

**SAY WHAT YOU NEED TO SAY: A CONCURRING OPINION
REGARDING INTRA-RELIGIOUS HATE CRIMES AFTER THE
MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES
PREVENTION ACT AND *UNITED STATES V. MULLET***

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INTRODUCTION

In the fall of 2011, the newspapers told of a strict Amish bishop disciplining one-time members of his Amish community. Samuel Mullet, Sr., had a history of out-of-the ordinary disciplinary and educational methods, particularly related to the sexual activity of the members of his Amish community.¹ Members of Mullet's community refused to comply with his orders and Mullet coordinated disciplinary measures with members still loyal to his leadership.² Over the course of a few weeks, Mullet's followers cut the beards and hair of numerous victims within the Amish community, which considers beards and hair as sacred symbols.³

Mullet and his followers were charged under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (HCPA),⁴ which requires imprisonment for acts of violence "because of . . . actual or perceived religion."⁵ Prior to their recent conviction, Mullet and his followers challenged the applicability of the HCPA on the basis that the action was "intra-religious," since all of the individuals involved were Amish.⁶ Mullet also maintained that his actions were religious discipline.⁷

The district court found against Mullet, explaining that the statute allows for convictions intra-religiously and that history provides numerous examples of "interneccine violence."⁸ The court held:

By the Defendants' logic, a violent assault by a Catholic on a Protestant, or a Sunni Muslim on a Shiite Muslim, or an Orthodox Jew on a non-Orthodox Jew, would not be prohibited by this statute. There is no logical reason why such acts of violence should be excepted from the reach of the Hate Crimes Prevention Act, and, in the absence of any

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1. *United States v. Mullet*, 868 F. Supp. 2d 618, 621 (N.D. Ohio 2012).

2. *Id.*

3. *Id.* at 620-21.

4. 18 U.S.C. § 249 (Supp. 2010).

5. *Id.* § 249(a)(2)(A).

6. *Mullet*, 868 F. Supp. 2d at 624.

7. *Id.*

8. *Id.*

language suggesting such limitation, the Court is not going to create such an exception.⁹

While the holding is accurate in its assertion that courts should not view the types of intra-religious violence given as examples outside the scope of the HCPA, the actual bounds of the application of the HCPA are left undefined.

The examples the district court provided are indeed intra-religious; however, they are also inter-denominational. Although Catholics and Protestants are both Christian, they are quite distinct. This distinction is exemplified in the dogma, polity, and practice of each community.¹⁰ Here, it is Mullet's perspective that he was the victims' bishop and spiritual leader seeking to bring them back into compliance with his leadership.¹¹ At least on its face, it seems a logical impossibility to commit a hate crime based on religion within a denomination or sect on the basis of that denomination or sect, distinct from between individuals of different denominations or sects.

In reaching that question, however, the use of the HCPA in the intra-religious context presented in *Mullet* gives the legal community an opportunity to test the bounds of hate crime legislation as it is understood by the legislature that enacts the laws and the society those laws touch. This Note discusses the intra-religious element of the new face of hate crimes legislation and the decision that has since validated the broader reading of the HCPA. Through this discussion, this Note urges the courts to define hate crimes more precisely in intra-religious contexts to avoid even the possibility of loopholes being present. With a lack of clarity, the courts may allow bias-motivated criminals to avoid necessary enhanced sentences.

Part I of this Note frames the problem and addresses the "logical impossibility" of intra-group hate crimes. Part II discusses hate crimes legislation from a federal perspective. There is no present need for an analysis of the detail found in the historical development of hate crimes legislation; however, there is insight in a more in-depth look at the development and implementation of the HCPA. Part III analyzes the few cases that have dealt with intra-religious hate crimes. The case law analysis will reveal uniformity in the lack of specificity the courts provide. Part IV introduces a new tool in analyzing hate crimes: bias crime indicators. Finally, Part V provides a means of moving forward to reframe the question and remove confusion from the application of hate crimes legislation

9. *Id.*

10. This distinction might most easily be characterized by the recognition of the Roman Pontiff, or Pope, as a legitimate church leader and teaching authority. While Catholics recognize him as such, Protestants do not. See Wendy Thomas Russell, *12 Simple Differences Between Catholics and Protestants*, WENDY THOMAS RUSSELL BLOG (June 10, 2013) <http://wendythomasrussell.com/catholics-protestants/>.

11. Thomas J. Sheeran, *Samuel Mullet, 15 Other Amish GUILTY of Hate Crimes in Beard Cutting Attacks*, HUFFINGTONPOST, Sept. 21, 2012, http://www.huffingtonpost.com/2012/09/20/16-amish-guilty-hate-crimes-beard-cutting-attacks_n_1901895.html, archived at <http://perma.cc/USM4-CVZP>.

to intra-group crime.

I. FRAMING THE PROBLEM: *MULLET*, THE HCPA, AND FUNDAMENTAL SOCIETAL UNDERSTANDING

The court in *Mullet* was not the first court to hold that the act of an individual performing a crime against another individual of the same class or group can qualify as a hate crime.¹² In 1996, the Illinois Court of Appeals held the same after a young Jewish boy and two of his friends verbally accosted an Orthodox Jewish boy of about the same age and threw parts of a knife, including the blade, at the boy.¹³ Although the courts were applying two different laws,¹⁴ the conclusions were the same: individuals of the same religion can perform religiously-based hate crimes against one another.¹⁵ However, what the courts meant to say compared with what the courts said leaves significant questions unanswered, particularly in light of public opinion.

Especially mindful of the racial tensions that have existed—and continue to exist—in our country’s history, society generally understands hate crimes as between individuals of different classes on the basis of that class distinction.¹⁶ Moreover, that common understanding presumably would not encompass the notion that a hate crime can occur between individuals of the same class on the basis of that class (a white man committing a crime against another white man on the basis of that man being white).¹⁷

But the HCPA defines “hate crimes” more broadly as: violent acts based on the “actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”¹⁸ There is no necessary requirement that the actor be a member of a different class, at least on the face of the statute. What the HCPA most essentially does is provides additional—and to transgender individuals, the first—protections for the Lesbian, Gay, Bisexual, and Transgender community and removes the requirement that in order to qualify as a hate crime there must be interference in the performance of a federally protected

12. *In re Vladimir P.*, 670 N.E.2d 839 (Ill. App. Ct. 1996).

13. *Id.* at 845.

14. *See id.* at 841 (applying 720 ILL. COMP. STAT. ANN. 5 / 12-7.1 (West 1994)); *Mullet*, 868 F. Supp. 2d at 620 (applying the HCPA).

15. *Mullet*, 868 F. Supp. 2d at 624; *In re Vladimir P.*, 670 N.E.2d at 845.

16. Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073, 1110 (2003) (discussing the apparent consensus in scholarship and criminal justice that hate crimes occur between individuals or groups of different classes).

17. Noah Feldman, *Is Cutting Off a Beard a Hate Crime?*, BLOOMBERG (Sept. 9, 2012, 6:34 PM), <http://www.bloomberg.com/news/2012-09-09/is-cutting-off-a-beard-a-hate-crime-.html>, archived at <http://perma.cc/V9QV-7TB9> (discussing his concern with the expansion of hate crimes legislation within class groups leading to more difficult litigation and arbitrary sentence enhancements).

18. 18 U.S.C. § 249(a)(2)(A) (Supp. 2010).

act (for example, voting).¹⁹

The problem lies in the disconnect between the plain language of the HCPA and what reason seems to dictate. Does the application of the HCPA further the desired curbing of hate crimes or does it unnecessarily enhance the punishment for crimes that are already punishable? It is certainly within our government's legal purpose to protect citizens from violence of any kind. But as the above analysis seems to conclude, declaring all criminal acts with even the most attenuated religious character as hate crimes might be problematic, if not a logical impossibility in some circumstances.

As mentioned at the outset, the HCPA's application in *Mullet* permits a conviction for "intra-religious" acts.²⁰ However, the examples provided in the district court's opinion do not give clarity to the assertion Samuel Mullet makes that because they are all of the Amish faith, there can be no hate crime.²¹ The court's examples are certainly apparent—Catholic against Protestant, Sunni against Shiite.²² However, Samuel Mullet and his followers were making a different argument: namely, he was the bishop or religious leader of all of the individuals, victims and co-defendants alike.²³ This means that Mullet might have considered the action not just "intra-religious," but "intra-denominational." The analysis would not be the same as a Catholic against a Protestant, but rather a Catholic against a Catholic. There is no meaningful distinction between the two individuals' religious belief system, at least facially. That is a significant departure from what the district court was analyzing and a more significant departure from the reasonable understanding of hate crimes that exists in scholarship and criminal justice institutions.²⁴ The opinions of the *Mullet* court, the academic community, and the criminal justice system seem to paint a picture that is inconsistent and inaccurate. However, that inaccuracy does not combat too offensively against the societal belief system outlined above. The inconsistency might. To overcome the burden of the beliefs of a society about what form hate crimes take requires a firm clarity from the courts and the legislature.

The problematic lack of clarity in the analyses the courts are providing on the issue is not unfounded. The legislature has also been unclear on the precise meaning and purpose of hate crimes legislation in light of the plain meaning of the statutory language and the legislative history.²⁵

19. *It's Official: First Federal Law to Protect Transgender People*, NAT'L CENTER FOR TRANSGENDER EQUALITY: NEWS, http://www.transequality.org/news09.html#first_law, archived at <http://perma.cc/6GQW-QS4P> (last visited July 15, 2014); David Stout, *House Votes to Expand Hate-Crime Protection*, N.Y. TIMES, May 4, 2007, <http://www.nytimes.com/2007/05/04/washington/04hate.html>, archived at <http://perma.cc/WEH6-3BF8>.

20. *Mullet*, 868 F. Supp. 2d at 624.

21. *Id.*

22. *Id.*

23. Sheeran, *supra* note 11.

24. Fairfax, *supra* note 16, at 1110.

25. See discussion *infra* Part II.

II. BEHIND THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

As mentioned, the HCPA in the federal context removed certain roadblocks that kept hate crimes from being categorized as such and also provided additional protections for different classes.²⁶ The passage of the HCPA did not come without disagreement. The legislation was sent to both President George W. Bush and President Barack Obama for a signature before being signed into law by President Obama on October 28, 2009.²⁷ On both occasions, the bill sent to the President was attached to a Defense Appropriations bill,²⁸ though the first time it did not turn out the way its advocates had hoped.

The legislation was passed as a long-awaited response to the horrific attacks against Matthew Shepard.²⁹ Matthew Shepard was a college student and was also gay.³⁰ At the conclusion of his evening at a bar, he left with a couple of men.³¹ Shepard was brutally beaten that evening by those men and was tied to a fence post, where he eventually died five days later.³²

The other named individual in the HCPA, James Byrd, Jr. had a similar fate. On his way home from his parents' house, three white supremacists picked up forty-nine-year-old Byrd (an African American), beat him in the woods, "then chained [Byrd] to [a] truck and dragged [him] for two miles."³³ Byrd gruesomely died in the process; his head and an arm were nearly a mile from where his torso was found.³⁴ Just as the 2012 mass shooting at Sandy Hood Elementary School in Newton, Connecticut, sparked societal conversation for legislative action about gun control, the gruesome deaths of Shepard and Byrd motivated the legislature to act on hate crimes. The same could be said of the legislature's response to the deaths of Shepard and Byrd at the hands of bias-motivated individuals.

"The Shepard Act altered existing hate crimes sentence enhancements to

26. See discussion *supra* Part I.

27. Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1585, 110th Cong. § 1023 (2007), 153 CONG. REC. S12562 (2007); Presidential Veto Message, 154 CONG. REC. H5 (2008); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2835-44 (2009).

28. See National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 100th Cong. (2007); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

29. Lisa Kye Young Kim, Comment, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT. L. 495, 496 (2011).

30. *Id.* at 495.

31. *Id.*

32. *Id.* at 495-96.

33. Carol Marie Cropper, *Black Man Fatally Dragged In a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, <http://www.nytimes.com/1998/06/10/us/black-man-fatally-dragged-in-a-possible-racial-killing.html?ref=jamesjrbyrd>, archived at <http://perma.cc/5L23-5AK7>.

34. *Id.*

protect new groups: gender, disability, sexual orientation, and gender identity”³⁵ According to the Anti-Defamation League, the HCPA also allows the federal government to assist in the investigation and prosecution of bias-motivated crimes, supplementing protections for at most thirty-eight and providing initial protections for at least twenty states whose laws did not include one of the newly added classes under which hate crimes could qualify.³⁶

The need for and the likely results from the HCPA were also outlined by the Anti-Defamation League from the 2009 FBI statistics, required to be compiled by the Federal Hate Crimes Statistics Act.³⁷ The Anti-Defamation League noted that between 2008 and 2009, reported hate crimes decreased by approximately 1100 crimes.³⁸ In particular, religion-based crimes decreased approximately 200 crimes; hate crimes against gay and lesbian individuals reduced by approximately seventy (reflecting 300 fewer victims); and crimes against Hispanics decreased by almost eighty.³⁹

In addition to the factual basis the Anti-Defamation League provided, the legislature also made findings of fact within its procedure implementing the HCPA.⁴⁰ Among those were more general findings, such as: “violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.”⁴¹ Additionally, it “disrupts the tranquility and safety of communities.”⁴² The findings noted that “[e]xisting Federal law is inadequate to address this problem” and that “greater Federal assistance” was needed.⁴³ The legislature determined that “violent crime motivated by bias . . . devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the [victim’s] traits.”⁴⁴

More interestingly, the legislature provided findings that discussed the need to eliminate “to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.”⁴⁵ Because certain religious communities are considered “races[,] . . . it is necessary to prohibit assaults on the basis of real or perceived religions or national origins.”⁴⁶

35. Kim, *supra* note 29, at 496.

36. ANTI-DEFAMATION LEAGUE, MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT (HCPA): WHAT YOU NEED TO KNOW 1 (n.d.), <http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf>, archived at <http://perma.cc/L6H6-YRVV>.

37. 28 U.S.C. § 534 (2006).

38. ANTI-DEFAMATION LEAGUE, *supra* note 36, at 2.

39. *Id.*

40. Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835 (2009).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* § 4702, 123 Stat. at 2836.

46. *Id.*

Aside from the expansion of classes covered under the HCPA, the bill also made it easier to enforce the protections against hate crimes by removing the previous requirement for hate crimes legislation that a victim be attacked because they were engaged in federally-protected activities.⁴⁷ “The new federal hate crimes legislation is, therefore, intended to ‘fill the gap’ for the few states that still lack hate crime legislation.”⁴⁸ Though, if one reads a bit beyond what the phrase indicates, it seems the federal government was raising the bar to ensure uniform protection of the classes they added in the HCPA and to cure any other deficiencies that might be present in states’ own hate crimes laws.

As mentioned above, this legislation did not pass without its own challenges. “Opponents of hate crime legislation argue that it is inappropriate because it creates special groups of victims, thereby countermanding equal protection under the law.”⁴⁹ Additionally, there were concerns raised based on sexual orientation’s inclusion in the protected classes.⁵⁰

The Senate debates in preparation of the conference report provide valuable insight into the disagreement of the legislation’s passage, particularly as it related to its addition into defense spending bills, but also the rationale behind its passage and interpretation.⁵¹ Senator John McCain noted in the Senate’s debate on the bill:

I strongly disagree with the majority’s decision to include hate crimes legislation in the national defense authorization bill . . . I again objected to the inclusion of this nongermane, nonrelevant language as an amendment to the defense authorization bill when the bill was being considered on the floor of the Senate. Today, I remain strongly opposed to its inclusion in the conference report . . . The stand-alone legislation . . . has not even been considered by the Senate Judiciary Committee, where it could have been debated, modified, and brought to the floor⁵²

Senator McCain also considered it inappropriate to expand the laws “to cover a certain class of citizens from ‘perceived injustices.’”⁵³ His criticism was not that violence against individuals should not be stopped, as he quoted an editorial from the *Detroit News*:

Certainly, threats of violence or violence against individuals for any reason should be prosecuted to the full extent of the law. Not, however, because the victims are members of a particular race or sex, adherents of a particular religion or are gay. These crimes should be punished

47. ANTI-DEFAMATION LEAGUE, *supra* note 36, at 1.

48. Kim, *supra* note 29, at 502.

49. *Id.*

50. *Id.*

51. 155 CONG. REC. S10663, 10666 (2009).

52. *Id.*

53. *Id.*

because the victims are uniquely valuable individuals who deserve the protection of the law solely on that basis. The idea of special prosecutions for “hate crimes” is inherently divisive.⁵⁴

Senator McCain went further in his disapproval, but his objections were just as much procedural as they were substantive.⁵⁵ He was not only concerned about the expanding protections, but also that the bill had been attached to a “veto-proof” piece of legislation.⁵⁶ A number of other Senators voiced similar opinions.⁵⁷

However, the discontent with the passage of the HCPA on a substantive and procedural level was not universal. Senator Cardin spoke his support for the HCPA:

The passage of the legislation demonstrates that the Congress is fighting for people such as Stephen Johns, who was killed at the U.S. Holocaust Museum; Lawrence King, a 15-year-old student murdered in his high school because he was gay; James Byrd, who was beaten and dragged by a truck for 2 miles because he was Black; and for the 28-year-old California woman who was gang-raped by four men because she was lesbian. Today, we stand and say: No more. No longer shall we tolerate these types of actions.⁵⁸

Here, Senator Cardin provided insight into the types of violations that constitute hate crimes. Interestingly, none of the examples of hate crimes provided by Senator Cardin—or any other Senator—mirror the circumstances in *Mullet*.

Although the arguments were generally the same, the House of Representatives was not without its own debate in the preparation of the conference report regarding the propriety of having such a bill, particularly on a substantive level.⁵⁹ None of the discussions reached the possibility of having hate crimes within the same class on the basis of that class as *Mullet* presents. The members of Congress in both chambers continued the common understanding of hate crimes as occurring between individuals of different classes.⁶⁰ It is possible that none had heard of situations, circumstances, or cases that had dealt with the intra-group hate crime issue before. At least one case found a hate crime in an intra-religious context before the passage of the HCPA and the comments that led to the development of the conference reports that were analyzed *supra*,⁶¹ but it

54. *Id.*

55. *Id.*

56. *Id.* *But see* Presidential Veto Message, 154 CONG. REC. H5 (2008) (discussing that even though the first HCPA to make it to President George W. Bush’s desk was within the “veto-proof” Defense Appropriations bill, Bush still vetoed it).

57. 155 CONG. REC. S10663 (2009).

58. *Id.* at S10675.

59. *Id.*

60. *Id.*

61. *In re Vladimir P.*, 670 N.E.2d 839 (Ill. App. Ct. 1996).

was a minor event that led to a mere juvenile adjudication.⁶² Additionally, even a cursory review of the Internet turns up few references to the case, particularly compared to the *Mullet* decision.⁶³

The work behind the development of the HCPA, the findings of fact the legislature provided with the bill, and the overarching desire by its proponents to make targeting hate crimes more possible, led to a facially broad statute. The relevant portion of the statute states:

(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.

(A) In general. Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person . . . or attempts to cause bodily injury to any person, because of actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person-

(i) shall be imprisoned⁶⁴

To ensure coverage under the law by the commerce clause—“guaranteeing constitutionality”—subparagraph (B) and paragraph (3) include that the actions must either explicitly be in interstate commerce or “otherwise affect[] interstate or foreign commerce.”⁶⁵

Again, note that nothing in the language of the statute indicates a limitation for hate crimes occurring intra-group or intra-religiously. However, through the legislative history discussed *supra*, it does not seem to be the explicit intention of the proponents of the bill to cover such circumstances.

III. INTRA-RELIGIOUS HATE CRIMES: A CASE ANALYSIS

In searching through the many hate crimes cases that have been decided by different courts, it is not at all common that this question of intra-religious—or even intra-group—hate crimes arises. It is an extremely rare occurrence. It is not troubling to find so few hate crimes cases on point, but it is troubling that both cases which will be discussed *infra* are off the mark in providing adequate analysis. The courts provide so little in their opinions and seem to express disbelief that a party would raise such an “obvious” claim.

The first of these cases is *In re Vladimir P.*⁶⁶ A young Orthodox Jewish boy, Bergovoy, was walking home one afternoon “wearing a head covering (yarmulke)

62. *Id.* at 841.

63. The development of the Internet must be considered along with the comment. In 1996, the ability to “post” Internet materials certainly was not the same procedure it is in 2012. It is likely not the case that if the Internet were more widely accessible that *In re Vladimir P.* would have been more known.

64. 18 U.S.C. § 249(a)(2)(A) (Supp. 2010).

65. *Id.* § 249(a)(2)(B).

66. 670 N.E.2d 839 (Ill. App. Ct. 1996).

and prayer tassels (tzitzis), symbolizing his religious beliefs.”⁶⁷ The respondent, Vladimir P., was with two friends sitting near Bergovoy’s route home.⁶⁸ At least one of the boys began yelling: “Fuck you Jew, get out of here Jew, I am going to kill you Jew, fuck you Jew.”⁶⁹ At that point, the boys threw a knife blade and the knife’s handle at Bergovoy.⁷⁰ Vladimir had thrown the knife blade.⁷¹

After the knife was thrown, Bergovoy ran home; upon his arrival, he was obviously afraid.⁷² Bergovoy’s mother went outside to see who had done it and Vladimir’s friend “approached and yelled, ‘Fuck you Jew.’”⁷³ Vladimir explained that the reasons for their actions were that they were “bored” and Bergovoy “looked funny.”⁷⁴

Vladimir was found guilty of assault under the Illinois Hate Crime Statute based on the religion of the victim.⁷⁵ The state statute provided, in relevant part, and similarly to the HCPA:

(a) A person commits a hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits . . . [a crime].⁷⁶

However, Vladimir’s mother testified on her son’s behalf, noting that Vladimir “knew what Bergovoy’s head covering and tassels represented because [Vladimir] was Jewish.”⁷⁷ Beyond that, Vladimir “and his family had come to the United States from Russia two years prior to this incident . . . because, as Jewish people, they did not feel safe.”⁷⁸ Vladimir argued that his actions could not qualify as a hate crime because he himself was Jewish.⁷⁹ The court disagreed.⁸⁰ The court spoke to the fact that the statute merely requires the victim to be chosen “by reason of” his religion.⁸¹ That statute seems to mirror what Congress would eventually provide in the HCPA: a broad enough statute that is not restricted by a requirement that the offender and victim be of different groups. However, the inference that these individuals are not members of different groups may not be so accurate.

67. *Id.* at 841.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 841-42 (citing 720 ILL. COMP. STAT. ANN. 5 / 12-7.1 (West 1994)).

77. *Id.* at 841.

78. *Id.*

79. *Id.* at 845.

80. *Id.*

81. *Id.*

Vladimir challenged the application of the hate crimes legislation to his crime through a variety of hypothetical circumstances in which he questioned whether the legislation reached that far.⁸² One such hypothetical asked whether the hate crime would be committed if a “bigoted white man threatens or attacks another white man because the second man dates an African American woman.”⁸³ The court responded, interestingly, by citing a Illinois Court of Appeals decision, *In re B.C.*,⁸⁴ stating, “in situations where an alleged victim is neither a member of the group to whom the hatred is directed towards nor perceived by the offender to be a member of that group, section 12 7.1 is inapplicable.”⁸⁵

This dialogue between Vladimir and the court is relative to a void-for-vagueness challenge by Vladimir,⁸⁶ but speaks to the much larger problem about the applicability of hate crimes legislation to intra-group crimes. Did the court mean to say what it did? Did the court realize the implication of its response? But before seeking a means of reconciling what the court has said with what the court likely meant and how it decided the case, one must look beyond the precise language of the court’s decision and analyze what the court’s perspective might be.

One such scholar considers *In re Vladimir P.* in her evaluation of the inclusion of affinity-based securities and investment fraud within hate crimes legislation.⁸⁷ In discussing *In re Vladimir P.*, Lisa M. Fairfax brings to light the distinguishing elements of hate crimes based on differing analytical models: the discriminatory selection model and the racial animus model.⁸⁸ Although the analysis of these models is less important, she describes different scenarios, which under these models would still qualify an action as a hate crime. First, “[b]ecause the defendant and his friends identified the victim as Jewish and yelled offensive religious slurs at him, the defendant specifically selected the victim because of his race . . . [therefore] the defendant’s conduct [is] a hate crime.”⁸⁹ In addition:

[T]he defendant claimed that he and his friends were bored and decided to pick on the victim because . . . [he] “looked funny.” . . . [E]ven if there was insufficient evidence to prove that the defendant uttered offensive religious slurs, the trial court could infer that the defendant was not acting independently because he failed to disassociate himself from the group of boys, at least one of whom did utter such slurs.⁹⁰

This interpretation of what constitutes a hate crime provides a wide array of

82. *Id.* at 844.

83. *Id.*

84. 661 N.E.2d 1148 (Ill. App. Ct. 1996), *rev’d*, 680 N.E.2d 1355 (Ill. 1997).

85. *In re Vladimir P.*, 670 N.E.2d at 844.

86. *Id.*

87. Fairfax, *supra* note 16, at 1111-15.

88. *Id.*

89. *Id.* at 1111.

90. *Id.* at 1112.

circumstances under which an individual could be convicted. Moreover, Fairfax considers that even if there were no actual hate involved, it would still be possible to commit a hate crime.⁹¹

Fairfax calls this broader option the “Violent Show Off” criminal, a term originally coined by Professor Frederick Lawrence.⁹² She notes “[t]he ‘Violent Show Off’ selects and assaults his victim in order to impress friends, but otherwise bears no ill will towards the victim.”⁹³ Even though there is no hate, the offender still performs the crime “because his knowledge of his friends’ animus ultimately drives” it.⁹⁴ The attack either manifests itself as an attack because of his friend’s hatred or “a reckless disregard for the consequences of this action, and therefore [he] may be as culpable as those who commit” hate crimes.⁹⁵ Fairfax concludes “the defendant classifies as a hate crime perpetrator under the discriminatory selection model because he selected the victim because of race, and under the racial animus model because he commits the crime with full awareness of the hostility such act generates towards the victim.”⁹⁶

The conclusion that Fairfax draws is not unfounded, nor is it inconsistent with the legislature’s broad writing and the court’s broad reading of the law: it does not dismiss intra-group crimes. But, again, is that what is being posited here?

In a footnote, Fairfax raises the bigger concern, but passes on the issue’s validity since the discussion was lacking in the court’s opinion:

In this case, the victim was an Orthodox Jew. While it is possible that one could argue that the defendant and the victim did not belong to the same identity group because one was Jewish and the other an Orthodox Jew, the court and the defendant appeared to concede that both the defendant and victim belonged to the same identity group for purposes of the hate crime statute. Thus, the court appeared to suggest that even if both the defendant and victim were Orthodox Jews, the fact would not preclude the defendant’s enhancement under the hate crime statute.⁹⁷

Fairfax also concludes that the distinction being drawn by Vladimir was irrelevant because hate crimes statutes seek an end to bias-motivated crimes not because of their cause, but because of their effects, as victims “suffered a greater degree of harm.”⁹⁸ Additionally, “[b]y refusing to exclude same religion crimes, the court implied that the defendant[s] actions inflicted the harm the state was seeking to redress.”⁹⁹

Why does the court’s decision need to be a passing rationale? Why is the

91. *Id.* at 1112-13.

92. *Id.* at 1112.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1113.

97. *Id.* at 1111 n.189.

98. *Id.* at 1111 n.190.

99. *Id.*

refusal to exclude same-religion crimes merely “implied”? If the consequences of hate crimes are so grave, why not say precisely what the rationale is to remove any belief that somehow if courts find common ground with the victim’s class the offender can avoid hate crime prosecution?

Given Fairfax’s analysis of *In re Vladimir P.*, and the same court’s response to Vladimir’s example of the white-on-white attack because of an African-American girlfriend, what conclusions can be drawn? The most important conclusion is that there is extreme inconsistency in how Fairfax would respond to the hypothetical and how the court responds.

The court’s response was a reference to *In re B.C.*, a Illinois Court of Appeals case that discussed a peculiar hate crime analysis question.¹⁰⁰ Two minors had been charged with delinquency for committing hate crimes.¹⁰¹ The petition against the minors indicated that they “displayed patently offensive depictions of violence toward African Americans in such unreasonable manner as to alarm and disturb James Jeffries and provoke a breach of the peace”¹⁰² Interestingly, however, Jeffries was not an African-American, nor did anyone contend that the minors perceived him as a member of the race.¹⁰³

Through the use of statutory interpretation rules, the court stated that if it allowed a hate crime to be found in the action based on a victim not having to be, or even thought to be, a member of the targeted group, “the word ‘perceived’ [in the statutory language] would be superfluous.”¹⁰⁴ It noted that the legislature used that word “to encompass situations in which the perpetrator directed his hate crime against a person he thought was a person of a particular race, color, creed, etc., but who was actually not a member of that class.”¹⁰⁵ As a result, the court held that because the victim was neither African-American nor perceived as such, the juvenile court did not err in dismissing the petitions against the juveniles and was therefore affirmed.¹⁰⁶

The *In re Vladimir P.* court apparently found this persuasive enough for its purposes. The court combated Vladimir’s contention that the hate crime statute was too vague to accurately interpret and implement, particularly in circumstances of intra-group hate crimes.¹⁰⁷ However, the true meaning of the analysis renders the logic of the court unreasonable. There are likely reasons that individuals engage in hate crimes other than the mere membership or apparent membership in certain defined classes of victims.

Fairfax provides some rationales for the importance of recognizing intra-group hate crimes. Her analysis begins with the notion that a court should not rule out intra-group hate crimes because that “discounts the fact that such

100. 661 N.E.2d 1148 (Ill. App. Ct. 1996), *rev’d*, 680 N.E.2d 1355 (Ill. 1997).

101. *Id.* at 1149.

102. *Id.*

103. *Id.*

104. *Id.* at 1150.

105. *Id.*

106. *Id.*

107. *In re Vladimir P.*, 670 N.E.2d 839, 844 (Ill. App. Ct. 1996).

members can experience feelings of prejudice towards members of their own group.”¹⁰⁸ She cites the doll selection study performed by Kenneth Clark, which was considered by the Supreme Court in its *Brown v. Board of Education* decision, in which African-American children chose white dolls as superior to African-American dolls due to the effects of racism and segregation on personal value.¹⁰⁹ Fairfax notes that “minority groups can internalize feelings of racial inferiority,” which can lead to intra-group hate, and potentially to intra-group crimes.¹¹⁰

Fairfax uses popular culture and the arts to provide context: “[T]he film ‘Boyz in the Hood’ depicts a black police officer harassing a young black boy while using racial epithets and claiming to hate black people. This phenomenon suggests that we cannot reject the possibility that racial animus impacts same race or religion crimes.”¹¹¹

Fairfax’s opinion appears accurate in theory. The difficulty, however, is that there are no clear examples in our court system to see how the rationale would actually be delineated. Instead, the courts are inaccurately analyzing the issue, not providing the clarity needed.

Similar to the decision in *In re Vladimir P.*, the *Mullet* court came to the correct conclusion, though provided inaccuracies in its analysis.¹¹² Distinct from *In re Vladimir P.*, however, the *Mullet* court had an opportunity to address a possibly closer similarity between the offenders and the victims. As Fairfax indicated, and as discussed above, there was much assumed by the *In re Vladimir P.* court that might have been telling if actually written.¹¹³ If the offending boys yelled obscenities at Bergovoy because of his head covering and tzitzis, saying that he “looked funny,” yet Vladimir claimed to be of the same Jewish sect, there would be inconsistencies. Hasidic Jews wear particular clothing that distinguishes them from the rest of society—and even the rest of the Jewish faithful.¹¹⁴ What would the result have been had Vladimir also been wearing a yarmulke and tzitzis?

Mullet gets closer to that question. *Mullet* himself argued not only that they were both Amish, as Vladimir argued they were both Jews or a denomination of Judaism, but that he was the spiritual leader of their particular community and only punishing them because they did not “adhere to his directives.”¹¹⁵ It is a much closer alignment between the religious communities than if *Mullet* and his

108. Fairfax, *supra* note 16, at 1113.

109. *Id.*

110. *Id.* at 1113-14.

111. *Id.* at 1115.

112. See *United States v. Mullet*, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012) (finding that a hate crime can occur intra-religiously, yet providing an analysis surrounding inter-denominational violence).

113. Fairfax, *supra* note 16, at 1111 n.189.

114. Joseph Berger, *Dressing With Faith, Not Heat*, *In Mind*, N.Y. TIMES, June 28, 2012, at A19.

115. *Mullet*, 868 F. Supp. 2d at 624.

violent followers were members of a Pennsylvania Amish community and the victims were members of the Ohio Amish community. Similarly, Vladimir did not allege that, beyond his being Jewish, the two boys' families belonged to the same synagogue. That would have provided a closer opportunity to analyze the issue presented here.

Yet the *Mullet* opinion does not even indicate an interest in discussing that proximity between the offender and the victim. Rather, the decision avoids the discussion in terms that close and instead provides an analysis within a larger category that seemingly is "intra-," though more realistically still "inter-group."¹¹⁶

As mentioned at the outset of this Note, to state that the actions were intra-religious is not an inaccuracy, but that perspective does not go far enough to answer the question that *Mullet* and *In re Vladimir P.* have posed to the courts: What if it is closer than the same religion and gets to the same denomination? Is an intra-denominational hate crime possible?

Ultimately, *In re B.C.* was overturned by the Illinois Supreme Court.¹¹⁷ "The statute [at question] includes no expression that the victim or complainant of the underlying offense must be that individual or of that group of individuals."¹¹⁸ After reviewing the legislative debates, the court did "not find that the legislature contemplated penalty enhancement of the underlying offenses because of any improper motive in *selecting* victims."¹¹⁹ The court noted that the legislation should be read expansively because a hate crime perpetrator could avoid conviction resulting from a misperception of the victim,¹²⁰ which would reasonably avoid the purpose behind protecting individuals from fear of violence.

The Illinois Supreme Court concluded all that was needed, and all that was present, were "patently offensive depictions of violence toward African-Americans that disturbed an individual [class not relevant] and provoked a breach of the peace."¹²¹

As a result of the Illinois Supreme Court's decision, the response provided to Vladimir was inaccurate. This inaccuracy is accentuated by another element of hate crime analysis: bias crime indicators.¹²²

IV. THE LITTLE ELEMENT IN ANALYSIS: THE IMPORTANCE OF BIAS CRIME INDICATORS

A bias crime indicator is a clue that "law enforcement professionals look for in determining if a case should be investigated as a bias crime."¹²³ The list of bias

116. *Id.*

117. *In re B.C.*, 680 N.E.2d 1355 (Ill. 1997).

118. *Id.* at 1359.

119. *Id.*

120. *Id.* at 1360.

121. *Id.* at 1363.

122. See discussion *infra* Part IV.

123. K.A. McLAUGHLIN ET AL., NAT'L CTR. FOR HATE CRIME PREVENTION, RESPONDING TO HATE CRIME: A MULTIDISCIPLINARY CURRICULUM FOR LAW ENFORCEMENT AND VICTIM

crime indicators was compiled for publication by the National Center for Hate Crime Prevention's Education Development Center.¹²⁴

The list is a set of "objective facts, circumstances, or patterns attending a criminal act(s) which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias."¹²⁵ Their presence suggests the possibility of motivation for hate crimes, but must be analyzed in the circumstances of each case.¹²⁶

The indicators are each listed with examples provided and are quite varied. They include: racial, ethnic, gender, and cultural differences; comments, written statements, or gestures; drawings markings, symbols, or graffiti; organized hate groups; previous bias crimes or incidents; perceptions of the victim; offender's motive; the location of the incident; and the likes.¹²⁷

Importantly, some of the examples provided within the categories of bias indicators give light to the circumstances both in *Mullet* and *In re Vladimir P.* Those include: the victim's "race, religion, ethnicity/national origin, disability status, gender, or sexual orientation . . . differs from that of the offender"; "[h]istorically, animosity exists between the victim's group and the offenders group"; and most importantly, "the victim was perceived by the offender as violating or breaking from traditional conventions."¹²⁸

If the bias crime indicators are used by any law enforcement agency, or are the grounds for any prosecution, it is easy to see that the motivations behind the actions by Vladimir and Mullet and his posse were precisely those types of actions that provide grounds for the possibility of a bias motivation of a hate crime.

First, Mullet's and Vladimir's perspectives—regardless of what they stated in their court filings—were that the victims were not of a different religion than the offender. "Religion," as defined by *Black's Law Dictionary*, is:

A system of faith and worship usu[ally] involving belief in a supreme being and usu[ally] containing a moral or ethical code; esp[ecially], such a system recognized and practiced by a particular church, sect, or denomination. In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term *religion* quite broadly¹²⁹

Religion, at least in this broad legal context, encompasses systems at a denominational level. That denominational analysis might be more apparent in

ASSISTANCE PROFESSIONALS 14 (2000), https://www.ncjrs.gov/ovc_archives/reports/responding/files/sessionA.pdf, archived at <http://perma.cc/8NEL-RWRN>.

124. See generally *id.*

125. *Id.* at 15.

126. *Id.*

127. *Id.* at 15-17.

128. *Id.* at 15-16.

129. BLACK'S LAW DICTIONARY 1404 (9th ed. 2009).

Vladimir's case, in which it is likely that the offender and victim belonged to different branches of Judaism, even over Fairfax's opinion that the assumption by the court was that they were both Orthodox.¹³⁰

In Mullet's case, it is not quite clear that the offenders and victims were of differing denominations. The only indication that the offenders and victims were of different groups is what news outlets allude to: a splintering off of the victim's group from Mullet's followers sometime around 2005.¹³¹ Does that alone constitute a variety in the religious denomination to qualify as a hate crime?

There is a second relevant bias crime indicator: "[H]istorically animosity exists between the victim's group and the offender's group."¹³² The court in *In re Vladimir P.* would likely not have found this relevant, considering that Orthodox Jews have—at least by its absence in the newspapers—been living a peaceful co-existence with other Jewish branches in this country for many years. However, the already-existing split within Mullet's Amish community might have indicated a bias motivation behind his and his group's actions.

Mullet broke away from mainstream Amish communities in the mid-1990s as a result of Mullet's perception of the "dissolution of traditional Amish culture. Boys rode their buggies while listening to stereos, girls skated on rollerblades . . . There were parties with beer in the woods and girls 'in their birthday suits' inviting dates into their beds."¹³³ After that initial break, Mullet's community had problems of its own: if men broke the rules, they "were paddled and locked in empty chicken coops."¹³⁴ Mullet had also been accused of having sex with married women and incestuous relationships with his own daughters.¹³⁵ In 2005, it was revealed that Mullet was having an affair with his son's wife, leading to the hospitalization of the son for a mental breakdown.¹³⁶ After this revelation, the group split, which led Mullet's followers to "reaffirm (sic) their loyalty to the group . . . eventually [leading] to the beard-cutting attacks."¹³⁷

This split of the group resulting from the ongoing "punishment" and other extreme disciplinary practices could well be considered a "history of animosity between the victim's group and the offender's group." This would indicate additional elements of a bias motivation from the list of indicators.

The third relevant bias indicator might be most persuasive. It states, "[t]he victim was perceived by the offender as violating or breaking from traditional

130. Fairfax, *supra* note 16, at 1111 n.189.

131. Michael McLaughlin, *Sam Mullet, Amish Leader Convicted Of Beard-Cutting Attacks, Gives Jailhouse Interview*, HUFFINGTON POST (Dec. 6, 2012, 11:54 AM), http://www.huffingtonpost.com/2012/12/05/sam-mullet-amish-beard-cutting-attacks_n_2246129.html, *archived at* <http://perma.cc/7VZG-C9LY>.

132. McLAUGHLIN ET AL., *supra* note 123, at 16.

133. McLaughlin, *supra* note 131.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

conventions”¹³⁸ There is no further explanation as to what a break from traditional conventions would look like, but the examples provided in the *In re Vladimir P.* court and the *Mullet* court seem to precisely fit this suggestion. The only question left would be how far we can consider breaks from traditional conventions within a denomination. Said differently, how minute can the break be for a crime to be considered a hate crime?

In *In re Vladimir P.*, reason mandates a reading that Vladimir himself was wearing neither a yarmulke nor tzitzis, otherwise the purpose behind his attacking Bergoloy because he “looked funny” is completely unfounded. It would seem that Vladimir’s actions toward the victim were based on his perceived break from traditional conventions, presumably that he still, or ever, wore those religiously-significant objects. His actions were likely based on a perceived and perhaps real distinction between their religions and a break from the traditional conventions to which Vladimir or, more likely, Vladimir’s family, subscribed.

Mullet was much more obviously guided by this precise element, given his legal position. Not only does his past indicate a propensity to magnify the distinctions between his perspective of traditional conventions and those of other Amish communities (the stereos, rollerblades, and beer parties), but he responded publicly, either through schism or extreme discipline.¹³⁹ The break from the traditional conventions was the catalyst that led to the beard-cutting attacks, and therefore should qualify as a hate crime. But the analysis is and should be distinct.

V. REFRAMING THE QUESTION

In reviewing the bias crime indicators that work to the benefit of those determining whether to qualify a crime as a bias-motivated or hate crime, there exists an opportunity to reframe the question presented to the courts. The courts should no longer be asked (or asking themselves) if there could be a hate crime intra-religiously, or within any group. Rather, the courts should ask if there is a distinction present with enough mass to drive even the smallest divide between the class to which the offender belongs and the class to which the victim belongs, even if their groups are or become a group of one. The other bias crime indicators should help provide additional light when seeking to define the potential divide.

The courts, then, should no longer conclude with statements affirming the possibility of intra-religious hate crimes. That conclusion, though potentially against the grain of public opinion, is more obviously within the realm of possibility than the circumstances presented to the court in the cases of *In re Vladimir P.* and *Mullet*. The courts are now asked to go further in their analysis, concluding not just that intra-group or intra-denominational hate crimes are possible, but that regardless of the pictures the offenders paint of being within the same class as the victim, a divide exists that can be seen by the court. The divide

138. McLAUGHLIN ET AL., *supra* note 123, at 16.

139. McLaughlin, *supra* note 131.

can qualify the circumstances as “us versus them”—precisely the “badges, incidents, and relics of slavery and involuntary servitude” that Congress seeks to abolish.¹⁴⁰

Now, instead of asking the possibility of intra-group or intra-religious hate crimes, the court should start its analysis from the “other side.” It should ask a series of questions: What was the crime? What distinguishes the offender from the victim? What bias crime indicators help define the distinctions that do exist? Is the distinction central enough to the conflict that it is reasonable to conclude that it was the motivation of the crime? Is the distinction based on one of the protected classes?

Although the discussions might be more in depth, the courts will be supporting their conclusions reasonably, instead of avoiding the precise issue at hand. Then, if it is found to be outside the scope of the legislature’s intent, the legislature can make the necessary amendments to ensure their purpose is met.

CONCLUSION

Congress’s long road to provide the protections it desired for the classes they sought to protect resulted in a broad statute with little definition to provide guidance to the courts. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 expanded the protections against bias crimes not just to new classes of individuals, but also to qualifying classes of individuals that were still unprotected because they were not engaged in a federally protected activity. Although some states have provided some protections for those classes, it was not universally to the level that Congress has now provided.

Crimes are indeed terrible acts. Hate crimes, however, raise the bar of evil in our society. The HCPA has provided a necessary means of ridding our society of those acts. However, in doing so, the legislature, likely unintentionally, left the limits of the scope of that legislation quite vague. Considering members of Congress did not discuss intra-group hate crimes either in theory or in the examples of actual hate crimes that have been committed, it seems unlikely they considered those circumstances even a possibility. However, there is an unexpected gift in the breadth of the legislation: hate crime perpetrators are no longer able to hide behind their common membership in a group with their victims.

The courts in *Mullet* and *In re Vladimir P.* address this particular problem. When acts are clearly within the bounds of hate crimes—acts motivated by the perceived or actual religion of the victim—punishment cannot, and should not, be escaped. However, because the courts’ analyses have not provided the precise language needed to ensure that outcome, the door was left open for future offenders to do just that.

In defining intra-religious hate crimes as the courts did after the challenges raised by the defendants in those cases, the courts avoided the hole that needed to be filled. In defining the conflict as they did, the courts were not necessarily

140. Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2836 (2009).

contradicting the intentions of Congress. They were, however, leaving interpretive room for future courts to reach flawed conclusions. With the aid of the bias crime indicators, and the more expansive reading of hate crimes legislation that the courts are beginning to accept, the courts are now armed with the needed tools to address the inadequacy in the way the courts have explained and answered the question of intra-religious acts as hate crimes.

As to *Mullet*, the court was indeed correct in its conclusion, but the path to that conclusion must explicitly recognize that, in light of bias crime indicators, there is enough distinction between the victims' identity and Mullet's identity to constitute separate groups. Because the separate group exists, there is a divide of enough mass to allow a hate crime to be committed. The court should have examined the attacks with a clear and large worldview as well as with a magnifying glass strong enough to catch the nuance distinguishing the belief systems to which the perpetrators and victims subscribed. In tightening up the language used to explain true intra-religious actions versus inter-denominational actions, they provide the protections necessary and adequate for the victims of this crime and the victims of future crimes.