322, § 320103(e) (1), as amended by Pub. L. 104–294, § 604(b) (15), which directed amendment in the caption by striking "bodily injury; death;" could not be executed because the words "bodily injury; death;" do not appear in the section catchline in the original.

Pub. L. 103–322, § 320103(e) (2)–(7), as amended by Pub. L. 104–294, § 604(b) (15), in concluding provisions, substituted "under this title" for "not more than $1,000," before "or imprisoned not more than one year", inserted "from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire" after "bodily injury results", substituted "under this title" for "not more than $10,000," before "or imprisoned not more than ten years", inserted "from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill," after "death results", substituted "fined under this title or imprisoned" for "subject to imprisonment" before "for any term of years", and inserted ", or both" before period at end.

1988—Cl. (a), (b) (1), (e). Pub. L. 100–430 inserted ", handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title)," after "sex".

1974—Pub. L. 93–383 inserted ", sex" after "religion" wherever appearing in cl. (a), (b) (1), and (c).

Effective Date of 1988 Amendment: Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of this title.

**Federally Protected Activities; Penalties**

Penalties for violations respecting federally protected activities not applicable to and not affecting activities under fair housing provisions of subchapter I of this chapter, see section 101(b) of Pub. L. 90–284, set out as a note under section 245 of Title 18, Crimes and Criminal Procedure.

[Note: The Fair Housing Act (Title VII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 et seq., was based on the Commerce Clause, but in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties.]

**42 U.S.C. § 14141 Pattern and Practice [of depriving rights in administration of juvenile justice]**

This civil statute was a provision within the Crime Control Act of 1994 and makes it unlawful for any governmental authority, or agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Whenever the Attorney General has reasonable cause to believe that a violation has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Types of misconduct covered include, among other things:

1. Excessive Force
2. Discriminatory Harassment
3. False Arrest
4. Coercive Sexual Conduct
5. Unlawful Stops, Searches, or Arrests

**1875 Civil Rights Acts**

*US Statutes at Large, Vol. XVII, p. 335 ff.*

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law:

Therefore,
Be it enacted, [Sec. 1] That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, . . . and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . .

SEC. 3. That the district and circuit courts of the United States shall have exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act . . .

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act ... shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy . . .
Appendix 15th Amt [1870] Fifteenth Amendment (1870), Voting Rights

Appendix 15th Amt
Fifteenth Amendment 1870
Right of Citizens to Vote

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

[Note: The Fifteenth Amendment has been described alternatively as a provision to abolish "suffrage qualifications on basis of race." (GPO, Fifteenth Amendment," at 2215.) The main issue was the attacks on African-Americans to intimidate them away from voting processes. Violent action took sharper form in the elections in 1868 well into the late 1870s. By 1876, White Democrats had regained control of many southern state legislatures. Troops were removed from the South in the same era, which marked the end of the Reconstruction era. Populist-Republican officials scooped elections well into the in the 1890s. In Giles v. Harris, 189 U.S. 475 (1903), the Court, in an opinion by Justice Holmes, refused to order the registration of 6,000 African-Americans who alleged that they were being wrongly denied the franchise, the Court observing that no judicial order would do them any good in the absence of judicial supervision of the actual voting, which it was not prepared to do, and suggesting that the petitioners apply to Congress or the President for relief.]

[Note: Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870, which had started out as a bill to prohibit state officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action—unconstitutional. The provisions aimed at official action proved ineffectual and much of it was later repealed. ]

[Note: The 1871 Act, ch. 99, 16 Stat. 433, provided for a detailed federal supervision of the electoral process, from registration to the certification of returns. It was repealed in 1894. ch. 25, 28 Stat. 36.]
CHAPTER SEVEN.

CRIMES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

SEC. 5506. Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any State, Territory, district, county, city, parish, township, school-district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment. (See 11104-11105.)


SEC. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, funds, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

Crotts v. Hanks et al., 92 U. S., 842.

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, more-
REFERENCES


