BIAS BEFORE THE LAW: THE REARTICULATION OF HATE CRIMES IN *WISCONSIN V. MITCHELL*

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> The subject of law is also the subject of the nation.
>
> Law is primarily a national institution and adherence to its rule symbolizes the imagined community of the nation and expresses the fundamental unity and equality of its citizens.
>
> Paul Gilroy[1]

The maintenance of a nation's identity *as a nation* depends crucially upon its particular historical memories and repressions.[2] Such memories can be expressed in venues and terms that resonate with existing recollections: collected somewhere, in some *form*. The law is one such form. Documents, records, transcripts, sealed with the imprimatur of governmental authority, are other, related forms. But memories needn't be official—needn't even be true in any objective sense—to have nation-making power. Movies, newspapers, art installations, poetry, can all be powerful expressions of national memory, hence national identity.

When James Byrd, Jr., a 49-year-old black man, was dragged to death behind a truck in Jasper, Texas in June of 1998, there were national memories at stake and in action. When a Jasper jury sentenced the white 24-year-old John William King to death for his role in Byrd's murder, "our" national identity was being re-cognized, *a posteriori*.[3] The capital sentence

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1. PAUL GILROY, "THERE AIN'T NO BLACK IN THE UNION JACK": THE CULTURAL POLITICS OF RACE AND NATION 74 (1991).

2. Benedict Anderson writes:

> [The] nation . . . is an imagined political community. . . . It is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion. . . . [It] is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.

BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6-7 (rev. ed. 1991).

3. Rick Lyman, *Man Guilty of Murder in Texas Dragging Death*, N.Y. TIMES, Feb. 24, 1999, at A1, A12.

represented a national catharsis, an expurgation of white guilt by association. While Jasper may have maintained two racially segregated cemeteries, while it may even have overlooked previous racist activities by King and his companions, Byrd's viciously-inflicted torture and death was seen as having gone too far.[4] Nothing less than blood vengeance, a life for a life, could possibly release the town and the nation from a disturbing sense of culpability. For few, if any, questioned the description of this murder as a crime motivated by racism: a "hate crime."[5]

The term "hate crime" is, historically speaking, new. If such things were dated precisely, its twentieth birthday would coincide roughly with the date of this publication.[6] Its connotations for a crime such as Jasper's may appear simple, common sensical—its connotations for the nation, only slightly less so. In this article, I intend to show that these appearances are deceptive. My principle argument is that throughout the past decade and a half, the term hate crime has been gradually and successfully articulated in the service of an historically-cleansed United States, an imagined nation-state of benevolent tolerance.

Over the past decade, I have been studying representations of hate crime in activist and non-profit advocacy circles, in law enforcement agencies, in courtrooms, in schoolrooms, in legal journals, and in the media.[7] This research has led me to argue that the state's role as a mediator of relations among inhabitants from many different social groups is under specific and dramatic contestation in law enforcement responses to hate crime. I have come to conclude that such contestation—explicitly over relationships between the law and bias-related violence—makes up one strand of a crucial hegemonic project: the articulation of the United States as a tolerant, multicultural nation.[8]

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4. *See generally* Clarence Page, *Jasper's Valuable Lessons for the Rest of the Nation*, CHI. TRIB., Feb. 19, 1999, at 24; Patty Reinert, *Jasper Killing Conceived in Prison, Ex-Con Says*, HOUSTON CHRON., Feb. 19, 1999, at A1.

5. The murder of Matthew Shepard, on October 6, 1998 was also termed a hate crime by many, though this label was initially contested by authorities in Wyoming where it occurred. *See, e.g.*, James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1, A17; Jay Croft, *Gay Killing Renews Penalty Debate*, ATLANTA J.-CONST., Oct. 18, 1998, at D8. The implications of various inclusions and exclusions in legal and popular definitions of hate crime are beyond the scope of this article, but are addressed in AnnJanette Rosga, Policing the State: Violence, Identity and the Law in Constructions of Hate Crime (1998) (unpublished Ph.D. dissertation, University of California (Santa Cruz)) (on file with the author).

6. *See* discussion *infra* Part IIA, for a review of the term's history.

7. This article is part of a larger project on the socio-legal constructions of hate crime by police and of police by their interlocutors in the anti-hate crime movement. *See, e.g.*, Rosga, *supra* note 5. My focus here, however, is on hate crime law and its adjudication through criminal cases, rather than the relationship of police to the category hate crime. In this article, I will generally use the popular term "hate crime," but "bias," "bias-related," and "bias-motivated" crime are other common terms.

8. "'Hegemony' implies: the struggle to contest and dis-organize an existing political formation; the taking of the 'leading position' (*on however minority a basis*)

Originally, I began my research with this question: How did it come to make "common sense" that such a wide range of events as racist attacks, "gay-bashing" (itself a relatively recent term), anti-Semitic violence, and violence against immigrants, were all traceable to the single causal sentiment of hate (however complicated the conditions that produced this sentiment might be said to be)? This led me to wonder what sorts of identities and communities were being generated by struggles to define, promote recognition of, and respond to hate crimes.[9] I have tracked the increasing institutionalization of the concept of "hate crime" and its entree into the popular lexica of U.S. culture(s), and I have endeavored to understand what makes that entree possible—and for many, desirable. Gradually, I began to see hate crime as a sign that is not only generative of meaning and identities, but which is also the effect of much larger historically and culturally located ways of knowing. These ways are themselves, I believe, as crucial to address as the acts of hate crime they are used to describe.

This article is not *about* the term "hate crime." For to write about hate crime requires one to assume more than I am comfortable assuming (about, for instance, concepts of group identity, of self-willed and self-named individuals). Rather, this piece treats "hate crime" as a sign that, like all signs, means different things in different places to different people at different times.

What has this to do with law? Law provides many of the central terms and assumptions through which hate crime has come to make sense (or not to make sense, depending on the interpreter). *Wisconsin v. Mitchell*[10] created one of the central channels through which the meaning of hate crime has solidified. In its decision, the United States Supreme Court upheld the constitutionality of a prevalent type of hate crime law. Representations of

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over a number of different spheres of society at once—economy, civil society, intellectual and moral life, culture; the conduct of a wide and differentiated type of struggle; the winning of a strategic measure of popular consent; and, thus, the securing of a social authority sufficiently deep to conform society into a new historic project. It should never be mistaken for a finished or settled project. It is always contested, always trying to secure itself, always 'in process.'"

STUART HALL, THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT 7 (1988) (emphasis added).

9. I was not alone in asking such questions. The processes by which "hate crime" has been constructed as a social problem by gay and lesbian anti-violence groups, and by organizations combating violence against women, have been traced by other scholars. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998), (describing a politicized distortion of statistics in the emergence of a so-called "epidemic" of hate crime in the 1980s and 1990s); VALERIE JENNESS & KENDALL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 22-30 (1997) (discussing the emergence and institutionalization of the civil rights movement, women's, gay/lesbian, and crime victims movements); Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564 (1998) (describing how the anti-hate crime movement arose alongside victims' rights activism in the 1980s, leading to some interesting "hybrid groups" with both overlapping and contradictory histories and agendas).

10. 508 U.S. 476 (1993).

this case, in both legal and popular fora, provide a rich set of narratives within which to read the competing versions of the United States' cultural imagination of itself. By offering an interdisciplinary, culturally-attuned analysis of *Wisconsin v. Mitchell*, one not specifically limited to pragmatic and/or jurisprudential concerns, I hope to widen the scope of discussions about state accountability for hate crime.[11] Further, by presenting this article as a revealing freeze-frame in the constantly mobile meaning-making processes of law and society, I suggest that the *way* hate crime is written about also matters.

Both theoretically and methodologically, I assume that "law," and metonymically "the state," cannot be seen as spheres and/or institutions fundamentally separate from society.[12] As the complex interactions among multiple actors, discourses, and institutions in the creation of hate crime law poignantly demonstrate, any simple model of "law and society" will fail to capture the rich complexities of the mutual constitution of law, culture, and human subjects. Because I am primarily concerned with how the sign "hate crime" functions as an ideological mobilizer, this article proceeds with what Stuart Hall, among the founders of the Birmingham school of British cultural studies and a sociologist at the Open University, calls

> [A] *discursive* conception of ideology—ideology (like language) is conceptualized in terms of the articulation of elements. As Volosinov remarked, the ideological sign is always multi-accentual, and Janus-faced—that is, it can be discursively rearticulated to construct new meanings, connect with different social practices, and position social subjects differently. . . . [D]isarticulation-rearticulation is the primary form in which ideological transformations are achieved. . . .[13]

In the first of two sections that follow, I will introduce the *Wisconsin v. Mitchell* case and some of the contexts in which it took shape. Then, I will briefly review the primary literatures with which this article is in conversation. In the second section, I will trace three discursive paths by which the rearticulation of the Janus-faced sign "hate crime" was accomplished. The history of legal debate over hate crime laws and their relationship to First Amendment controversies constitutes the first of these paths. The second path is bound up with a crucial wording difference between the Wisconsin

11. The 1999 inaugural issue of the *Georgetown Journal of Gender and Law* offers an excellent selection of articles on the issue of state accountability for domestic violence and hate crime. *See* GEO. J. OF GENDER & L. (inaugural issue, 1999). Of particular interest are the considerations, interspersed throughout the volume, of international human rights frameworks for reconceptualizing domestic approaches to violence by non-state actors.

12. I take Paul Gilroy's analysis of the complex, contradictory positions occupied by black social workers in British social service departments as a model here. *See* GILROY, *supra* note 1, at 64-69.

13. HALL, *supra* note 8, at 9-10.

statute and an original model hate crime statute written by the Anti-Defamation League of B'nai B'rith. The third and final discursive path I trace examines how the film *Mississippi Burning* functioned in representations of the case to powerfully solidify rearticulations of the term "hate crime" within popular discourse.

I.
STAGE SETTING

A. Contexts

KENOSHA, WISCONSIN, 1989. Todd Mitchell, a black teenager, was found to have instigated the racially motivated beating of a younger, white teen named Gregory Reddick. Years later, when his case was on its way to the United States Supreme Court, the *New York Times* summarized the original incident:

> One October night . . . Todd Mitchell and some friends, all of them black, returned from a viewing of *Mississippi Burning*, incensed over a scene in the movie in which a Klansman had beaten a black boy as he prayed. The group had gathered outside the Rambler apartments . . . when they spotted Gregory Reddick, 14 years old and white, across the street. "Do you all feel hyped up to move on some white people?" the 20-year old Mr. Mitchell asked his friends, all younger than he. "There goes a white boy! Go get him!" He pointed at Gregory, then counted to three. Nine of the young men crossed the street and beat the boy into unconsciousness.[14]

Mitchell was convicted under a then newly-passed Wisconsin hate crime statute, and his conviction was upheld by a Wisconsin Court of Appeals.[15] While in force, the Wisconsin statute permitted judges or juries to "enhance" the sentence of a defendant convicted of committing a crime when that defendant was also found to have "intentionally selected" his or her victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[16] As a result, Todd Mitchell's sentence for aggravated battery was increased from two years to a total of four years because he selected his victim based on the victim's race. His conviction was subsequently overturned, however, by the Wisconsin Supreme Court on the grounds that the hate crime law violated First

14. David Margolick, *Test of a "Hate Crime" Law Reaches Center Stage*, N.Y. TIMES, Apr. 20, 1993, at A14.

15. State v. Mitchell, 473 N.W.2d 1 (Wis. Ct. App. 1991), *rev'd*, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* Wisconsin v. Mitchell, 508 U.S. 476 (1993).

16. WIS. STAT. ANN. §939.645 (West 1998).

Amendment protections.[17] The Supreme Court granted certiorari in December of 1992.[18] The following summer, the Court issued its holding that the Wisconsin hate crime sentence enhancement law ("HCSE law") passed constitutional muster and reinstated the original conviction and sentence.[19]

The articulation of hate crime is context-specific. Its possible range of meanings is determined by the time, place and details of the event in question and the cultural narratives available for interpreting it. According to one popular cultural narrative in the final two decades of the 20th century (during which time the term hate crime has emerged and grown ubiquitous), the U.S. has been governed by leaders more tolerant of "difference" than its very citizens; the nation's otherwise steady social progress marred by the uneducated bigotry of aberrant individuals.[20] Intersecting this account (and supporting it when it falters), is a story of the U.S. under threat of explosion from its futile attempts to accommodate "too much difference."[21] Prominent in the hate crime narrative produced by *Wisconsin v. Mitchell* are claims for the first of these stories. However, as I will show, sounds of a third—anxiety over the never quite silent history of a nation founded on legalized inequality—can also be heard.

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17. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992).

18. State v. Mitchell, 485 N.W.2d 807, *cert. granted sub nom.* Wisconsin v. Mitchell, 506 U.S. 1033 (Dec. 14, 1992) (No. 92-515).

19. *Mitchell*, 508 U.S. at 476. *See also* State v. Mitchell, 504 N.W.2d 610 (Wis. 1993) (reinstating Mitchell's original conviction and sentence).

20. This narrative was succinctly expressed by California Representative Don Edwards in a 1985 hearing on the federal Hate Crimes Statistics Act:

> Our country is getting more complicated all the time. . . . And Washington, D.C., here in Congress, the Federal Government has to help out and explain to the people of the United States, like we do in civil rights and civil liberties, what our country's all about, and what the Constitution requires. And a lot of that has to do with getting along with each other, and insisting that we get along.

Hate Crimes Statistics Act, 1985: Hearings on H.R. 1171, H.R. 775 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 99th Cong. 30 (1985) (statement of Rep. Don Edwards).

21. Consider this quote by Morris Dees of the Southern Poverty Law Center in Montgomery, Alabama: "Historically, immigration and economic hardship have inspired racial tension and violence. . . . [Recent] contemporary conflicts reflect the growing friction generated by the increasing diversity in our society." Morris Dees, *Foreward to* JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED vii (1993). This formulation, which suggests difference is naturally provocative of violence, is not unique to legal epistemology. It has a solid foundation within social scientific theories of prejudice as well. *See, e.g.*, T. W. ADORNO, ELSE FRENKEL-BRUNSWIK, DANIEL J. LEVINSON, & R. NEVITT SANFORD, THE AUTHORITARIAN PERSONALITY (Max Horkheimer & Samuel H. Flowerman eds., 1st ed. 1950); GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); Richard D. Ashmore & Frances K. Del Boca, *Conceptual Approaches to Stereotypes and Stereotyping*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1-35 (David L. Hamilton ed., 1981). While I recognize that most who invoke such narrative constructions have a far more complex understanding of the relationships between difference and potentially violent conflict, I am arguing for attention to the available terms we have for short-hand glosses, and for an examination of the assumptions they import. For further analysis of the implications of "too much difference" narratives, see Rosga, *supra* note 5.

Out of several cases posing challenges to hate crime laws which might have gone to the Supreme Court, it is significant that the Court upheld the constitutionality of HCSE laws in the context of *Mitchell.* Such laws emerged from very particular conditions; they were, if not designed to be, then widely assumed to be applicable mainly to cases in which attacks on "minorities" had been carried out by members of "dominant groups." The extent to which the crime in this case contrasts with what was originally signified by "hate crime" is amply demonstrated by the popular coinage of the term "reverse hate crime" to describe "black on white" attacks such as Mitchell's.[22]

There is no question that *Wisconsin v. Mitchell* represented to many an ironic and troubled victory.[23] Organizations such as the Anti-Defamation League of B'nai B'rith ("ADL"), the National Gay and Lesbian Task Force ("NGLTF"), the Asian Law Caucus, the Lawyers' Committee for Civil Rights, and others, spent the better part of the 1980s working for the passage and/or enforcement of various state and national laws that would recognize and address bias-related violence. Implicit in the argumentation and organizational strategies of many of these groups has been an understanding of "hate crime" as an act unique in its violent reinforcement of group-based societal inequalities. The ADL and other advocacy organizations have lobbied for HCSE statutes since the early 1980s and analyzed the cultural, economic, and political contexts that they viewed as preconditions for the rise in hate crimes. The pressure to pass hate crime laws intensified toward the middle of the decade as civil rights groups began forming active coalitions that identified the danger of "hate violence." Together, they articulated links between growing numbers of hate crimes and the increasingly conservative policies of the era.[24]

This direct socio-political link, and the critique it signified, was severely frayed by the hegemonic representations of hate crime laws that emerged in the wake of *Wisconsin v. Mitchell.* Furthermore, while bias-related violence raised difficult questions for jurists about intentionality, the law's access to the interiority of the criminal mind, and the validity of

22. My goal is not to speculate upon *why* it was that this case, rather than another, was successful in reaching the Supreme Court. Rather, I am interested in considering the trace effects of that fact.

23. Telephone Interview with Diane Chin, Director, Racial Violence Project, San Francisco Lawyers Committee for Civil Rights (Aug. 2, 1993).

24. I draw these conclusions from extensive interviews with activists and non-profit organization workers, and from ethnographic fieldwork over the years 1988-1996 with anti-hate crime organizations in New York City, central California, Maryland, and Philadelphia. *See, e.g.,* Rosga, *supra* note 5. However, while it has been my impression that such constructions of hate crime predominate, there is certainly not unanimity *within* groups about the nature of hate crime and its causes. For instance, Robert Purvis of the Center for the Applied Study of Ethnoviolence, who graciously read an earlier draft of this article, disagreed in many ways with my characterization of the cultural weighting of hate crime laws toward crimes that reinforce existing identity-linked social inequities. Telephone Interview with Robert Purvis (July 6, 1994).

the distinction between "motive" and "action," these questions were ultimately resolved in ways consonant with a neutralized rearticulation of hate crime laws.

B. Violence, Storytelling and Law

Beginning in the mid-1980s, in response to the introduction and passage of various hate crime laws around the country, law review articles began to appear that evaluated the constitutionality of such laws, assessed the prospects for their successful implementation, and argued either for the necessity of HCSE laws or for caution regarding their potential dangers. Although the legal arguments regarding bias crime legislation are discussed in more detail below, it is worth noting here that most of this literature is concerned with the possible First Amendment ramifications of laws that specially criminalize conduct motivated by "personal opinions" or "beliefs." A subset of such material is devoted solely to the problem of hate speech. The imbrication of hate speech and hate crime in legal scholarship has had fundamental effects on the articulation of the category hate crime, as I discuss in Section IIA below.

Another prominent genre of legal writing on hate crime (much of which forms the early corpus of work by legal scholars associated with critical race theory, and which overlaps significantly with the speech-centered writing), attends to the relationship between the formal structures of legal argument and the limited range of perspectives those structures allow. In the late 1980s, lawyers interested in pushing the envelope of the law's definitions of redressable wrongs began to call for *stories*; specifically, for more victim-centered storytelling by those rendered outside the world of "reasonable men."[25] Two important examples are Richard Delgado's *Storytelling for Oppositionists and Others: A Plea for Narrative*,[26] and Mari Matsuda's *Public Response to Racist Speech: Considering the Victim's Story*.[27]

This narrative-centered strategy emerged out of the specific context of legal argumentation, in which unmarked norms (purportedly neutral with regard to sex, race, class, or other status) tend to privilege those who are white, male, or middle- to upper-class. By treating all victims alike under supposedly neutral standards, such scholars argue, the non-normative victim's experience is often rendered invisible or nonsensical. Delgado writes:

25. Perhaps the most well-known early example of this writing strategy is Susan Estrich's, *Rape*, 95 YALE L.J. 1087 (1986), in which she disrupts an otherwise dispassionate legal analysis of rape law with a first-person account of her own experience being raped.

26. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter *Storytelling for Oppositionists*].

27. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter *Public Response*].

> Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. . . . [T]he received wisdoms that serve as [legal writers's] starting points [are] themselves no more than stories. . . . Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality.[28]

Delgado claims no greater level of inherent truth for "underdog" accounts. Instead, he seeks an acknowledgment that legal principles do not emerge out of socially neutral contexts, and he proposes that a proliferation of stories, especially by "outgroups" will pluralize the law and help "lead the way to new environments."[29] Feminist legal scholar Robin West also advocates a corrective privileging of subordinated voices, arguing that the life experience of individuals without access to hegemonic forms of social power is more likely to produce just and humane legal interpretations.[30]

Interestingly, during roughly the same period that legal scholars were formulating calls for narrative and for the articulation of oppressed perspectives, other feminist and anti-racist scholars were engaged in critiques of how identity categories and narrative forms themselves have functioned to repress and distort non-hegemonic experiences.[31] Scholars engaged in this work have attended to the ways in which subjects' own narrations of themselves are fundamentally shaped (though never fully contained) by available modes of expression.[32] Joan W. Scott's article *Experience*,[33] for instance, poses challenging questions for any strategy that relies solely on victims' stories:

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28. *Storytelling for Oppositionists*, *supra* note 26, at 2440-41.

29. *Id.* at 2439-40.

30. *See* Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473 (1990). *But see* Barbara Herrnstein Smith, *The Unquiet Judge: Activism without Objectivism in Law and Politics, in* RETHINKING OBJECTIVITY 289, 307-08 (Alan Megill ed., 1994) (criticizing West's method of reaching "good judgments" as "chimerical because the idea of objectively good judgments, as distinct from judgments that are good under certain (ranges of) conditions and good from the perspectives of certain (sets of) people. . . .").

31. *See, e.g.*, HENRY LOUIS GATES, JR., "RACE," WRITING AND DIFFERENCE (1986). *See also* THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE (Nancy Armstrong & Leonard Tennenhouse, eds., 1989) [hereinafter THE VIOLENCE OF REPRESENTATION]. Of particular relevance is Teresa deLauretis's essay, *The Violence of Rhetoric: Considerations on Representation and Gender, in* THE VIOLENCE OF REPRESENTATION, at 239.

32. *See* DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING (1993) (exploring the racialization of social subjectivity). For one critique of the idea of self-as-subject, especially as it is expressed by and through identity categories, see Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism," in* FEMINISTS THEORIZE THE POLITICAL 3 (Judith Butler & Joan W. Scott eds., 1992) [hereinafter FEMINISTS THEORIZE THE POLITICAL].

33. Joan W. Scott, *Experience, in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 32, at 33.

> [Experience] serves as a way of talking about what happened, of establishing difference and similarity, of claiming knowledge that is "unassailable". . . . Experience is at once always already an interpretation *and* is in need of interpretation. What counts as experience is neither self-evident nor straightforward; it is always contested, always therefore political.[34]

Unfortunately, the contexts in which legal advocates of storytelling and theorists of narrative, identity, and representation in the humanities cross paths are relatively few. I would identify Patricia Williams's *The Alchemy of Race and Rights*[35] as one of the earliest examples. However, conversations between the two approaches are occurring more frequently of late.[36] The most promising strand of such trans-disciplinary scholarship has been fostered by the work of the late Robert Cover, whose works have been collected in a volume entitled *Narrative, Violence, and the Law*, and have spawned something of a theoretical rejuvenation in the field of law and society.[37] Martha Minow asserts that Cover's early work in *Justice Accused: Antislavery and the Judicial Process*[38]

> set in motion three captivating arguments: (1) government should be understood as one among many contestants for generating and implementing norms; (2) communities ignored or despised by those running the state actually craft and sustain norms with at least as much effect and worth as those espoused by the state; and (3) imposition of the state's norms does violence to communities, a violence that may be justifiable but is not to be preferred *a priori*.[39]

This attention to the generative power of competing normative orders, and (implicitly) to the violence inherent in establishing any one of them over others was a startlingly anthropological analysis in jurisprudential

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34. *Id.* at 37.

35. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

36. *See generally* AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); HENRY LOUIS GATES, JR., ANTHONY P. GRIFFIN, DONALD E. LIVELY, ROBERT C. POST, WILLIAM B. RUBENSTEIN, & NADINE STROSSEN, SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994) [hereinafter SPEAKING OF RACE, SPEAKING OF SEX]; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

37. NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT M. COVER (Martha Minow, Michael Ryan & Austin Serat eds., 1992) [hereinafter NARRATIVE, VIOLENCE AND THE LAW].

38. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

39. Martha Minow, *Introduction* to NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 37, at 1, 2.

scholarship. Its focus on cultural/linguistic meaning-making processes foreshadowed Cover's later (and recently quite influential) writings on the violence of judicial interpretation. His essay *Violence and the Word* begins

> Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.[40]

Such provocative claims have captured the interest of social scientists who study law, particularly anthropologists whose work begins from a complex repudiation of, and epistemological dependence upon, its forebears's foundational dichotomy between words and force. Carol Greenhouse explains that

> the roots of sociolegal scholars' concerns with law have been consistently nourished by the distinction they draw between social orders based on personal power and force and those "superior," "more advanced," or "more rational" orders based on the authority of words. . . . Modern cross-cultural research has lent support to the view . . . that law displaces violence when law is successfully institutionalized.[41]

This dichotomy between words and force structures First Amendment jurisprudence, and it has nowhere come under more sustained attack than in arguments surrounding legal responses to hate crimes.[42] In the sections that follow, I will describe the role played by the *Mitchell* case in temporarily suppressing, the fault-lines of this dichotomy exposed by hate crime legislation.

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40. Robert M. Cover, *Violence and the Word,* 95 YALE L.J. 1601-03 (1986). Further enriching the interdisciplinary reach of his work, Cover draws upon Elaine Scarry's literary/philosophical argument that violence and pain are destructive of language, and thus of the vital world-making activity of interpretation. *See generally* ELAINE SCARRY, THE BODY IN PAIN 4 (1985). For others whose scholarship spans disciplinary divides in its consideration of the relationships between violence and language see DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991); DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell, David Gray Carlson, & Michel Rosenfeld eds., 1992) [hereinafter DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE]; LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1992) [hereinafter LAW'S VIOLENCE]; THE RULE OF LAW (Robert Paul Wolff ed., 1971); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990).

41. Carol J. Greenhouse, *Reading Violence, in* LAW'S VIOLENCE, *supra* note 40, at 105, 106-07 (internal citations omitted).

42. For more in-depth analyses of the ways in which the dichotomy of words and force has structured debates over hate crime, see generally BUTLER, *supra* note 36; AnnJanette Rosga, *Ritual Killings: Anti-Gay Violence and Reasonable Justice, in* STATES OF CONFINEMENT: POLICING, DETENTION & PRISONS (Joy James ed., forthcoming 2000); Rosga, *supra* note 5.

II.
DISARTICULATION-REARTICULATION

A. The Subject of Law

Nationwide, deliberations over governmental definitions of hate crime have emerged primarily in efforts to create two different, though sometimes overlapping, legislative products: laws requiring the collection of hate crime data and laws increasing sentences for, or prohibiting, hate crimes. The meaning now conveyed by the term hate crime in the U.S. emerged during the period from 1985 to 1990, when Congress debated passage of various versions of a hate crime statistics bill. Initially this legislation referred only to crimes involving "racial, religious, or ethnic" prejudice.[43] Considerable debate ensued over the *types* of bias, according to victim identity category, that would be written into the law. One long-standing tension centered on whether to expand the named categories from the axiomatic "racial, religious, and ethnic" to include "sexual orientation" and "gender." Eventually, Congress passed the Hate Crimes Statistics Act, which included sexual orientation but not gender. It was signed into law by President Bush in 1990.[44]

Hate crime statistics were, for the most part, first generated by non-profit, non-governmental organizations ("NGOs"). Hate crimes *as such* began to be counted in the late 1970s, when the Anti-Defamation League of B'nai B'rith ("ADL") initiated a program to record anti-Semitic attacks. Such incidents, according to reports the organization collected, increased significantly from 120 in 1979, to 377 in 1980, and 974 in 1981.[45] By 1985, the "unofficial" but well-publicized numbers collected by non-profit NGOs were climbing at alarming rates.[46] In 1981, responding to this recorded increase, the ADL's legal department drafted a model hate crime bill for

43. *Hate Crime Statistics Act, 1985: Hearings on H.R. 1171, H.R. 775 Before the Sucomm. on Crime and Crim. Justice of the House Comm. on the Judiciary*, 99th Cong. 1 (1985).

44. *See* Joseph M. Fernandez, *Bringing Hate Crime into Focus—The Hate Crime Statistic Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261 (1991) (discussing the goals and legislative history of the Hate Crimes Statistics Act, as well as potential procedural difficulties predicted to arise during the year following passage of the Act).

45. JEFFREY P. SINESKY, HATE CRIME STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM AND VIOLENT BIGOTRY 1 (1988).

46. In hearings before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, Joan Weiss, Executive Director of the Institute for the Prevention and Control of Violence and Extremism, testified that, "in the State of Maryland . . . [f]ive years ago there was a large proportion of harassment and vandalism; the proportion of assaults in the last year, 1983-84, increased 50 percent," and that, "the Anti-Defamation League . . . from 1979 through 1984 . . . documented . . . a 454-percent increase in anti-Semitic acts nationally." *Hate Crimes Statistics Act, 1985: Hearings on H.R. 1171 Before the Subcomm. on Crime and Crim. Justice of the House Comm. on the Judiciary*, 99th Cong. 98-99 (1985). In the same hearings, Representative Mario Biaggi of New York reported, "overall there was a 6.7-percent increase in the frequency of anti-Semitic vandalism, and of other attacks against Jewish institutions, businesses, and homes . . . compared to 1983. . . . In 1984, there was a total of 23 bombings, arsons, and cemetery desecrations—almost twice as many as in

state legislatures to use in their efforts to combat racist and anti-Semitic incidents. This model legislation focused on using the state's power to prevent or punish bias-related attacks. The model clearly identified attacks directed against specific groups for the purpose of intimidation, and it included several components, the most significant of which for the purposes of this article is its "penalty enhancement" provision:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct).
>
> B. Intimidation is a _____ misdemeanor/felony (the degree of criminal liability should be made contingent upon the severity of the injury incurred or property lost or damaged).[47]

In other words, when someone commits what is already designated a relevant crime under this provision, and does so against a victim(s) because of "bias" against a group defined by one of the named categories, the alleged perpetrator may be charged with a more serious crime and given a harsher sentence.[48]

1983." *Id.* at 3-4. Representative Barbara Kennelly of Connecticut noted that Klan Watch, part of the Southern Poverty Law Center in Alabama, had "reported about a thousand [racial, religious, and ethnic crimes]. . . ." since 1978. *Id.* at 17. *But see* James Jacobs & Jessica S. Henry, *The Social Construction of Hate Crimes*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996) (critiquing the methods by which such statistics were generated).

47. SINENSKY, *supra* note 45, at app. A.

48. By the fall of 1998, forty-one states had enacted hate crime laws similar to the ADL model. Most of these laws were passed by state legislatures without much controversy over their purpose or function. However, dispute continues over which identity categories will be written into the law; as of this writing, sexual orientation has only been included in the HCSE laws of twenty-two states and the District of Columbia. Efforts to pass a federal hate crime sentence enhancement law have thus far been unsuccessful, in part because of the divisiveness over the inclusion of sexual orientation, which recently forestalled the passage of the Hate Crime Prevention Act of 1998. Naftali Bendavid, *Hate Crime Bill Stalls*, CHI. TRIB., Oct. 19, 1998, at 1. Introduced in November 1997, the Hate Crimes Prevention Act of 1998 (S.B. 1529) would have "[a]mended the Federal criminal code to set penalties for persons who, whether or not acting under color of law, willfully cause bodily injury to any person or, through the use of fire, firearm, or explosive device, attempt to cause such injury, because of the actual or perceived: (1) race, color, religion, or national origin of any person; and (2) religion, GENDER [sic],sexual orientation, or disability of any person, where in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce, or where the offense is in or affects interstate or foreign commerce." *Bill Summary & Status for the 105th Congress*, S. 1529 (visited Oct. 18, 1999) <http://thomas.loc.gov/cgibin/bdquery/z?d105:SN01529:@@@L>. A notable feature of this amendment is its inclusion of gender, sexual orientation, and disability. Additional components of the bill are summarized below.

> "(Sec. 5) Directs the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes and, if appropriate, amend

Since their inception, HCSE laws have been the object of substantial legal critique from a variety of perspectives. In 1992, legal scholar James Morsch wrote that despite the existence of sentence enhancement laws in more than thirty-two states—some for the better part of the past decade—there had been only two criminal convictions and two successful civil actions reported under any of the new statutes.[49] Many attorneys attributed this infrequency of attempted and successful prosecution to the difficulty of proving a prejudiced motivation for a crime.[50] At the root of this difficulty are phrases central to all hate crime laws: "because of," "on account of," "by reason of," or "on the basis of," race, religion, or whatever other categories the law includes. In order to obtain a hate crime conviction, the prosecutor must prove beyond a reasonable doubt that the defendant committed the offense "because of" hatred toward the identity group represented by the victim as perceived by the offender. According to Morsch,

> An individual's personality and psyche . . . largely determine his or her motives. The exact contours of motive, accordingly, will be within each individual's knowledge alone as personality and psyche are inherently subjective. . . . [Thus,] . . . [p]roving that racism rather than paranoia motivated the attacker's actions may be an impossible task for prosecutors given the reasonable doubt standard. . . .[51]

Morsch situates the problem with the law in the inherent make-up of the individual. He argues that the law's ineffectiveness lies not in requiring proof of motivation *per se*, but in failing to distinguish between "unconscious racism," defined as "the baggage of prejudgments and stereotypes that each individual carries with him or her when meeting a person of a

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the Federal sentencing guidelines to provide sentencing enhancements for adult defendants who recruit juveniles to assist in the commission of hate crimes." *Id.*
"(Sec. 6) Requires the Administrator of the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice (DOJ) to make grants to State and local programs designed to combat hate crimes committed by juveniles. Authorizes appropriations." *Id.*
"(Sec. 7) Authorizes appropriations to the Department of the Treasury and to DOJ to increase the number of personnel to prevent and respond to alleged violations of provisions regarding interference with specified federally protected activities, such as voting." *Id.*

49. James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 663 (1992). Robert Purvis suggests that Morsch's claim may be misleading. Since most hate crime convictions are obtained at a local level and are not appealed, it is impossible to ascertain the actual number of successful prosecutions using hate crime statutes. Attorneys involved in hate crime prosecution readily agree, however, that the laws are under-utilized, in part due to the difficulties outlined below. Telephone Interview with Robert Purvis, Center for Applied Study of Ethnoviolence (July 6, 1994).

50. Anastasia Steinberg, Remarks at the Meeting of the Hate Crime Investigators' Association (June 18-19, 1992) (on file with author). Ms. Steinberg represented the Santa Clara County District Attorney's Office.

51. Morsch, *supra* note 49, at 663-64.

different background," and "racial animus," defined as "the translation of those prejudices into actions which directly injure persons of these different backgrounds."[52]

Such arguments highlight the fact that all criminal statutes require that an immediate and individualized link be established between a perpetrator's state of mind and his or her criminal action. In this respect, hate crime statutes are no different in their fundamental assumption of Cartesian subjects, whose actions follow from individually distinct, conscious, and independent thought processes.[53] Morsch's criticism of HCSE laws can just as effectively be applied to all of criminal law, since the severity of many sentences is predicated on a determination of *mens rea*. Morsch seems to assume that *bias*-motivation operates at an ontologically unknowable, subterranean tier of the personality (the unconscious), which in turn implies that under "normal" circumstances, criminal motivations are generally conscious and accessible through objective means. This line of reasoning begins with the belief that in most situations, it is possible to separate conscious from unconscious thought to an extent sufficient for criminal prosecution. In order to sustain this belief one must also believe that it is generally possible to establish a direct link between conscious thoughts and actions, and analogously, an individual cause and its effect. One must also believe that a perpetrator's motives in non-bias-related crime can be assessed without encountering the troubles of subjectivity and interpretation.

Events we now call "hate crimes" appear to disturb this paradigm enough to warrant much hue and cry. On the one hand, detractors of HCSE statutes argue that these laws take aim at actions that are too *different* from those which "regular" criminal statutes address. In Morsch's terms, once one has acted upon "unconscious racism" it would appear that "racial animus" has occurred, but since the motivating unconscious is "subjective," racial animus must be linked to something else—something *conscious*—in order to be identified as racially-motivated. On the other hand, many commentators have complained that HCSE statutes *create* difference where none actually exists. For instance, in commenting upon the possibility that Georgia might again consider passing a 1999 HCSE law, the Reverend Ron Crews, a Republican Georgia state representative, asked rhetorically "What about married white men who are 50? . . . Is that a

52. *Id.* at 686 n.168. *See also* Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845 (1990) (pointing to the "unconscious racism" of prosecutors in deciding whether or not to charge suspects under bias crime statutes as one explanation for such statutes's under-utilization).

53. The problematic subject assumed here has been aptly described by (summarizing Foucault) as "the instrumental military subject" whose intentions and words are directly materialized into destructive deeds, the consequences of which he controls and, I would add, whose motivations are transparently known to himself. Judith Butler, *Contingent Foundations: Feminism and the Question of 'Postmodernism,' in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 32, at 10.

category that should be specialized? Intimidation and harassment ought to be prosecuted because they're wrong, not just because of the victim."[54]

Between the poles of these arguments, the subject of hate crime law ceases to be a socially, historically located subject. The defendant's motives and actions are solely her own,[55] and she is "naturally" provoked by "difference." So it is that, almost immediately, what became most noticeable about HCSE laws was *not* any implicit acknowledgment of the existence of group-based inequalities and historical oppression, but the threat that such laws posed in suggesting the legal system might try to discern—and prosecute—the contents of an individual's mind. This threat emerged as the most salient feature of the debate surrounding hate crime laws for two reasons. First, HCSE laws, no matter how neutrally worded, inscribe within the law an implicit acknowledgment that the nation's founding freedoms—individual equality and progressive tolerance—belonged to select groups only. HCSE laws suggest that the story of poisonous economic, social, and structural inequalities is not over, however frenetically our cultural institutions document the past-tense-ness of violence and bigotry.[56]

Second, and I believe more significantly, HCSE laws by their very practical difficulties, threaten existing models of criminal justice in the U.S. In their persistent *socialness,* hate crimes undermine models of individual culpability that are already under siege. When the city of Jasper tore down the fence dividing its black and white cemeteries during the trial of John William King, when the fence removal was reported as the symbolic elimination of a "remnant" of past discrimination, the act expressed the cultural knowledge that King's guilt *cannot* be his alone, any more than Todd Mitchell's guilt could be confined to his individual psyche.

I believe that HCSE laws are both so vehemently supported and so relentlessly resisted because they have the potential to further undermine confidence in the U.S. criminal justice system. I read the sign "hate crime" together with several other signs: national concern over exploding prison populations; the widely circulated news that John William King began planning the murder of a black man while a member of a white supremacist prison gang; and, finally, the creation of a hate crime prevention program, partially in response to the recent Littleton, Colorado school shootings. These disparate signs, I will argue, all suggest an emerging sense that individualistic models of criminal justice simply fail to appreciate the crucial, interconnected socialness of our actions.

54. Jay Croft, *Gay Killing Renews Penalty Debate,* ATLANTA J.-CONST., Oct. 18 1998, at D8.

55. Gender equity notwithstanding, the overwhelming majority of hate crime perpetrators continue to be male.

56. *See, e.g.,* Page, *supra* note 4, at 21 ("In one particularly notable gesture of goodwill, black and white residents tore down a fence that had separated black and white graves in a local cemetery, a relic of the days of legal segregation.").

B. . . . But Words Will Never Harm Me

In the late 1980s, the law's requirement that the degree of criminality be measured by the strength of individual motive combined synergistically with the eruption of fear over the threat posed by "political correctness." In a process too complex to fully trace here, the 1990s saw the issue of bias-motivated violence caught up in and transformed by the vitriolic public debate over hate speech.[57] Hate crime laws and bias-crime prevention plans began to be collapsed in the public imagination with anti-pornography ordinances, university speech codes, and other perceived forms of censorship. For the opponents of hate *speech* restriction, laws criminalizing bias-related violence were themselves seen as a form of state violence toward the very centerpiece of democracy: the protection of free expression.[58] Thus, in what emerged at the beginning of the decade as the most salient—and politically explosive—rearticulation of the hate speech debate, hate crime laws were analogized to the policies preceding the German holocaust, suggesting that state restrictions on expression of any kind would lead to genocide.[59]

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57. A vigorous debate among legal scholars, most prominently Richard Delgado, Susan Gellman, David Kretzmer, Charles Lawrence, Mari Matsuda, Clarence Post, and Nadine Strossen, sparked a parallel course in the print media. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Speech on Campus*, 1990 DUKE L.J. 431; *Public Response*, *supra* note 27; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; George Dukakis, *Criticism of George Bush's Position on National Endowment for the Arts and Hate Crimes Statistics Act*, NAT'L REV., May 14, 1990, at 16; Nat Hentoff, *Beyond a Burning Cross: Hate Crime Law Has Frightening Implications*, L.A. DAILY J., Mar. 31 1992, at 17. The years 1993-94 marked a publication explosion in the scholarly community outside the law review circuit. *See, e.g.*, Brief Amicus Curiae of the National Black Women's Health Project in Support of Respondent, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (No. 90-7675); STANLEY FISH, THERE'S NO SUCH THING AS FREE (1994); CATHERINE A. MACKINNON, ONLY WORDS (1993); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994); Judith Butler, *Burning Acts: Injurious Speech*, *in* DECONSTRUCTION IS/IN AMERICA 149 (Anselm Haverkamp ed., 1995); Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, *in* SPEAKING OF RACE, SPEAKING OF SEX, *supra* note 36, at 17.

58. I do not mean to suggest that there are easy or transparent distinctions between violence and speech. I merely wish to point out the rather astonishing ease with which debates over the status of speech-as-violence eclipsed public—or perhaps I should say scholarly—concern about bias-related murders and assaults. This phenomenon is more fully explored in Rosga, *supra* note 5.

59. *See generally* Gellman, *supra* note 57. This idea is also powerfully articulated in texts devoted to "the Skokie Case" in which the American Civil Liberties Union successfully defended the right of National Socialist Party of America members to march through a small town in Illinois, against the objections of holocaust survivors. *See generally* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979). See also DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM,

This rearticulation was possible because one of the principal modes of access to the defendant's "motive" (and often the only one) has been the defendant's speech during (or soon before) the crime. Prosecutorial method calls for the location of witnesses who will attest to incriminating speech by the defendant (if the defendant himself will not do so), the recording and transcription of the reported speech, and finally, the creation of an interpretive frame within which the speech event will be read as evidence of choice, selection, motive, or intent.[60]

This framing of the debate has had the effect of containing a broad spectrum of positions into a polarized field in which the two sides have been identified as free speech and equality. A prominent figure in the debates over the regulation of racist speech, Mari Matsuda has characterized the two sides as "the victim's story of the effects of racist hate messages" and "the First Amendment's story of free speech."[61] I have taken my "free speech" and "equality" nominalizations from her article *Public Response to Racist Speech*, in which she argues,

> When the legal mind understands that reputational interests, which are analogized to the preferred interest in property, must be balanced against first amendment interests [as is done by exceptions to First Amendment protection in cases of libel], it recognizes the concrete reality of what happens to people who are defamed. . . . The selective consideration of one victim's story and not another's results in unequal application of the law . . . when victims of racist speech are left to assuage their own wounds, we burden a limited class: the traditional victims of discrimination.[62]

Thus, she argues, the "equal treatment" provisions of the Fourteenth Amendment must be balanced against the provisions for the protection of expression in the First Amendment.

Defenders of the right to freedom of speech argue that since speech can be used to prove the existence of a punishable motive, it is speech itself which is being punished by hate crime laws. As a result, the legal determination which must be made is whether hateful or prejudiced speech is protected by the First Amendment. Those in favor of HCSE laws argue that

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COMMUNITY, AND THE FIRST AMENDMENT (1985), for a scholarly legal treatment of the case.

60. The definition of "incriminating" speech has been assumed, more or less, to be relatively unproblematic. Usually, it involves a "commonly recognized slur" referring to the legal group attacked, or a direct statement of intent to select a "representative" of that particular group.

61. *See Public Response*, *supra* note 27, at 2375-76.

62. *Id.*

speech is merely "circumstantial evidence" of the criminal *action* of attacking a victim because of his or her group status. Thus, no First Amendment questions are raised.[63]

The debate was brought to a confusing head with the Supreme Court's ruling in *R.A.V. v. Minnesota,*[64] the only case concerning HCSE laws to precede Mitchell's. In this case, a white male was charged under a Minnesota hate crime statute for burning a cross in a black family's yard. The Court struck down the statute, finding that it unconstitutionally impinged upon free expression. Cross-burning was interpreted as an act of symbolic expression by the Court. Much of the rearticulation of hate crime as a new legal category turns upon this decision and upon its subsequent effect on interpretations of the Wisconsin hate crime statute in *Mitchell.*

The St. Paul "Bias-Motivated Crime" Ordinance at issue in *R.A.V. v. Minnesota* provided that:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[65]

Though the ordinance was recognized as applying only to expression that could be considered "fighting words" (a category of speech excluded from protection under the First Amendment since *Chaplinsky v. New Hampshire*[66]), the Court found that it nevertheless violated the First Amendment by specifying a subtype of inflammatory expression for prohibition. "In our view, the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech."[67] The Court held that by distinguishing expression that would arouse hostility "on the basis of race, color, creed, religion, or gender," the ordinance made

63. The degree to which this debate thoroughly contained the terms in which *Wisconsin v. Mitchell* could be discussed is evidenced by the fact that even the American Civil Liberties Union was divided along its lines. The national office of the ACLU submitted an amicus brief to the U.S. Supreme Court in support of the State of Wisconsin, while the ACLU of Ohio submitted a brief in support of Todd Mitchell. *See* Bernard James, *May Criminals Be Punished More Severely for Selecting Victims on the Basis of Race or Other Protected Status?*, U.S. SUP. CT. PREVIEW 8 (1993). Implicit in both arguments is, of course, a collective agreement that speech is more equal to thought than it is to action. *Cf.* Delgado, *supra* note 57, at 135-49, 172-79 (discussing the tangible impact of racial insults and the existence of incitement, libel, and fighting words as categories of speech that are exempt from First Amendment protection).

64. 505 U.S. 377 (1992).

65. *Id.* at 380 (*citing* St. Paul, Minn., Legis. Code § 292.02 (1990)).

66. 315 U.S. 568 (1942).

67. *R.A.V.*, 505 U.S. at 387.

a proscription based on "content."[68] Justice Scalia, writing for the majority, dismissed as "word-play" the notion put forward by Justice Stevens that the ordinance was directed "not to speech of a particular content, but to particular 'injur[ies]' that are 'qualitatively different' from other injuries."[69] Scalia replied,

> What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.[70]

This dismissal never mentioned whether or not the Court would find the harms of bias-motivated violent behavior to be any more distinctively severe than the harms of bias-motivated expression.

In his analysis of *R.A.V.,* Derrick Bell argues that the Court erred by holding the Minnesota statute to an unjustifiable standard in light of precedents, set by *Chaplinsky* and other cases dealing with exceptions to a blanket protection of all expression.[71] Bell asserts that the "fighting words" doctrine (as defined in *Chaplinsky*[72] and refined in *Brandenburg v. Ohio*[73]) does not require governments to be "content-neutral" in their evaluation of whether speech can be proscribed when that speech has the likelihood of producing certain reactions in its hearers.[74] He objects to the Court's particular "separation of speech and non-speech elements of communication," in which it analogizes hate speech to a noisy sound truck.[75] As Bell quotes the Court,

> Both [fighting words and a noisy sound truck] can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on

68. *Id.* at 391.

69. *Id.* at 392.

70. *Id.* at 392-93.

71. DERRICK BELL, CONSTITUTIONAL CONFLICTS 335-37 (1997).

72. 315 U.S. 568 (1942).

73. 395 U.S. 444 (1969).

74. BELL, *supra* note 71, at 334. *Brandenburg* and *Chaplinsky* offer contrasting criteria, according to Bell, for the kinds of probable reactions that can justify an exception to governmental protection of speech. While *Chaplinsky* permits the restriction of words "which by their very utterance inflict injury and tend to incite an immediate breach of the peace" (315 U.S. at 572), *Brandenburg* requires "that for speech to be proscribable it must first advocate unlawful action or violence, *and* be likely to incite or produce such action." BELL, *supra* note 71, at 334-36. Bell's point, as I understand it, is that the governments are entirely within their constitutional powers when they use the content of speech to evaluate its likelihood to produce such reactions. Once an expression is identified as falling within these exempted regions, it may be subject to governmental non-neutrality.

75. BELL, *supra* note 71, at 336.

> hostility—or favoritism—towards the underlying message expressed.[76]

Here the Court suggests that fighting words are like noise: assaultive in form, not content. This construction separates "use" from "underlying message," a distinction Bell rejects, instead arguing that the correct analogy would be to compare hate speech to obscene speech.

> Hate speech is not merely "noise" or "non-speech". . . . [It] is deplorable because of its expressive and communicative impact. In this aspect it is more similar to obscene speech—speech this society chooses not to protect because we, through our elected bodies, deem it morally unacceptable and offensive.[77]

Bell and other critical race theorists argue that hate speech constitutes fighting words because its *content* injures when it is directed at an individual. Thus, while the Court in *R.A.V.* is prepared to draw a clean line between form and content, and to declare the government's obligation to content-neutrality, critical race theorists counter with an eraser, and reply that content *is* the form. As Henry Louis Gates, Jr., puts it, "the 'fighting words'/ 'assaultive speech' paradigm analogizes racist expression to physical assault."[78] To this Gates objects that, "[i]n arguments of this sort, the pendulum has swung from the absurd position that words don't matter to the equally absurd position that *only* words matter."[79]

This debate, then, set the parameters within which the Wisconsin HCSE statute in *Mitchell* would be evaluated. In justifying its reversal of the Wisconsin sentence enhancement statute, the state Supreme Court turned to the Supreme Court's decision in *R.A.V.* The Wisconsin Supreme Court held that the state's hate crime law punished *subjective mental processes* by "punishing what the legislature has deemed to be offensive thought." It found further that the statute was unconstitutionally overbroad because "[a]side from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect on free speech."[80]

Thus, by the time Mitchell's case had reached the Supreme Court, much of the rearticulation of hate crime had already occurred. Legal debate, along with popular representations of hate crime, effectively shifted the emphasis in the popular understanding of "hate crime" from an appropriate response to the causes and harms of bias-motivated violence, to problems of restricting hate *speech.*

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76. *Id.* (*quoting R.A.V.*, 505 U.S. 377 at 386).

77. BELL, *supra* note 71, at 336.

78. SPEAKING OF RACE, SPEAKING OF SEX, *supra* note 36, at 27.

79. *Id.* at 54.

80. State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992).

III.
SPLITTING BIAS FROM VIOLENCE

> [T]he riddle of neutrality [is that g]overnmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus symbolically reinforces them.
>
> Martha Minow[81]

> The attempt to split bias from violence has been this society's most enduring and fatal rationalization.
>
> Patricia J. Williams[82]

Prior to the creation of hate crime statutes, racist and anti-Semitic attacks could not be punished *as such* under state laws. If local authorities wished to bring more than misdemeanor charges against members of the Ku Klux Klan engaged in acts of harassment, they would have had to turn to federal provisions against the violation of the victims' civil rights.[83] Under provisions of the United States Code—provisions building upon Reconstruction Era statutes—the federal government may have jurisdiction to prosecute certain local crimes if they involve both the use or threat of force, and the willful interference with a federally protected right, and if this interference is "because of" or "on account of" the victim's "race, color, religion or national origin."[84] However, Michael Sandberg explains that,

> because the resources the federal government can devote to this kind of prosecution are limited, federal jurisdiction is invoked on a predictably selective bases [sic]. Typically, federal charges are brought under circumstances that suggest that the federal interest [in protecting civil rights] has not been adequately served by prosecution at the local level.[85]

Of note, the Reconstruction Era statutes allowing prosecution of "private" acts that violate an individual's civil rights do not specifically criminalize "bias" or the targeting of particular *named* groups. Like the Fourteenth Amendment, these statutes were written in response to white attacks on "Negroes," or to acts of ongoing anti-black discrimination in the decades following the Civil War, but they do not actually mention race. Instead, the statutes require "equal protection under the law." It wasn't

81. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987).
82. WILLIAMS, *supra* note 35, at 61.
83. *See* Michael A. Sandberg, *Bias Crime: The Problems and the Remedies, in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 193, 197 (Robert J. Kelly ed., 1993).
84. 18 U.S.C.A § 245 (West 1998).
85. Sandberg, *supra* note 83, at 197.

until 1969 that a civil rights bill explicitly identified its criteria as "race, color, religion or national origin."[86]

> 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. . . . They shall be fined . . . or imprisoned. . . .[87]

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . whereby another is injured in his person or property . . . the party so injured or deprived may have an action for the recovery of damages. . . .[88]

So, to some extent, federal law *has* specifically criminalized a subsection of acts that today would be widely regarded as hate crimes. And categories like "race" and "religion" had certainly entered the law elsewhere with regard to whether classifications would constitute a punishable offense, most prominently in cases regarding racial segregation. But penal code statutes codifying the criminality and punishability of physical, verbal, or symbolic attacks by private individuals did not begin to specify particular group categories or prejudicial motivation until the advent of hate crime laws in the 1980s.[89]

Thus, HCSE laws are relatively unique in their institutionalization of identity categories within criminal laws. As a result, they are especially fruitful locations for the examination of "identity" and "difference" as these are constructed, negotiated, and regulated by legal institutions. Anti-hate crime groups have often sought HCSE laws in order to force recognition of the violent effects of material inequality organized by socially constructed identity categories. Paradoxically, writing the categories into law also naturalizes and further enforces them.[90] Hate crime laws, even more

86. 18 U.S.C.A. § 245 (West 1998).

87. 18 U.S.C.A. § 241 (West 1982 & Supp. 1999). An 1866 predecessor to 18 U.S.C. § 242, which was aimed specifically at law enforcement officers as opposed to private individuals, did suggest context, however, when it criminalized the infliction or "different punishment, pains, or penalties . . . by reason of [the victim's] color or race, than [are] prescribed for the punishment of white persons." Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1868). The right of the federal government to make increased use of this statute against private perpetrators of racist violence has been proposed in Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L REV. 689 (1986).

88. 42 U.S.C. § 1985(3) (1982 & Supp. 1999).

89. Thanks to Diane Chin, former Director of the Racial Violence Project, San Francisco Lawyers' Committee for Civil Rights, for pointing out two exceptions to this claim. Within civil rights laws of the 1960s, there are criminal provisions under the Voting Rights Act and the Fair Housing Act which do issue criminal penalties for race-based discrimination in housing or voting activities.

90. This paradox is, of course, well known and discussed widely, particularly within feminist jurisprudence. *See generally* Minow, *supra* note 81, at 12-14; CORNELL, supra note 40; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d

than anti-discrimination laws, vividly demonstrate the legal system's configuration of intergroup relations as an arena of internally coherent, self-motivating "groups," in inherent and eternal conflict with one another.[91] Like the controversial *Bakke* case,[92] *Wisconsin v. Mitchell* throws legal efforts to define and punish *racism* into crisis via its re-institutionalization of "race."

Because hate crime laws are drawn with neutrality as a goal, their result has been to equalize identities, regardless of social context, and to naturalize conflict between them. Hate crime laws assume first that it will be possible to identify both perpetrators' and victims' category membership (police hate crime report forms detail a list of possible identities: "black," "Hispanic," "heterosexual," "homosexual," "Jewish," "Muslim," "Protestant," etc.), and second, that hate crime is always "intergroup" (that is, the perpetrator and victim "belong" to different groups).[93] This fails to take account of, for example, cases of anti-gay violence in which the perpetrator has had sex, on one or more occasions, with the victim before attacking him. According to many police officers, this would indicate that the perpetrator belongs to the same sexual orientation "group" as the victim, and that the attack is therefore not a hate crime. Finally, since additional punishment accrues for attacks "based on" religion, for instance, an assault on a "Protestant" by a "Jew" is the legal equivalent of an anti-Semitic assault. The state is re-asserted as the neutral (identity-less) arbiter of "naturally" occurring hostilities between "different" but equally empowered groups.[94]

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ed. 1994); Drucilla Cornell, *The Philosophy of the Limit: Systems Theory and Feminist Legal Reform, in* Deconstruction and the Possibility of Justice, *supra* note 40, at 68.

91. Henry Louis Gates, Jr., makes the same argument about support for hate speech restrictions in critical race scholarship. He argues that

> critical race theory sees a society composed of groups; moral primacy is conferred upon those collectivities whose equal treatment and protection ought to be guaranteed under law. . . . And yet the very importance of these social identities underscores one of the most potent arguments for an individualist approach toward the First Amendment. . . . [T]he meaning of all our social identities is mutable and constantly evolving, the product of articulation, contestation, and negotiation.

Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment, in* SPEAKING OF RACE, SPEAKING OF SEX, *supra* note 36, at 17, 51.

92. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 271-72 (1978), the Supreme Court found the affirmative action program at the Medical School of the University of California, Davis unconstitutional for its consideration of applicants' race in admissions decisions. The Court ruled that the petitioner, a white applicant who had been denied admission, was correct in his contention that the special admissions program violated Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment.

93. *See generally* UNITED STATES DEP'T OF JUSTICE, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION (1991); UNITED STATES DEP'T OF JUSTICE HATE CRIME DATA COLLECTION GUIDELINES (1991).

94. Critical race theorists, among others, have argued for writing the historical context of racism into the law. For instance, Matsuda argues for the use of three criteria in identifying racist hate messages: "1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutory, hateful, and degrading." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's*

Within the language of hate crime laws and the debates over them, several elements have lent to the individualization and de-historicization of hate crime. The Supreme Court's ruling in *Wisconsin v. Mitchell,* and the terms in which the case was represented in the media and in legal scholarship, significantly amplified these elements. Specifically, the Court deemed the much fretted-over problem of "motive"—and its problematic access through speech—to be a non-issue. The disappearance of the problem of motive occurred simultaneously via the semiotics of both legal and extra-legal cultural texts. The legal text at issue was the Wisconsin hate crime statute, which differs crucially in its wording from dozens of otherwise similar state laws. The cultural text (which became a significant part of both legal and popular representations of the case) was the film, *Mississippi Burning.* Readings of the statutory provisions and the cultural text structured each other and together provided the conditions of possibility for current understandings of hate crime.

What made Todd Mitchell's violence bias-related? His motive. What provided evidence of his motive? His speech. Therein lies the principal conundrum of hate crime laws. To eliminate speech from the prosecution is to eliminate motive; to eliminate motive is to eliminate the only possibility of a socio-political critique provided by hate crime laws. Theoretically at least, such laws *might* have had the potential to signify a strong state response to attacks that violently enforce and perpetuate societal prejudices and inequalities. As rearticulated, however, they operate to naturalize intergroup conflict and to reduce complex social relations to pop-psychological expressions of "hate."

With the *R.A.V.* and Wisconsin Supreme Court decisions, it seemed that hate crime laws might not survive in any form. However, by means of a small but significant difference in the wording of the Wisconsin law, the Court was able to deny claims brought by First Amendment defenders that the law punished "thought" not "action." The phrases lawyers found so problematic in the ADL model statute: "because of" or "on the basis of" were supplanted in Wisconsin's case by a new phrase, "intentionally selected."[95] This simple addition produced a subtle rhetorical shift in the description of "motive."

Story, 87 MICH. L. REV. 2320, 2357 (1989). On the other hand, Henry Louis Gates, Jr., provides an incisive critique of such proposals: "what trips up the content-specific approach is that it can never be content-specific enough." Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment, in* SPEAKING OF RACE, SPEAKING OF SEX, *supra* note 36, at 32.

95. The relevant portion of the statute reads:

(1) If a person does all of the following, the penalties for the underlying crime are increased . . . :

. . .

(b) Intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.

Motive, in the ADL's model legislation, refers to the question of why the perpetrator *attacked* the victim. In the Wisconsin statute, as argued by both sides in *Wisconsin v. Mitchell,* motive refers to the question of why the perpetrator *chose the victim* to attack. This shift partially accounts for the initial success of Mitchell's attorneys in arguing that the statute violated the First Amendment: they could make a rhetorically persuasive claim that the act criminalized under this law is "choice" (the inalienable foundation of a marketplace culture, the right to comparison shop). In their argument, "choice" or "selection" is more nearly equal to thought than to action; thus, to punish Mitchell more severely for choosing a victim on the basis of race is to punish him for his "racist" (and constitutionally protected) thoughts. From the prosecutor's point of view, and echoed in the Clinton Administration's amicus brief, it was indeed Mitchell's *selection* of his victim on the basis of race that made his actions more criminal. According to the prosecutors, "selection" is an action, not a thought.[96]

Implicit in both sides of the argument—and perhaps in the very concept of HCSE laws—is the assumption that somehow the underlying crime, the violent beating, would have happened to *someone* regardless of the perpetrator's motive. *"Because of"* no longer describes the reason for the attack in the first place. It describes—and here is where the "hate" element enters—an act of discrimination in the perpetrator's choice of victim. This line of reasoning allowed the State to argue that the hate crimes statute was, in fact, not significantly different from civil anti-discrimination laws. Furthermore, if the Wisconsin statute were to be overturned because "selection equals thought" the door would open for First Amendment challenges to every anti-discrimination law currently in force.[97] In all of its conservative wisdom, the Court chose to avoid this path toward potential legal havoc, and simply ignored the troubling collapse of clearly delineated spheres of thought and action, prejudice and behavior.

In sum, the single, rather anemic, reference in hate crime laws to the existence of something less than multicultural harmony in the relations between private U.S. individuals and their fractious histories and identities, was significantly neutralized by the Supreme Court decision in *Wisconsin v. Mitchell.* A law that began as an attempt to criminalize *attacks* instigated because of racism, homophobia, or anti-Semitism, was rearticulated as the criminalization of the perverse individual *decision* to direct an already

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WIS. STAT. ANN. § 939.645 (West 1989-1990).

96. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 7-8, Wisconsin v. Mitchell, 508 U.S. 476 (1993) (No. 92-515).

97. The United States echoed the prosecution's argument in its assertion that "Wisconsin's protection of particular groups through the criminal process is a form of antidiscrimination law. The constitutionality of the provision is confirmed by this Court's decisions upholding other federal and state antidiscrimination statutes." *Id.* at 16.

planned attack at a member of another group, against which one "naturally" has hostile feelings. Thus the attack, and the violence itself, is dissociated from racism, homophobia or anti-Semitism and re-located in that sphere of "meaningless" "random" violence which everyone in the country fears equally.[98]

While the legal interpretation of *Wisconsin v. Mitchell* consolidated a conception of hate crimes as individualized episodes of last-minute prejudice, and while it generated additional material for the current public hysteria over violent crime, it did not produce an image of equally distributed violence. Nor did it completely eliminate any reference to an underlying *reason* for Mitchell's bias-motivated "selection." The troubling political and socio-economic inequalities suggested by many grassroots anti-hate crime activists were relegated to the realm of subtext. The articulation which emerged victorious offered "reasons" which both enhanced the legal re-figuration of the state as benevolent guarantor of equality and reified images of the violent black male and innocent white victim.

IV.
THE SUBJECT OF THE NATION

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie *Mississippi Burning* where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.

98. My point here is not that now the law *cannot* be used to punish attacks that would not have occurred but for the racism or other bigotry of the offender. Rather, I am arguing that it is significant that, in order to protect existing models of anti-discrimination law, the courts could only uphold a version of HCSE laws that rhetorically permitted a dissociation of state-defined and socially-reified identity categories and the actions by non-state actors that function to enforce those categories. The *Mitchell* decision left in place the hegemonic narrative of the U.S. as constituted by ontologically different "groups" who are clearly distinguishable from one another, whose options and choices are inevitably shaped by these differences, and who are yet to be treated as though they are identical under law. What is not addressed here is the state's role in maintaining the very identity categories and inequalities that produce the conditions in which hate crimes are thinkable and do-able.

> The group ran towards Reddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.[99]

A curious feature of the "facts . . . not in dispute" in representations of Todd Mitchell's crime is the ubiquitous inclusion of the perpetrators' previous viewing and discussion of the film *Mississippi Burning* prior to their attack on Reddick. The consistent presence of this "fact"—which, by virtue of its repetition, became the identifying feature of the case—is curious because it is not, strictly speaking, legally necessary to the hate crime argument. Proof that Mitchell watched a film with the potential to incite racial animosity was not necessary to establish his racially biased motive in urging his friends to beat up Reddick. Nor was it necessary to show that he had a discussion with others about an emotionally traumatizing scene which exemplifies the history of racism in the U.S. not only in that it portrays the beating of a black boy praying, but in how it portrays that event. None of this evidence was necessary, given that what Mitchell allegedly said to his friends was legally sufficient to prove that he possessed a racially biased motive.[100] He told his black friends to "go get" a "white boy;" they did.[101] Once these two facts were established, statutory elements of a hate crime conviction had been fulfilled. What purpose, then, did the information about *Mississippi Burning* serve? What were the effects of its inclusion?

David Luban has written that "[l]egal argument is a struggle for the privilege of recounting the past. . . . [It] succeeds when it demonstrates that a local narrative has reenacted an episode of a political narrative, and thus that the two have become stitched together, paired in affinity."[102] A "local narrative," in Luban's terms, is a narrative that "constitut[es] 'the facts of the case at hand.'" By contrast, a "political narrative" is one that situates a particular law historically, giving it an origin story and, hence, a particular

99. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992). The Wisconsin Supreme Court issued this opinion on June 23, 1992.

100. It is even less relevant when there is at least some doubt as to whether he saw the movie or discussed the scene. I have found no account stating that Mitchell himself viewed the movie. Further, out of all of the reasonably accessible representations of the evening in question, only the Wisconsin Court of Appeals opinion notes that "[t]here was no evidence that Mitchell was involved in [any discussion of] that part of the movie where a white man beat a young black boy who was praying." State v. Mitchell, 473 N.W.2d 1, 3 (Wis. Ct. App. 1991).

101. Under the Wisconsin penal code, one can be charged with and convicted of committing a crime, even if one did not directly commit it, where one was "concerned in the commission" of that crime. This includes intentionally aiding or abetting the commission of a crime, being party to a conspiracy with another to commit a crime, or procuring another to commit a crime. WIS. STAT. ANN. § 939.05 (West 1996).

102. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152, 2221 (1989).

set of meanings.[103] Luban's argument provides a useful framework for understanding the relationship between the case, *Wisconsin v. Mitchell*, and the film, *Mississippi Burning*. Accounts of the case can be seen as a local narrative "mirrored" in the larger political narrative which is exemplified by the film, the history of U.S. race relations during the 1960s, and the state's fight against racists. According to Luban, this kind of "mirroring" functions to fuse "distinct historical episodes . . . into political equivalence."[104]

The implication of these accounts is, of course, that there is some sort of causal relationship between viewing *Mississippi Burning* and Mitchell's instigation of the beating, just as there is a causal link drawn from the instigation to the beating itself. Each narration places these events in chronological order, as though they flowed naturally and directly from one to the next. Their close proximity in time is taken to indicate causality. Aside from the trial court hearing and possibly the early Kenosha news reports, none of the authors takes the additional step of saying Mitchell's verbalizations *led to* or *caused* his friends to beat Reddick. Nevertheless, this connection is understood to be a reasonable assumption (particularly after the fact of Mitchell's conviction on exactly those grounds). Similarly, it is presented as a reasonable assumption that the viewing of *Mississippi Burning led to* or *caused* Mitchell to provoke his friends into beating Reddick.

The courts and the media are likely to have integrated the *Mississippi Burning* evidence on the grounds that this information indicated something about Mitchell's "state of mind." The foreshadowing implied by the film's viewing—and the discussion of the scene in which the Klan beats a black youth—effectively crafts the subsequent attack on Reddick into the evening's narrative climax. What is the "state of mind" suggested by the linkage of *Mississippi Burning* to an attack by black youths against a white youth? Perhaps more importantly, how did the linkage of the Mitchell attack with the Klan attack portrayed in the movie simultaneously re-construct each event in terms of the other? How might the construction of Mitchell's crime have re-remembered the violence of the history recounted by the film?

Mississippi Burning, made by British filmmaker Alan Parker, was released in December of 1988, and widely panned for its historical inaccuracies.[105] Its central protagonists are two white FBI agents, played by Gene Hackman and Willem Dafoe, who are sent to Mississippi to investigate the

103. *Id.* at 2152.

104. *Id.* at 2154.

105. *See, e.g.*, Sundiata K. Cha-Jua, *Mississippi Burning: The Burning of Black Self-Activity*, 44 RADICAL HIST. REV. 125 (1989); Patrick Rael, *Freedom Struggle Films: History or Hollywood?*, 22.3 SOCIALIST REV. 119, 120 (July-Sept., 1992); Richard Corliss, *Fire This Time*, TIME, Jan. 9, 1989, at 56; Jack E. White, *Just Another Mississippi Whitewash*, TIME, Jan. 9, 1989, at 60.

disappearance of three civil rights workers (Schwerner, Chaney, and Goodman), during the Freedom Summer black voter registration drive in 1964. The film re-narrates the history of that summer as a battle between the forces of good, federal law enforcement agents who are "so zealous in [their] defense of black rights that [they] resort[ed] to vigilantism to promote them," and evil, rural, southern, white racists, with black characters in the supporting role of passive victims.[106]

In the scene allegedly discussed by Mitchell and his friends prior to assaulting Reddick, the Ku Klux Klan attacks a group of black choir members as they are leaving church at night. The attack is an act of retaliation for some congregants' cooperation with the FBI investigation. As several people are chased and beaten by men in white hoods, a black boy (who has spoken to the FBI agents in a previous scene) drops to his knees in prayer. A Klansman kicks him in the face and threatens to kill him if he talks again.

The film concludes after the agents trick the racists into confessing—bizarrely, by "import[ing] a free-lance black operative to terrorize the town's mayor into revealing the murderers' names"—and successfully convict them of the murder of the three civil rights workers.[107] Hackman, as the agent with the inevitable romantic interest in the victimized wife of the deputy sheriff (one of the murderers), has an extended session of violent revenge against her husband, and the agents leave the town cleansed of its most virulent racists. The remaining (white) citizens are left to "unlearn" their racism, as the wife of the deputy tells us she has done.

While the relationship between this film and Todd Mitchell's involvement in the assault on Gregory Reddick was only implied in legal documents and most press accounts, one author made the causal link explicit. In his summary of the "facts" of the case, Michael Greve, an editorialist for the *Wall Street Journal* wrote, "[h]aving thus avenged the indignities portrayed in the movie, [Mitchell's friends] stole [Reddick's] sneakers."[108] Situating the attack on Reddick in the shadow of *Mississippi Burning* suggested a motive for the crime in addition to "hate": revenge.

In no other representation, however, is revenge explicitly named as a possible motive. I would like to argue that the suggestion of revenge, and with it, anxiety and fear on the part of many white Americans over a U.S. history of legal(ized) oppression and the lingering possibility of black revolt, operated subtextually—and more powerfully for its explicit absence—in the representations of this case. First, while it remained an implication (or a sarcastic dismissal, as in the above editorial) the unclarified link suggests that "true revenge" *cannot* be the motive. In order for feelings of

106. White, *supra* note 105, at 60.

107. Corliss, *supra* note 105, at 58.

108. Michael Greve, *What's Wrong With Hate-Crime Laws*, WALL ST. J., Apr. 21, 1993, at A15.

"vengeance" to be aroused, *real* violations must have been suffered by the avenger, not mere "indignities." The cultural imagination within which Greve is able to reduce a portrayal of the systematic terrorism of an entire community to the level of "indignities" is a constitutive factor of the rearticulation of hate crimes I am attempting to trace. Greve implies that Mitchell and his friends were merely playing at being avengers of *someone else's* (the black boy in the film's, all black people's?) suffering, which made them not only criminals, but foolish consumers of politically correct rhetoric about racism as well. What they really wanted, suggests Greve, were Reddick's brand name tennis shoes, those urban signifiers of the underclass's obsession with (and inability to properly negotiate) commodity capitalism. Mitchell and his friends thus become consumers so foolish they would risk going to jail for a pair of shoes.

Second, even if Mitchell's revenge couldn't really be revenge, explicitly naming it as a possible motive in anything other than a dismissive tone would have granted it a potential legitimacy, particularly in legal narratives where authors strive for "neutrality." Operating at the level of suggestion, however, it retained both its quasi-ridiculousness and its power to mobilize deep historical fears on the part of a "white" U.S. readership, fears that "blacks" will take revenge on "whites" for the injustices of "the past." Any ominous consequences of "revenge" that Mitchell's actions may have raised were succinctly employed as an implied warning to African-Americans by one news writer. Quoting Gregory Reddick's father,

> "He had a lot of black friends before they beat him," [Gregory's] father, William Reddick, told the Kenosha News last December. "He didn't have a prejudice in him. Now he can't stand them."[109]

Had commentators seriously wanted to entertain the idea of Mitchell as avenger, they might easily have noted that Yusuf Hawkins' nationally publicized murder by "white" Italian Americans in Bensonhurst, Brooklyn took place less than two months before the attack on Reddick. None did. But Mitchell was not, after all, actually being charged with a crime of revenge—or even of unsubstantiated revenge. He was charged with, and convicted of, a "hate" crime. Thus, while the subtext of this link between

109. Margolick, *supra* note 14, at A14. Here prejudice is transformed from "pre-judgment" to "post-judgment," and a genuinely horrific experience is used as the justifiable basis for ending friendships and upholding a hegemonic association between African-Americans and danger-to-whites. This paradigmatic line of reasoning was taken to extraordinary lengths in the worker's compensation case of Ruth Jandrucko. A Florida judge upheld Jandrucko's disability claim for a "post-traumatic stress disorder" incurred when Jandrucko, a white woman, was mugged by a man whose neck and arms appeared to be black (she was unable to see the man's face). As a result of the mugging, Jandrucko claimed a disabling fear of large black men and was awarded compensatory benefits. This case is described in Lynne Duke, *Color Me Stressed: What If We All Sought Compensation For Our Race-Based Problems?*, WASH. POST, Aug. 16, 1992, at C5. The case was affirmed in *Colorcraft Corp., Fuqua Indus. v. Jandrucko*, 576 So. 2d 1320 (Fla. Dist. Ct. App. 1991). Thanks to Sara Satterthwaite for calling this case to my attention.

his crime and the scene in *Mississippi Burning* might have placed Mitchell in the subject position of the black boy attacked by the Klan—now grown and less willing or able to piously withstand the violence of racists—the delegitimation of any possible claim to revenge effectively inverted Mitchell's implied relationship to the scene. By virtue of the legal charge of "hate crime," Mitchell was analogously aligned with the white Klansmen.

On the other hand, the image of a gang of black teenagers converging upon a lone white victim invokes other, more visceral stories to white readers, narratives of difference and fear. The semiotic linkage of Mitchell with the Klan was limited by that racial demarcation which "black" people in the United States can only rarely, if ever, entirely escape. As Patricia Williams has eloquently written, the association of blacks with crime and whites with innocence is a national, legal and cultural "legacy . . . [which] survives as powerful and invisibly reinforcing structures of thought, language, and law."[110] Mitchell, the figure, was doubly indicted. He stood in not only for the Klan, but also for irrational and criminally violent black male youths like the "wilding" articles, which vilified the black youths convicted of raping a woman in New York City's Central Park.[111]

All of these elements combined, then, to rearticulate the significance of Mitchell's crime. The "mirroring" of *Mississippi Burning* and *Wisconsin v. Mitchell* triggered two parallel and complimentary chains of signification. At one level, *Mississippi Burning* signaled a history of racialized inequality and violence, which in turn suggested the possibility that Mitchell's attack on Reddick might have retributive connotations (though the fear of racial guilt would be immediately—if not entirely—suppressed by the knowledge of Reddick's *individual* innocence). Unexpressed, these connotations powerfully mobilized white anxiety over "black crime/resistance," which had reached an especially high level as the Supreme Court was hearing Mitchell's case in April of 1993. Mitchell's case was decided in the context of the Los Angeles riots after the acquittal of police officers in the beating of Rodney King. The riots were barely a year past, and it was feared that a new round of civil unrest would follow the federal trial of the officers.

At another, more explicit, level, the mirroring of film and case positioned Mitchell as a "bigot," no different from members of the Ku Klux

110. WILLIAMS, *supra* note 35, at 59-91.

111. In the spring of 1989, several black men were arrested for the rape and assault of a white woman in New York City's Central Park. The case was nationally reported as symptomatic of the ills of the inner city and the "gang mentality" and animalistic violence of young black men (who were repeatedly referred to as "wolves" or "wolverines"). *See, e.g.*, Nancy Gibbs, *"Wilding" in the Night: A Brutal Gang Rape in New York City Triggers Fears that the U.S. Is Breeding a Generation of Merciless Children*, TIME, May 8, 1989, at 20; Elizabeth Lyttleton Struz, *What Kids Who Aren't Wolves Say About Wilding*, N.Y. TIMES, May 1, 1989, at A15; David Gelman, *Going "Wilding" in the City*, NEWSWEEK, May 8, 1989, at 65; William Pfaff, *"Wilding" in New York, Moral Void in America*, L.A. TIMES, May 7, 1989, § 5, at 5.

Klan. This had the related effect of positioning the state (government prosecutors and the courts), as independent seekers of justice with no relation to the violence at issue other than that of law enforcer and defender of victims, just like the FBI agents in *Mississippi Burning*. The subtextual threat of revenge was rearticulated within and by the law as an ahistorical individualized "hatred." Working in the opposite direction, *Mississippi Burning* operated in portrayals of the case as a direct representation of the history of U.S. race relations that pre-figured Mitchell's crime. The racial attacks portrayed in the movie were implicitly re-narrated into a cultural story of unruly prejudiced individuals violently attacking one another despite the best efforts of the state. This legally established correspondence offers a powerful recounting of history, and, as Luban paraphrases Walter Benjamin, "align[s] certain moments with each other so that the later moments reenact the earlier and recreate them as their precursors."[112]

Let me stress here that I am not asserting Mitchell's crime *was* an act of revenge, nor that, if his actions *had* been motivated by an attenuated vengeance for U.S. racism, the beating of Reddick would have been any less horrific or any less deserving of punishment. Rather, I am interested in elucidating the "common sense" expressed in the linkage of Mitchell's case with *Mississippi Burning*. The simultaneous implication of an illegitimate revenge motive, and an avoidance of making that implication explicit bespeaks unresolved national guilt over slavery and racism, just as the removal of the segregating cemetery fence in Jasper, Texas does. However, in Jasper, this act of symbolic desegregation acknowledged some degree of collective responsibility for James Byrd, Jr.'s, death. No such responsibility was taken for the actions of Todd Mitchell and his friends.

While the facts of the case were not disputed in *Wisconsin v. Mitchell*, possible readings of the facts proliferated. "Hate crime," the ideological sign, was indeed "multi-accentual and Janus-faced."[113]

V.
CONCLUSION

> Hence the symmetry of the idea of "racism" in mainstream American culture: once race is divorced from its social meaning in schools, workplaces, streets, homes, prisons, and paychecks and from its historic meaning in terms of the repeated American embrace of white privilege, then all that's left, really, is a hollow, analytic norm of 'color-blind'—an image of racial power as embodied in abstract classifications by race that could run either way, against whites as easily as against Blacks. And finally,

112. Luban, *supra* note 102, at 2154.
113. *Id.*

> this . . . seems like the very definition of what's neutral and objective, a narrative that doesn't depend on point of view. . . .[114]

The Supreme Court's decision in *Wisconsin v. Mitchell*, while rejecting the appellant's argument that Wisconsin's hate crime law unconstitutionally punished Mitchell's *thoughts*, nevertheless upheld the law on grounds that reinforce the Cartesian subject's separate spheres of mind and body, thought and action. The decision in *Wisconsin v. Mitchell* offers reinforcement for what Paul Gilroy has called the "imagined community of the nation . . . [and] the fundamental unity and equality of its citizens," by way of a model of crimes defined by the emotional idiosyncrasies of individual citizens.[115] These citizen-individuals are presumed by the law to operate in an externally discernible pattern of cause (provocation), thought (plan or choice), and action-effect. While legal practitioners themselves may know perfectly well that such clarity is rarely present, the space of the courtroom and statutory texts often require just such a formulation to establish the defendant's guilt and responsibility for a crime.

The law's individualization and de-historicization of crime is a widely remarked upon phenomenon. In this case, however, its consequences, as they have developed through the life of hate crimes laws, are profound for a national discourse of difference and violence. I would like to argue that this case and its sociohistorical context can be read as exemplifying a culture in distress about its most profound aspects of self-definition, specifically, multicultural equality under the law and individualism. Individualism in this case represents the belief that only individuals are responsible for violent acts in the world, the belief that when such violence (beatings or slavery, equal here) occurs, the goal should be to assign individual blame and punishment. In the western juridical model, responsibility does not accrue over time to a people, or to a race, or to a government, but is isolable in particular perpetrators. Thus the individual white victim, Reddick, and the individual black perpetrator, Mitchell, can be figured in their respective innocence and guilt, as outside the United States' history of racism.

On a more concrete level, the newly affirmed hate crime law amplifies all of those aspects within the original model statutes which lent themselves to an individualistic, decontextualized definition of hate crimes. The hate crimes laws do this by semiotically detaching bias-motivated violence from its context in a society organized hierarchically by enforced identity categories. Hate crime laws in this instance might be seen as permitting the assertion of a developing hegemonic "post-1960s" recuperation of the United States as a body of tolerant benevolence in relation to a nation of often

114. Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice, in* READING RODNEY KING, READING URBAN UPRISING 56, 63 (Robert Gooding-Williams ed., 1993).

115. GILROY, *supra* note 1, at 74.

unruly, bigoted subjects. It articulates a claim to a liberal culture of "tolerance" at a moment in which this image of the nation is severely threatened by the claims of internal "others" who are insisting on a history not of tolerance but of oppression inscribed within the law.

To confront this history needn't mean we should pass more criminal laws to ensure that the context of racism is properly inscribed there. Instead, it may well mean we should examine how criminal laws both permit and perpetuate the short-sighted attribution of individual blame at the expense of nuanced discussion of the meaning of collective responsibility.