

# Federalizing the Hate Crimes Frame

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## INTRODUCTION

Public debate over the U.S. legal response to White supremacist violence is on constant simmer, bound to boil over whenever an attack draws national attention. In recent years, that’s happened often. Like in 2015, when a White nationalist gunman killed nine worshippers at a Black church in Charleston, South Carolina.<sup>1</sup> And in 2019, when a White man who decried the “Hispanic invasion of Texas” shot twenty-two people dead at an El Paso Walmart.<sup>2</sup>

In each case, the legal response was swift, and the penalties severe. Both men were tried in state and federal court, including for committing federal hate crimes, and both men faced a life sentence, if not death.<sup>3</sup> But neither man was charged with terrorism. To some, that alone rendered the response inadequate, at

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1. See Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html>.

2. See Merrit Kennedy & Barbara Campbell, *U.S. Charges Suspect in El Paso Walmart Shootings with Hate Crimes*, NPR (Feb. 6, 2020, 7:29 PM), <https://www.npr.org/2020/02/06/803503292/u-s-charges-walmart-gunman-in-el-paso-with-hate-crimes>.

3. See Meg Kinnard & Denise Lavoie, *Court Upholds Death Sentence for Church Shooter Dylann Roof*, ABC NEWS (Aug. 25, 2021, 6:45 PM), <https://abcnews.go.com/US/wireStory/black-church-shooters-conviction-death-sentence-upheld-79640421>; Press Release, U.S. Dep’t of Just., Texas Man Charged with Federal Hate Crimes and Firearm Offenses Related to August 3, 2019, Mass-Shooting in El Paso (Feb. 6, 2020), <https://www.justice.gov/opa/pr/texas-man-charged-federal-hate-crimes-and-firearm-offenses-related-august-3-2019-mass>.

least as an expressive matter,<sup>4</sup> because “terrorism” is a stronger word than “hate crime.”<sup>5</sup> A violent White supremacist might be charged with hate crimes and sentenced to death, but unless he is called a terrorist, some might argue that he has evaded the appropriate moral censure.<sup>6</sup> In short, the debate over the legal response to White supremacist violence is in part a debate over framing.

Published in the California Law Review, Shirin Sinnar’s article, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*,<sup>7</sup> is among the latest and perhaps most thorough contributions to this debate. After describing the respective origins, contours, and practical implications of the “hate crimes” and “terrorism” frames, she argues that neither frame “addresses White supremacist violence in a way consistent with evolving ideas of racial justice.”<sup>8</sup> As Sinnar makes clear, of the two, the terrorism frame represents a greater threat to individual rights, and is therefore disfavored, but her critique of the hate crimes frame is no less persuasive. She writes that despite raising awareness of bias-motivated violence, the hate crimes frame “focused on individual responsibility” to the exclusion of systemic factors, “de-emphasized the link between racist violence and historical subordination, and sought solutions in criminal law” instead of structural reform.<sup>9</sup>

This Essay builds on Sinnar’s critique of the hate crimes frame. It charts the distinction between state and federal hate crime enforcement and argues the distinction is relevant to Sinnar’s broader critique. State hate crime statutes, which enhance the penalties for underlying criminal offenses when based on

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4. See, e.g., Sean Illing, *We Must Call Him a Terrorist: Dylann Roof, Fox News and the Truth About Why Language Matters*, SALON (June 21, 2015, 2:17 PM), [https://www.salon.com/2015/06/21/we\\_must\\_call\\_him\\_a\\_terrorist\\_dylann\\_roof\\_fox\\_news\\_and\\_the\\_truth\\_about\\_why\\_language\\_matters](https://www.salon.com/2015/06/21/we_must_call_him_a_terrorist_dylann_roof_fox_news_and_the_truth_about_why_language_matters); Mary B. McCord, *White Nationalist Killers Are Terrorists. We Should Fight Them Like Terrorists.*, WASH. POST (Aug. 8, 2019), [https://www.washingtonpost.com/outlook/white-nationalist-killers-are-terrorists-we-should-fight-them-like-terrorists/2019/08/08/3f8b761a-b964-11e9-bad6-609f75bfd97f\\_story.html](https://www.washingtonpost.com/outlook/white-nationalist-killers-are-terrorists-we-should-fight-them-like-terrorists/2019/08/08/3f8b761a-b964-11e9-bad6-609f75bfd97f_story.html).

5. For a perceptive reflection on this dynamic, see Shibley Telhami, *Thoughts After the Las Vegas Shooting: Is ‘Terrorism’ More Morally Objectionable than Other Forms of Mass Killing?*, LAWFARE (Oct. 8, 2017, 2:00 PM), <https://www.lawfareblog.com/thoughts-after-las-vegas-shootings-terrorism-more-morally-objectionable-other-forms-mass-killings>.

6. In reference to an exchange during an earlier hearing in which she noted the lack of terrorism charges in the Charleston case, a member of Congress said that “[n]eo-Nazis are getting off the hook.” Mike Levine, *Rep. Alexandria Ocasio-Cortez Appears to Conflate Two Types of FBI Cases in Viral Video*, ABC NEWS (June 7, 2019), <https://abcnews.go.com/Politics/rep-alexandria-ocasio-cortez-appears-conflate-types-fbi/story?id=63542165>. The Charleston shooter received a death sentence in federal court and nine life sentences in state court. Associated Press, *Dylann Roof: Charleston Church Shooter Gets Nine Life Sentences in State Case*, NBC NEWS (Apr. 10, 2017, 10:52 AM), <https://www.nbcnews.com/news/us-news/dylann-roof-charleston-church-shooter-pleads-guilty-state-charges-n744746>.

7. Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489 (2022).

8. *Id.* at 493.

9. *Id.* at 525; see also *id.* at 537.

characteristics such as race, are a product of the “tough on crime” era.<sup>10</sup> As Sinnar explains, these statutes ignore the systemic and historical factors that undergird individual acts of White supremacist violence and their enforcement could exacerbate racial inequities in the criminal legal system.<sup>11</sup> In other words, state hate crime statutes do not advance a racial justice approach to White supremacist violence.

But federal hate crime enforcement casts a different shadow. At its heart are five criminal laws,<sup>12</sup> three of which predate the hate crimes frame (the oldest goes back to Reconstruction),<sup>13</sup> now known as federal hate crime statutes.<sup>14</sup> Compared to their state analogues, these statutes are less prone to Sinnar’s critique of the hate crimes frame. In three parts, this Essay walks through her critique as applied to state hate crime enforcement, distinguishes the origins, purpose, and mechanics of federal hate crime statutes, and suggests that, in some respects, federal hate crime enforcement, unlike its state equivalent and in sharp contrast to the terrorism frame, adopts a racial justice approach to White supremacist violence. That suggestion neither saves the hate crimes frame nor alters the strength of Sinnar’s critique, but it should inform the debate nonetheless.

## I.

### THE STATE HATE CRIME ENFORCEMENT CRITIQUE

To begin, here is an overview of state hate crime enforcement. All but a few states have laws that increase the punishment for crimes when they are based on race.<sup>15</sup> Some states extend these protections to other characteristics, but coverage varies, as it does for the types of criminal offenses subject to increased punishment.<sup>16</sup> To illustrate, Ohio’s statute elevates the degree of a misdemeanor offense when based on race, color, religion, or national origin, but covers neither felonies nor offenses based on sexual orientation, disability, gender, or gender identity.<sup>17</sup>

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10. *Id.* at 511–12; *see also* Terry A. Maroney, Note, *The Struggle Against Hate Crime: A Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 583–85 (1998).

11. Sinnar, *supra* note 7, at 541–43.

12. 18 U.S.C. §§ 241, 245, 247, 249; 42 U.S.C. § 3631.

13. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 74 (codified as amended at 18 U.S.C. § 245); *id.* § 901, 89-90 (codified as amended at 42 U.S.C. § 3631); *United States v. Price*, 383 U.S. 787, 801–02 (1966) (discussing origins of 18 U.S.C. § 241).

14. *See* PETER G. BERRIS, CONG. RSCH. SERV., OVERVIEW OF FEDERAL HATE CRIME LAWS 3 (Apr. 1, 2022), <https://crsreports.congress.gov/product/pdf/R/R47060>.

15. *See Federal Bias Categories Included by State Laws*, U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> (last updated May 9, 2022).

16. For a detailed compilation of state hate crime laws, *see State Hate Crimes Statutes*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes> (last updated July 2, 2020).

17. OHIO REV. CODE ANN. § 2927.12 (LexisNexis 2022).

As Sinner writes, the first state hate crime statutes date to the 1980s, which is the same decade that “hate crime” became a named social problem.<sup>18</sup> By 1993, when the Supreme Court held that hate crime sentence enhancements were constitutional in a case, she notes,<sup>19</sup> involving Black on White violence,<sup>20</sup> thirty states had a hate crime statute.<sup>21</sup> To be sure, states have also passed laws requiring police to collect data and receive training on hate crimes,<sup>22</sup> and some localities offer restorative justice measures for certain offenses.<sup>23</sup> But sentence enhancement remains the defining feature of state hate crime enforcement.

Less clear, however, are the effects of sentence enhancement. Few states publish statistics on the use of hate crime statutes. But police-reported data show a statistical overrepresentation of Black hate crime offenders,<sup>24</sup> suggesting that hate crime enforcement might perpetuate what the Brennan Center for Justice has called “existing pathologies in the criminal justice system.”<sup>25</sup> And, as the legal scholar Avlana Eisenberg has written, enforcement incentives might dissuade prosecutors from using enhancements in “archetypal hate crime” cases but encourage their use, for strategic purposes, in cases that lack evidence of a bias motivation.<sup>26</sup> In other words, hate crime enhancements might not work as intended.<sup>27</sup>

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18. Sinner, *supra* note 7, at 509–10. California arguably passed the first hate crime statute in 1978, when voters approved a ballot initiative that named the intentional selection of a victim because of their race, color, nationality, or country of origin as one of several special circumstances that increased the punishment for convictions of first-degree murder to death or life without parole. *See* CAL. PENAL CODE § 190.2(a)(16) (West 2023); *see also* Ryken Grattet, Valerie Jenness & Theodore R. Curry, *The Homogenization and Differentiation of Hate Crime Law in the United States, 1978 to 1995: Innovation and Diffusion in the Criminalization of Bigotry*, 63 AM. SOCIO. REV. 286, 289 (1998).

19. Sinner, *supra* note 7, at 513.

20. *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993).

21. David Margolick, *Test of a ‘Hate Crime’ Law Reaches Center Stage*, N.Y. TIMES (Apr. 20, 1993), <https://www.nytimes.com/1993/04/20/us/test-of-a-hate-crime-law-reaches-center-stage.html>.

22. *See* BRENNAN CTR. FOR JUST., *supra* note 16.

23. Shirin Sinner & Beth Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 164 (2020).

24. *Compare Hate Crime*, FED. BUREAU OF INVESTIGATION CRIME DATA EXPLORER, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/hate-crime> (last visited May 12, 2022) (showing that, for U.S. police-reported hate crimes in 2020, about twenty-five percent of known offenders were Black or African American), *with* Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html#:~:text=In%202020%2C%20the%20Black%20or,million%20and%2012.6%25%20in%202010> (reporting that Black or African American people accounted for about fourteen percent of U.S. population in 2020).

25. MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CTR. FOR JUST., *FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 14* (July 14, 2019), <https://www.brennancenter.org/our-work/research-reports/fighting-far-right-violence-and-hate-crimes>.

26. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 U.C.L.A. L. REV. 858, 863–64 (2014).

27. Avlana Eisenberg, *Hate-Crime Laws Don’t Work as Their Supporters Intended*, ATLANTIC (June 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/hate-crimes-not-used-prosecutors/619179>.

These dynamics factor into Sinnar's critique of the hate crimes frame. Because state hate crime statutes "took shape against a backdrop of law-and-order politics and conservative backlash to civil rights," she writes, "these laws responded to hate crimes as a problem of biased individuals, unconnected to ideology or social structures, to be addressed primarily through lengthening incarceration."<sup>28</sup> At another point, Sinnar's article delineates three limits of the hate crimes frame as applied to White supremacist violence. First, it "often fails to recognize the systemic and political character of [such] violence."<sup>29</sup> Second, it "is reactive in focusing on the charging of crimes and enhancement of penalties."<sup>30</sup> And third, its focus on increased punishment "minimizes state violence and repression, including the problems of mass incarceration and disparities in the criminal legal system."<sup>31</sup> As a result, she argues, this application of the hate crimes frame is not consistent with principles of racial justice.<sup>32</sup>

I think Sinnar's argument is right on all fronts. State hate crime enforcement, with its fixation on sentence enhancement, disregard for the systemic and historical roots of bias-motivated violence, and lack of oversight or integration with other social programs, does little to advance civil rights or promote racial justice. To be sure, campaigns to enact state hate crime statutes brought attention to bias-motivated violence and elevated characteristics less often accorded civil rights protections, like sexual orientation or gender identity, alongside race and religion. But at what cost?

In light of Sinnar's critique, the question becomes how, if not whether, to improve the hate crimes frame with an eye toward racial justice. A potential first step is better oversight of hate crime enforcement. Police-reported hate crime data, even if accurate, at most reflect the nature and extent of suspected bias-motivated crimes that come to the attention of law enforcement, not the use of hate crime enhancements or the attributes of hate crime cases. To ascertain the effects of hate crime enforcement, states should therefore require statistics on not only reported hate crime incidents, but also the outcomes of hate crime investigations and prosecutions.

And then there is the potential for state hate crime reform. Elsewhere, Sinnar has written about restorative justice and victim compensation programs as alternatives to hate crime enhancement.<sup>33</sup> Both options decrease the emphasis on retribution in favor of recognizing and addressing the harms that hate crimes inflict, and may be preferable to sentence enhancement, if not criminal prosecution, in certain cases.

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28. Sinnar, *supra* note 7, at 493.

29. *Id.* at 541.

30. *Id.* at 542.

31. *Id.* at 543.

32. *Id.* at 537.

33. *See generally* Sinnar & Colgan, *supra* note 23.

As for the prevention critique of the hate crimes frame, i.e., that prosecutions are reactive and that hate crime statutes have what one report labeled “at best, an inconclusive deterrent effect,”<sup>34</sup> the answer lies outside the criminal justice system. In this context, Sinnar explains, prevention can mean two things. On one hand, hate crime prevention could mean eradicating the systemic conditions that give rise to bias-motivated violence. On the other hand, it could mean the adoption of “preventative law enforcement” strategies, which define the terrorism frame and are inimical to civil rights and civil liberties on multiple fronts.<sup>35</sup> The former version of hate crime prevention might cease to be criminal enforcement. But since this version would advance racial justice rather than undermine individual rights, it is preferable to the latter. The challenge is that addressing the systemic underpinnings of bias-motivated violence or, in this specific context, White supremacist violence, would require structural reforms that exceed the scope of criminal law enforcement.

In sum, the last four decades have seen the emergence and widespread adoption of state-level hate crime enhancements, which increase the punishment for crimes that are based on characteristics such as race. Few states, however, keep statistics on their use, and some data suggest that hate crime enhancements might perpetuate racial inequities in the U.S. criminal legal system. Sinnar’s critique of the hate crimes frame cuts straight into these provisions, and the critique is persuasive. So long as sentence enhancement remains the centerpiece of state hate crime enforcement, it is unclear whether this dimension of the hate crimes frame can be saved.

## II.

### DISTINGUISHING FEDERAL HATE CRIME ENFORCEMENT

Hate crime enforcement neither begins nor ends with the states. As Sinnar acknowledges, there is a distinction between state hate crime enforcement, on one hand, and federal hate crime enforcement, on the other. This Part explores that distinction with her critique of the hate crimes frame in mind.

Sinnar writes that after the proliferation of state hate crime enhancements in the 1980s, “the federal government followed suit with new hate crime laws.”<sup>36</sup> She mentions three federal statutes, passed between 1990 and 2009, which (1) required the collection of national hate crime statistics, (2) authorized the application of sentence enhancements to bias-motivated federal crimes, and (3) expanded federal criminal jurisdiction over bias-motivated violence.<sup>37</sup> I agree

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34. TYLER BISHOP ET AL., STAN. L. SCH. POL’Y LAB & BRENNAN CTR. FOR JUST., EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES 12 (June 2021), [https://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report\\_v09-final.pdf](https://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report_v09-final.pdf).

35. See Sinnar, *supra* note 7, at 528–29, 548–52.

36. *Id.* at 510.

37. Sinnar, *supra* note 7, at 510–11 (discussing the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140, 101st Cong. (1990) (codified as amended at 34 U.S.C. § 41305); Hate Crime Sentencing Enhancement Act, Pub. L. No. 103-332, § 280003, 108 Stat. 1796, 2096 (codified at 28

with Sinnar’s decision to ground these statutes in the same political context as state hate crime laws. Like their state counterparts, these are criminal laws dipped in a civil rights gloss. And Congress channeled the same tough-on-crime politics to guarantee their passage.<sup>38</sup> But these statutes do not present a complete picture of federal hate crime enforcement.

As Sinnar explains, “long before the ‘hate crime’ term came into common usage, Congress had passed criminal laws that might be viewed as forerunners of hate crime laws.”<sup>39</sup> She mentions a provision of the Civil Rights Act of 1968, codified at 18 U.S.C. § 245(b)(2), that makes it a federal crime to forcibly injure, intimidate, or interfere with someone because of their “race, color, religion, or national origin” and their participation in one of six enumerated federal rights.<sup>40</sup> She distinguishes § 245(b)(2) from more recent hate crime laws on two grounds. First, it creates a standalone criminal offense, not a sentence enhancement for an existing crime.<sup>41</sup> Second, its dual-intent requirement limits the statute’s reach to bias-motivated interference with a narrow set of civil rights, whereas newer laws focus on bias motivation regardless of victim conduct.<sup>42</sup>

Even if § 245(b)(2) departs, in some respects, from Sinnar’s rendition of the hate crimes frame, it is no less a hate crime statute or an instrument of federal hate crime enforcement.<sup>43</sup> It is just that the origins, purpose, and mechanics of federal hate crime enforcement are distinct from those of its state equivalent.

Both the historical and constitutional origins of federal hate crime enforcement lie in Reconstruction. In 1870 and 1871, Congress passed the Enforcement Acts, which increased federal power to safeguard constitutional rights.<sup>44</sup> In the words of legal scholar Jack Balkin, “[t]hese statutes were passed in the wake of widespread political terrorism in the South,” in which White

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U.S.C. § 994 note); and Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009) (codified as amended at 18 U.S.C. § 249).

38. See, e.g., Sinnar, *supra* note 7, at 511-12 (noting that Congress passed the Hate Crime Sentencing Enhancement Act as part of the 1994 crime bill).

39. Sinnar, *supra* note 7, at 510.

40. Civil Rights Act of 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 74 (codified as amended at 18 U.S.C. § 245).

41. Sinnar, *supra* note 7, at 510.

42. *Id.*

43. The Justice Department calls § 245 a “federal hate crime statute.” *Hate Crime Laws*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/hate-crime-laws> (last updated Mar. 7, 2019). And prosecutors have brought charges under § 245 in several recent federal hate crime cases involving white supremacist violence. See Press Release, U.S. Dep’t of Just., Ohio Man Charged with Federal Hate Crimes Related to August 2017 in Charlottesville (June 27, 2018), <https://www.justice.gov/opa/pr/ohio-man-charged-federal-hate-crimes-related-august-2017-rally-charlottesville>; see also Press Release, U.S. Dep’t of Just., Three Georgia Men Charged with Federal Hate Crimes and Attempted Kidnapping in Connection with Death of Ahmaud Arbery (Apr. 28, 2021), <https://www.justice.gov/opa/pr/three-georgia-men-charged-federal-hate-crimes-and-attempted-kidnapping-connection-death>; Indictment at 3, *United States v. McMichael*, No. 2:21-cr-00022-LGW-BWC (S.D. Ga. Apr. 28, 2021).

44. Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

supremacist groups like the Ku Klux Klan used violence to prevent Black citizens and political opponents “from exercising their rights to vote, assemble, exercise free speech, and participate in politics.”<sup>45</sup>

The first Enforcement Act included a criminal provision that outlawed private conspiracies “to injure, oppress, threaten, or intimidate any citizen” for the purpose of interfering with a “right or privilege secured . . . by the Constitution or the laws of the United States.”<sup>46</sup> The provision’s author, Senator John Pool of North Carolina, argued that conspiracies to violate constitutional rights should come under federal jurisdiction and that states had effectively denied these rights through lax criminal enforcement.<sup>47</sup> The federal government had “a perfect right under the Constitution of the United States,” he declared, “to go into [the] States for the purpose of protecting and securing liberty.”<sup>48</sup> According to Pool, that right drew in part from the Thirteenth, Fourteenth, and Fifteenth Amendments,<sup>49</sup> each of which empowered Congress to enforce its provisions “by appropriate legislation.”<sup>50</sup>

The U.S. Supreme Court would soon undercut these powers in a series of cases involving racial violence and discrimination. First, in *United States v. Cruikshank*,<sup>51</sup> an 1875 decision, the Court reversed the Enforcement Act convictions of three White men charged for their role in the Colfax Massacre,<sup>52</sup> which historian Eric Foner described as “[t]he bloodiest single instance of racial carnage in the Reconstruction era.”<sup>53</sup> In that case, the government alleged the defendants had conspired to interfere with Black citizens’ due process, equal protection, and voting rights under the Fourteenth and Fifteenth Amendments, as well as their rights to assemble and bear arms “for lawful purposes” under the First and Second Amendments.<sup>54</sup> The Court, however, held that Second and Fourteenth Amendment rights were unenforceable against private conduct and that the government failed to allege actual violations of the First or Fifteenth Amendment.<sup>55</sup>

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45. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1841 (2010).

46. Act of May 31, 1870, ch. 114, § 6, 16 Stat. at 141.

47. CONG. GLOBE, 41st Cong., 2d Sess. 3611 (1870) (statement of Sen. John Pool).

48. *Id.*

49. *Id.* (referring to “these three amendments”).

50. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

51. 92 U.S. 542 (1875).

52. See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L.L. REV. 385, 387–88, 407 (2014).

53. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, 437 (1988).

54. *Cruikshank*, 92 U.S. at 552–56. The government also alleged violations of the Fourteenth Amendment’s privileges and immunities clause. *Id.* at 557.

55. *Id.* at 552–56. According to the Court, the government alleged that the defendants conspired to prevent their victims not from assembling to petition the government for a redress of grievances, thus implicating the First Amendment, but rather from assembling “for lawful purposes,” which was not a constitutional right. *Id.* at 551–53. As for the accusation that the defendants conspired to interfere with



Then, in the *Civil Rights Cases*, an 1883 decision, the Court held that Congress could not use the Thirteenth or Fourteenth Amendment to regulate private acts of racial discrimination in public accommodations, which it attempted to do in the Civil Rights Act of 1875.<sup>56</sup> In part, the Court's holding was an extension of *Cruikshank*, which said that the Fourteenth Amendment "adds nothing to the rights of one citizen as against another."<sup>57</sup> As for the Thirteenth Amendment, the Court held that it lacked a similar state action requirement, and could therefore reach private conduct, but limited its enforcement to eradicating the "badges and incidents of slavery," which the Court defined to exclude racial discrimination in public accommodations.<sup>58</sup>

Two decades later, in *Hodges v. United States*, the Court adopted an even narrower reading of the Thirteenth Amendment.<sup>59</sup> There, the Court reversed the Enforcement Act convictions of White supremacists who used threats of violence to prevent Black workers from performing their contracts, writing that "it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation."<sup>60</sup>

These and other late nineteenth century decisions, such as the *Slaughterhouse Cases*,<sup>61</sup> drained the Reconstruction Amendments of considerable power and limited the scope of federal civil rights enforcement for decades. Things changed, however, in the 1960s, when the Warren Court both reinvigorated Section 2 of the Thirteenth Amendment, which empowers Congress to enforce the amendment's ban on slavery and involuntary servitude "by appropriate legislation," and recognized the Commerce Clause as another source of congressional civil rights power.<sup>62</sup> First, in *Jones v. Alfred H. Mayer Co.*, a 1968 decision, the Court upheld a federal statute barring racial discrimination in property transactions on Thirteenth Amendment grounds, writing that "Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."<sup>63</sup> Congress has since applied *Jones* to

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the victims' voting rights, the Court faulted the government for not alleging a racial motivation, as the Fifteenth Amendment did not protect the right to vote per se, but rather the right to vote without discrimination "on account of race, color, or previous condition of servitude." *Id.* at 555–56; U.S. CONST. amend. XV, § 1.

56. 109 U.S. 3 (1883); Civil Rights Act of 1875, ch. 114 §§ 1–2, 18 Stat. 335.

57. *Cruikshank*, 92 U.S. 542, 554 (1875); see also Pope, *supra* note 51, at 388 ("It was *Cruikshank*, not the far more famous *Civil Rights Cases*, that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action.").

58. *The Civil Rights Cases*, 109 U.S. at 20–21.

59. *Hodges v. United States*, 203 U.S. 1 (1906).

60. *Id.* at 19.

61. 83 U.S. 36 (1873); see also *Plessy v. Ferguson*, 163 U.S. 537, 542–43, 550–51 (1896).

62. See U.S. CONST. amend. XII, § 2; George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1552–53 (2012).

63. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

enact federal hate crime statutes covering racial violence,<sup>64</sup> and courts have upheld these and older provisions as valid exercises of congressional power to enforce the Thirteenth Amendment.<sup>65</sup> Second, in two landmark cases, the Court upheld different applications of the Civil Rights Act of 1964 under the commerce power,<sup>66</sup> which would also become the source of future hate crime provisions.<sup>67</sup>

For what it is worth, multiple members of the Warren Court also signaled an interest in relaxing other constraints on the Reconstruction powers, including the Fourteenth Amendment's state action requirement. In *United States v. Guest*, a 1966 case involving a § 241 prosecution for racial violence, six justices over two concurring opinions argued that the statute should cover private conspiracies to interfere with Fourteenth Amendment rights.<sup>68</sup> Congress ran with this argument and drafted new hate crime provisions grounded in the Fourteenth Amendment, which it passed under the Civil Rights Act of 1968.<sup>69</sup> Months later came *Jones*, where instead of eliminating the state action requirement to uphold the antidiscrimination statute on Fourteenth Amendment grounds, the Court reinforced Section 2 of the Thirteenth Amendment.

To paraphrase legal scholar Jamal Greene, this might have come as a shock, in part because Congress had drafted legislation anticipating an eventual Fourteenth Amendment holding that *Jones* could have produced but, for whatever reason, did not.<sup>70</sup> Decades later, in *Morrison v. United States*, the Rehnquist Court shut the door that *Guest* left open, reaffirming the Fourteenth Amendment's state action requirement as applied to a federal statute that regulated private acts of gender-based violence.<sup>71</sup> As for the hate crime provisions that Congress passed in light of *Guest*, courts have since upheld those covering racial violence on Thirteenth Amendment grounds.<sup>72</sup>

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64. See Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, § 4702(7), 123 Stat. 2190, 2836 (2009); Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 2(6), 110 Stat. 1392, 1392 (1996).

65. See *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) (upholding 18 U.S.C. § 249(a)(1) on Thirteenth Amendment grounds); *United States v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012) (same); *United States v. Nicholson*, 185 F. Supp. 2d 982, 990, 992 (E.D. Wis. 2002) (holding 18 U.S.C. § 241 and 42 U.S.C. § 3631 constitutional under the Thirteenth Amendment as applied to racial violence); *United States v. Nelson*, 277 F.3d 164, 190-91 (2d Cir. 2000) (holding 18 U.S.C. § 245(b)(2)(B) constitutional under Thirteenth Amendment as applied to racial violence).

66. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

67. See 18 U.S.C. §§ 245(b)(2)(E)–(F); 18 U.S.C. §§ 247(a)–(b); 18 U.S.C. § 249(a)(2); see also *United States v. Nicholson*, 185 F. Supp. 2d 982, 988–990 (E.D. Wis. 2002) (upholding 42 U.S.C. § 3631 as valid exercise of commerce power).

68. *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 781–84 (Brennan, J., concurring).

69. Civil Rights Act of 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 74 (codified as amended at 18 U.S.C. §§ 245(b)(2)(E)–(F)).

70. See Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1757–60 (2012).

71. *Morrison v. United States*, 529 U.S. 598, 620–23 (2000).

72. See, e.g., *United States v. Allen*, 341 F.3d 870, 883–85 (9th Cir. 2003).

In short, Congress passed the first hate crime statute during Reconstruction, and in the context of racial violence, federal hate crime provisions are grounded in the Thirteenth Amendment, a Reconstruction power. By their respective origins, federal hate crime enforcement runs deeper than its state equivalent, as it is rooted in a historical and constitutional narrative about the use of federal power to defend civil rights and promote racial justice. When it comes to thinking about the U.S. legal response to white supremacist violence, that distinction feels relevant.

As for the purpose of federal hate crime enforcement, it is less to increase punishments for bias-motivated violence than to assert that bias-motivated violence is a matter of federal concern. An important distinction between state and federal hate crime statutes revolves around jurisdiction. States have jurisdiction over bias-motivated violence independent of their hate crime statutes. As explained above, Ohio's hate crime statute does not cover felonies or offenses based on sexual orientation, disability, gender, or gender identity.<sup>73</sup> But that does not mean the state lacks jurisdiction to punish these crimes. For example, state prosecutors could charge a perpetrator of fatal racial violence with homicide or other felonies.<sup>74</sup> Likewise, someone who defaces an LGBTQ community center with slurs could be liable for misdemeanor property offenses.<sup>75</sup>

Jurisdiction has a different bearing on the operation of federal hate crime statutes. The Constitution reserves the general powers of criminal law enforcement to the states.<sup>76</sup> The upshot is not that Congress lacks power to enact criminal statutes, but rather that federal criminal statutes must be tied to a federal power enumerated in the Constitution, such as enforcing the abolition of slavery or regulating interstate commerce.<sup>77</sup> As discussed above, both powers undergird federal hate crime statutes.<sup>78</sup> But, depending on the source of power, the characteristics protected in a statute serve different jurisdictional functions.

Consider the Shepard-Byrd Act, codified at 18 U.S.C. § 249, which creates one offense for racial violence and another for violence based on religion, national origin, sexual orientation, gender, disability, or gender identity.<sup>79</sup> The latter is codified at § 249(a)(2). Because it is grounded in the Commerce Clause, § 249(a)(2) has a “jurisdictional element,” which provides that the offense must be in or affect interstate commerce.<sup>80</sup> Specifically, the jurisdictional element

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73. See *supra* text accompanying note 17.

74. See OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2022).

75. See OHIO REV. CODE ANN. §§ 2909.05, 2909.07 (LexisNexis 2022).

76. See U.S. CONST. amend. X; *Bond v. United States*, 572 U.S. 844, 854 (2014).

77. See *Luna Torres v. Lynch*, 578 U.S. 452, 457 (2016) (“In our federal system, Congress cannot punish felonies generally, it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers.”) (citations and quotations omitted).

78. See *supra* text accompanying notes 63–67.

79. Compare 18 U.S.C. § 249(a)(1), with 18 U.S.C. § 249(a)(2).

80. See 18 U.S.C. § 249(a)(2)(B); see also *United States v. Lopez*, 514 U.S. 549, 561–62 (1995).

outlines six different circumstances—for example, that the defendant used a weapon that traveled in interstate commerce—at least one of which prosecutors must prove to establish jurisdiction under the statute. To be sure, Congress arguably could have stopped there, and granted federal criminal jurisdiction over all conduct that satisfies one of the six circumstances enumerated in the statute’s jurisdictional element. Instead, Congress went a step further, and limited § 249(a)(2)’s application to conduct that not only satisfies the jurisdictional element but also involves certain forms of bias-motivated violence. In other words, the bias motivations proscribed in § 249(a)(2) operate to limit the scope of jurisdiction under the statute. The same cannot be said for § 249(a)(1), which covers racial violence and lacks a jurisdictional element altogether. For that provision, Congress chose to ground jurisdiction in the Thirteenth Amendment, not the Commerce Clause, the argument being that racial violence is a badge or incident of slavery that falls within the amendment’s enforcement power to commit ..<sup>81</sup> Therefore, in contrast to the bias motivations proscribed at § 249(a)(2), the express prohibition of racial violence at § 249(a)(1) serves as a grant of jurisdiction, not a limit.

Despite these differences, the protections in both examples affect the scope of federal jurisdiction under the statute. The same cannot be said for protections in state hate crime statutes, which neither increase nor limit state criminal jurisdiction over bias-motivated violence, but rather single out certain criminal offenses, both violent and nonviolent, for increased punishment.

In short, states have exclusive jurisdiction over bias-motivated violence unless the federal government can assert jurisdiction under an enumerated power. Whether a state has jurisdiction over bias-motivated violence does not turn on the existence or coverage of a state hate crime statute; the purpose of state hate crime enforcement is to increase punishments for conduct that already falls under state jurisdiction. In contrast, the purpose of federal hate crime enforcement is to assert jurisdiction over conduct otherwise subject to punishment under state criminal laws.

To be sure, the reason for asserting federal jurisdiction over bias-motivated violence has changed with time. During Reconstruction, a justification for § 241 was that states had often failed to prosecute racial violence.<sup>82</sup> Deliberations over recent federal hate crime statutes, however, like the Shepard-Byrd Act, have treated federal jurisdiction as not only a tool for supporting state criminal investigations but also a fallback when state criminal charges lack sufficient

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81. 18 U.S.C. § 249(a)(1).

82. See CONG. GLOBE, 41st Cong., 2d Sess. 3611 (1870) (statement of Sen. John Pool) (arguing, in debate over the precursor to 18 U.S.C. § 241, that “[i]f a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the [Reconstruction] amendment[s], it is in my judgment the duty of the United States to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment[s] vitality there”).

expressive force.<sup>83</sup> Indeed, federal hate crime prosecutions often coincide with separate state prosecutions that do not involve hate crime charges.<sup>84</sup> But despite these changes, and even if dual prosecutions effectively increase the punishment for a single act of bias-motivated violence, the purpose of federal hate crime enforcement remains the same.

At last, we come to the mechanics of federal hate crime enforcement. Compared to its state equivalent, federal hate crime enforcement is subject to greater oversight and more integrated with broader efforts to advance civil rights and promote racial justice. A national dataset on the use of state hate crime statutes does not exist. This prevents us from knowing how often state prosecutors bring hate crime charges and the factors that influence their decision-making. When it comes to federal hate crime statutes, acquiring this knowledge is an easier task. For one, the dataset is small—federal hate crime prosecutions are rare—and the Justice Department often shares press releases about hate crime cases, which sometimes include court filings, on its public website.<sup>85</sup> Furthermore, the Justice Department keeps data on federal hate crime referrals and prosecutions.<sup>86</sup> And then there is the promise of congressional oversight.<sup>87</sup>

If prosecution data and oversight hearings provide back-end knowledge on the use of federal hate crime statutes, then there are multiple front-end constraints on prosecutorial discretion to consider as well. Three federal hate crime statutes have certification requirements, which not only require prosecutors to get the Justice Department’s permission before charging a violation of the statute but also limit the circumstances in which such charges are available, even when the alleged conduct otherwise meets the statute’s jurisdictional requirements.<sup>88</sup> The Shepard-Byrd Act, for example, stipulates that no prosecution under the statute can occur unless the Attorney General or a designee certifies that the state lacks jurisdiction, the state asks the federal government to assume jurisdiction, the

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83. See *Hate Crimes Prevention Act of 1998: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 66–67 (responses from Eric Holder, Deputy Att’y Gen. of the United States, to questions from Sen. Robert Torricelli) (involving legislative precursor to the Shepard-Byrd Act); see also 18 U.S.C. § 249(b)(1)(C) (permitting federal hate crime prosecution when “the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence”).

84. See, e.g., *supra* text accompanying note 3 (explaining that the Charleston and El Paso shooters faced state criminal charges and federal hate crime charges for their respective crimes).

85. See, e.g., U.S. Dep’t of Just., *supra* note 3.

86. See *National Caseload Data*, U.S. Dep’t of Just., <https://www.justice.gov/usao/resources/foia-library/national-caseload-data/frequently-asked-questions> (last updated Dec. 8, 2020). For caseload data analysis on federal hate crime prosecutions, see, e.g., TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, FEW FEDERAL HATE CRIME REFERRALS RESULT IN PROSECUTION (Aug. 12, 2019), <https://trac.syr.edu/tracreports/crim/569>.

87. In recent years, multiple congressional committees have held public hearings on federal hate crime enforcement with testimony from government witnesses. See, e.g., *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. (2019); *Combating the Rise in Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022).

88. See 18 U.S.C. §§ 245(a)(1), 247(e), 249(b).

state prosecution did not vindicate the federal government's "interest in eradicating bias-motivated violence," or a federal prosecution "is in the public interest and necessary to secure substantial justice."<sup>89</sup>

Another constraint is structural. The certification power for all three statutes has been delegated to the Assistant Attorney General for Civil Rights,<sup>90</sup> who leads the Justice Department's Civil Rights Division. Established under the Civil Rights Act of 1957,<sup>91</sup> the division coordinates the federal response to "all matters affecting civil rights."<sup>92</sup> This includes the enforcement of federal hate crime statutes, which falls to the division's Criminal Section.<sup>93</sup> The section does not lead every federal hate crime prosecution, but certification requirements centralize decision-making to some extent, and section prosecutors often assist U.S. Attorney's Offices with their hate crime cases.<sup>94</sup>

This sets up a second distinction between the mechanics of state and federal hate crime enforcement: the latter's integration with civil rights and racial justice programs. Congress enacted the first three federal hate crime statutes as features of larger civil rights bills geared toward structural change.<sup>95</sup> The Civil Rights Act of 1968, for example, included the Fair Housing Act, which established federal civil jurisdiction over multiple forms of housing discrimination.<sup>96</sup> The Act also contained a criminal provision, codified at 42 U.S.C. § 3631, that prohibited violent interference with housing based on race, color, religion, or national origin.<sup>97</sup> This provision, since amended with protections for sex, "handicap," and familial status,<sup>98</sup> can be seen as the tip of the Act's enforcement spear.

In a similar respect, we can view the Criminal Section as the sharp end of the Civil Rights Division, whose mandate exceeds the scope of criminal law enforcement. In the racial discrimination context, the division's work includes the enforcement of civil rights laws grounded in the same powers that undergird federal hate crime statutes.<sup>99</sup> And, to mention another critique of the hate crimes

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89. 18 U.S.C. § 249(b).

90. Barbara Kay Bosserman & Angela M. Miller, *Prosecuting Federal Hate Crimes*, 66 U.S. ATT'YS' BULL. 191, 193–94 (2018).

91. Civil Rights Act of 1957, Pub. L. No. 85-315, § 111, 71 Stat. 634, 637.

92. 1958 Att'y Gen. Ann. Rep. 171, 171 (1958); see also Dorsey Edw. Lane, *The Civil Rights Act of 1957*, 4 HOWARD L.J. 36, 43–44 (1958) (describing the "three cardinal aims" of creating the Civil Rights Division).

93. *Criminal Section*, C.R. DIV., U.S. DEP'T OF JUST., <https://www.justice.gov/crt/criminal-section> (last visited May 21, 2022).

94. *Id.*

95. See Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141 (1870); Pub. L. No. 90-284, § 101, 82 Stat. 73, 73 (1968); *id.* § 901, 82 Stat. at 89–90.

96. Pub. L. No. 90-284, §§ 801–901, 82 Stat. at 81–90.

97. *Id.* § 901, 82 Stat. at 89–90.

98. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b)(4), 88 Stat. 633, 729; Fair Housing Amendment Act of 1988, Pub. L. No. 100-430, § 9, 102 Stat. 1619, 1635.

99. See Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 88 (2010) (noting that

frame, the division's civil and criminal enforcement priorities extend to preventing state violence.<sup>100</sup> Indeed, the most expansive federal hate crime statute, the Shepard-Byrd Act, covers bias-motivated violence committed under color of law,<sup>101</sup> and the Criminal Section enforces another statute that applies exclusively to official misconduct.<sup>102</sup>

The division's various enforcement priorities should not be viewed in isolation, but rather as components of a broader federal project to advance civil rights. From this perspective, the ties between federal hate crime and civil rights enforcement are not only constitutional and historical, but also strategic.

### III.

#### FEDERAL HATE CRIME ENFORCEMENT AND RACIAL JUSTICE

One can distinguish between state and federal hate crime enforcement. But in the debate over hate crime, terrorism, and the legal response to White supremacist violence, do the distinctions matter? Of course, asking this question assumes that such distinctions exist. And there are two arguments against that assumption. The first is that "federal hate crime statute" is a misnomer. Congress might have enacted laws to establish federal criminal jurisdiction over bias-motivated violence, and more recent additions might even include the word "hate crimes" in their titles,<sup>103</sup> but these laws fall too far outside the hate crimes frame to be compared with state hate crime enhancements. Second, one could argue that despite the historical and constitutional origins of statutes like § 241, which, as a reminder, predates the earliest state hate crime laws by more than a hundred years, the brunt of federal hate crime enforcement exists within Sinner's rendition of the hate crimes frame. This argument cuts against the first, as it emphasizes points of connection between state and federal hate crime enforcement, which include specific provisions, such as the federal hate crime sentencing enhancement act,<sup>104</sup> and the general observation that, like their state analogues, federal hate crime statutes prioritize after-the-fact criminal punishments of individual conduct.

As for whether the distinctions are relevant, there is an argument that even if federal hate crime enforcement departs, in some respects, from the hate crimes frame, federal hate crime statutes likely account for a small percentage of U.S.

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courts have upheld civil provisions of the Fair Housing Act, as applied to racial discrimination, under Section 2 of the Thirteenth Amendment).

100. See, e.g., *Conduct of Law Enforcement Agencies*, C.R. DIV., U.S. DEP'T OF JUST., <https://www.justice.gov/crt/special-litigation-section> (last visited May 22, 2022); C.R. DIV., U.S. DEP'T OF JUST., *supra* note 93.

101. 18 U.S.C. § 249.

102. See 18 U.S.C. § 242; *Statutes Enforced by the Criminal Section*, C.R. DIV., U.S. DEP'T OF JUST., <https://www.justice.gov/crt/statutes-enforced-criminal-section> (last updated July 28, 2017).

103. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009) (codified as amended at 18 U.S.C. § 249).

104. Hate Crime Sentencing Enhancement Act, Pub. L. No. 103-332, § 280003, 180 Stat. 1796, 2096 (codified at 28 U.S.C. § 994 note).

hate crime prosecutions. This is a denominator problem, as national statistics on the use of state hate crime statutes do not exist. But the numerator, at least, is no more than a couple dozen per year. And, as explained in Part II, state hate crime statutes lack the same jurisdictional and other constraints that limit the scope of federal hate crime enforcement. State hate crime prosecutions might therefore significantly outnumber their federal counterparts. As a question of framing, this could mean that federal hate crime laws scarcely influence the legal response to bias-motivated violence or public understandings of that violence.<sup>105</sup>

These arguments are persuasive. But all three overlook a nuance in the hate crime, terrorism, and White supremacist violence debate. No matter the relationship between state and federal hate crime enforcement, the former is less relevant in the context of the debate itself. And that is because the debate, as far as it concerns the legal response to White supremacist violence, is often about two competing visions of federal criminal law enforcement.

On one side is federal hate crime enforcement. Despite the likely prevalence of nonfatal White supremacist violence involving a single victim, fatal acts of mass violence seem to drive, or at least often reignite, the hate crime or terrorism debate. These same acts of violence, which also tend to receive national attention, appear more likely to prompt a federal hate crime investigation. The Introduction notes that the Charleston and El Paso gunmen were prosecuted in state and federal court, with both charged for committing federal hate crimes.<sup>106</sup> But since South Carolina did not have a hate crime statute, the Charleston gunman's state prosecution did not include hate crime charges.<sup>107</sup> As for the El Paso gunman, the state of Texas reindicted him eleven months after the shooting with new charges applying a hate crime enhancement.<sup>108</sup> But the enhancements did not cover his capital murder charges for killing twenty-three of his victims; only the counts of aggravated assault with a deadly weapon that he received for wounding twenty-two others.<sup>109</sup>

These two examples tell us something about the relationship between state and federal hate crime statutes. If the debate turns on acts of White supremacist violence that, because of their sheer brutality or reach, attract widespread attention and merit federal involvement, then we are bound to associate one side of the debate with federal hate crime enforcement. To be sure, when federal

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105. See Sinnar, *supra* note 7, at 508 (“[L]aw both *influences* how a problem comes to be classified and understood and *responds* to how social actors have categorized the problem.”).

106. See *supra* text accompanying note 3.

107. German Lopez, *44 States Could Prosecute the Charleston Shooting as a Hate Crime—but Not South Carolina*, VOX (June 18, 2015, 3:30 PM), <https://www.vox.com/2015/6/18/8807655/charleston-shooting-hate-crime>. The state still lacks a hate crime statute.

108. Daniel Conrad, *El Paso Shooting Suspect Faces New Murder, Hate Crime Charges*, COURTHOUSE NEWS SERV. (June 25, 2020), <https://www.courthousenews.com/el-paso-shooting-suspect-faces-new-murder-hate-crime-charges>.

109. *Id.*



prosecutors bring hate crime charges, that does not preempt their state counterparts from doing the same. Sometimes, as in Charleston, state hate crime charges might be unavailable.<sup>110</sup> But the El Paso shooting and other major acts of White supremacist violence have drawn both state and federal hate crime prosecutions.<sup>111</sup> At the same time, however, the principal justification for state hate crime statutes—increased punishment—has less relevance in the case of fatal mass violence.

In Texas, for example, capital felonies can be charged as hate crimes.<sup>112</sup> But when the underlying sentence is death, a state cannot possibly “increase” the punishment.<sup>113</sup> This might explain the lack of hate crime enhancements for the El Paso gunman’s capital murder charges. As for the enhancements that the state applied to his charges for aggravated assault with a deadly weapon, one could argue there is a retributive justification for increasing the punishment for each individual count, but again, none of these enhancements change the bottom line.

In contrast, the purpose of federal hate crime enforcement becomes no less relevant as the violence intensifies. If anything, the justification for asserting federal jurisdiction intensifies as well, assuming that, as the scale of violence increases, so do the likelihood of national attention and the demands for a federal response. If major acts of violence drive the hate crime or terrorism debate, then within that debate, federal hate crime enforcement plays a defining role.

On the other side of the debate is federal counterterrorism, and not some state equivalent. This makes sense in part because, assuming the debate turns on violence that attracts a federal hate crime prosecution, it is natural to pit one federal response against another. And furthermore, a true state equivalent to federal counterterrorism does not exist.

On the first point, consider the debate as it transpired in the aftermaths of the Charleston and El Paso shootings. Within hours of the Charleston shooting, Attorney General Loretta Lynch announced that federal law enforcement were investigating the attack as a potential hate crime, but initially made no reference

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110. Lopez, *supra* note 107.

111. Conrad, *supra* note 108; Greg Moran, *Poway Synagogue Shooter Gets Life Sentence*, L.A. Times (Dec. 28, 2021, 12:17 PM), <https://www.latimes.com/california/story/2021-12-28/poway-synagogue-shooter-federal-life-sentence>; Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> (noting that in addition to federal hate crime charges, Pittsburgh synagogue shooter faced state charge of ethnic intimidation).

112. TEX. PENAL CODE ANN. § 12.47 (West 2022).

113. Note that first-degree felonies are not subject to hate crime enhancements in Texas, perhaps because those crimes would become death eligible if an enhancement applied. *Id.*; see also Eisenberg, *supra* note 27 (“[W]hen a crime is particularly heinous and the defendant is already facing a long prison sentence—or even multiple life sentences—a hate-crime conviction would not have any practical effect.”).

to terrorism.<sup>114</sup> Following the announcement, critics were quick to note a perceived double standard in the federal government's treatment of political violence,<sup>115</sup> in which "non-white shooters or bombers are called terrorists, while their white counterparts are not."<sup>116</sup> Alluding to this dynamic in the *New Yorker*, Jelani Cobb wrote that "what happened in Charleston" "was not simply" a hate crime, but rather "an act of terror."<sup>117</sup>

Implicit in this critique was the sense that "terrorism" is somehow worse than "hate crime," or at least that designating violence as an act of terrorism instead of, or in addition to, a hate crime has significant rhetorical and practical consequences. As Rick Gladstone, writing in the *New York Times*, observed, the Charleston shooting took place "[a]gainst the backdrop of rising worries about violent Muslim extremism in the United States."<sup>118</sup> But those worries alone could not explain the criticism of the terminology that Lynch and others used to describe the attack.<sup>119</sup> Rather, what upset critics about the apparent reluctance of federal officials to describe White supremacist violence as terrorism was their apparent readiness to invoke the term whenever the suspect was Arab or Muslim, and the sheer magnitude of the federal response, measured in resources, personnel, legal authorities, and lack of restraint, that such an invocation appeared to sanction, if not require.

For one reason or another, the Justice Department soon announced that it was investigating the attack not only as a hate crime but also "as an act of domestic terrorism."<sup>120</sup><sup>121</sup> In the end, however, the gunman was indicted only

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114. Harriet McLeod, *White Suspect Arrested in Killing of Nine at Black Church*, REUTERS (June 17, 2015, 10:18 PM), <https://www.reuters.com/article/us-usa-shooting-south-carolina/white-suspect-arrested-in-killing-of-nine-at-black-u-s-church-idUKKBN0OY06A20150618>.

115. Rick Gladstone, *Many Ask, Why Not Call Church Shooting Terrorism?*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/us/charleston-shooting-terrorism-or-hate-crime.html>.

116. James Downie, *The Charleston Shooter Is a Terrorist. The Federal Government Should Charge Him as One.*, WASH. POST (June 26, 2015, 1:31 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/06/26/the-charleston-shooter-is-a-terrorist-the-federal-government-should-charge-him-as-one>.

117. Jelani Cobb, *Terrorism in Charleston*, NEW YORKER (June 20, 2015), <https://www.newyorker.com/magazine/2015/06/29/terrorism-in-charleston>; see also Margaret Hartmann, *Why the Charleston Shooter Should Be Called a Terrorist*, N.Y. MAG.: INTELLIGENCER (June 19, 2015), <https://nymag.com/intelligencer/2015/06/why-the-charleston-shooter-is-a-terrorist.html> (referring to "hate crime" as a "milder term" than "domestic terrorism").

118. Gladstone, *supra* note 115.

119. See Kevin Cirilli, *FBI Head Won't Call Charleston Shooting a Terrorist Act*, HILL (June 20, 2015, 6:16 PM), <https://thehill.com/blogs/blog-briefing-room/news/245649-fbi-head-wont-call-charleston-shooting-a-terrorist-act>.

120. Nick Gass, *Dylann Roof Charged with 9 Counts of Murder in S.C. Massacre*, POLITICO (June 19, 2015, 9:47 AM), <https://www.politico.com/story/2015/06/dylann-roof-alleged-confession-charleston-shooting-119206>.

121. See, e.g., Victoria Macchi, *Was Charleston Shooting a Hate Crime or Terrorism?*, VOICE OF AMERICA (July 17, 2015), <https://www.voanews.com/a/was-charleston-shooting-hate-crime-or-terrosim/2866203.html>.

on federal hate crime charges.<sup>122</sup> Some saw this as a choice.<sup>123</sup> But the department's charging decisions were less an exercise of prosecutorial discretion than the result of a mechanical application of law to facts, and a determination that existing federal terrorism statutes did not cover the gunman's alleged conduct.

Since then, much has been made about the coverage of federal terrorism statutes. Indeed, the issue overwhelmed the debate after the El Paso shooting.<sup>124</sup> In the immediate wake of Charleston, however, it was a fledgling source of controversy. After Attorney General Lynch announced the investigation of that incident without mention of terrorism, some argued that the gunman's conduct fit squarely within the definition of "domestic terrorism" codified in federal statute.<sup>125</sup> That term is defined to include "activities that . . . involve acts dangerous to human life" that violate state or federal criminal laws and that "appear to be intended . . . to intimidate or coerce a civilian population."<sup>126</sup> "At a minimum," wrote Jelani Cobb, the gunman "intended to intimidate and coerce the black civilian population of Charleston, and beyond,"<sup>127</sup> so why not call it terrorism?

As it happens, this definition likely provided the statutory basis for the ensuing terrorism investigation. Official guidelines permit investigators to examine whether violations of federal criminal law—for instance, a hate crime statute—that meet the federal definition of domestic terrorism are connected to a particular group.<sup>128</sup> When the Justice Department announced that it was investigating the shooting as an act of domestic terrorism, this meant investigators were examining whether the gunman acted alone. It did not mean,

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122. Matt Apuzzo, *Dylann Roof, Charleston Shooting Suspect, Is Indicted on Federal Hate Crime Charges*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/2015/07/23/us/dylann-roof-charleston-shooting-suspect-is-expected-to-face-federal-hate-crime-charges.html>.

123. See, e.g., Marcy Wheeler, *Dylann Roof Should Be Tried as a Terrorist: America's Disturbing Double-Standard on Political Violence (and Why it Matters)*, SALON (July 24, 2015, 11:58 AM), [https://www.salon.com/2015/07/24/dylann\\_roof\\_should\\_be\\_tried\\_as\\_a\\_terrorist\\_americas\\_disturbing\\_double\\_standard\\_on\\_political\\_violence\\_and\\_why\\_it\\_matters](https://www.salon.com/2015/07/24/dylann_roof_should_be_tried_as_a_terrorist_americas_disturbing_double_standard_on_political_violence_and_why_it_matters).

124. See Charlie Savage, *What Could a Domestic Terrorism Law Do?*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/domestic-terror-law.html>; Mary B. McCord, *supra* note 4; Robert Chesney, *Should We Create a Federal Crime of Domestic Terrorism?*, LAWFARE (Aug. 8, 2019, 11:31 AM), <https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism>.

125. See, e.g., Cobb, *supra* note 117; Dean Obeidallah, *Get Real: Charleston Church Shooting Was Terrorism*, DAILY BEAST (July 12, 2017, 4:17 PM), <https://www.thedailybeast.com/get-real-charleston-church-shooting-was-terrorism>.

126. 18 U.S.C. § 2331(5).

127. Cobb, *supra* note 117.

128. Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015, 11:34 AM), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism>; see also Michael German, *Why New Laws Aren't Needed to Fight Domestic Terrorism*, JUST SEC. (Dec. 14, 2018), <https://www.justsecurity.org/61876/laws-needed-domestic-terrorism> ("FBI policy instructs agents to open a parallel 'domestic terrorism' investigation whenever a suspect in a hate crimes investigation 'has a nexus to any type of white supremacist group.'").

however, that he might be charged for committing an act of domestic terrorism. As commentators soon explained, the definition does not impose associated criminal penalties.<sup>129</sup> In the words of Attorney General Lynch, who spoke at a press conference announcing the gunman's indictment for committing hate crimes, "there is no specific domestic terrorism statute."<sup>130</sup>

Without additional context, that statement, while correct, might lead to several misconceptions about the coverage of federal terrorism statutes. In the years since, journalists and commentators have often observed that "there is no federal crime of domestic terrorism," and have attributed to that fact the lack of terrorism charges in subsequent prosecutions of White supremacist violence.<sup>131</sup> What goes unmentioned, however, is that neither does a crime of "international terrorism" exist.<sup>132</sup> Still others have argued that White supremacists cannot be tried as terrorists in federal court,<sup>133</sup> even though dozens of federal terrorism statutes can be used to prosecute crimes that meet the federal definition of domestic terrorism.<sup>134</sup>

This debate came to a head four years after Charleston in the wake of the El Paso shooting, when members of Congress moved to introduce legislation that would have created a new federal criminal statute of "domestic terrorism."<sup>135</sup> While unsuccessful, these efforts crystallized the arguments described above. Democratic Representative Adam Schiff, who introduced one of the bills, invoked Charleston to argue the public took White supremacist violence "less seriously" because the federal government prosecutes such violence as hate

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129. Faiza Patel & Adrienne Tierney, *The Reasons Why Dylann Roof Wasn't Charged with Terrorism*, JUST SEC. (July 30, 2015), <https://www.justsecurity.org/25071/reason-dylann-roof-charged-terrorism>.

130. Jenna McLaughlin, *Why Wasn't Dylann Roof Charged with Terrorism?*, INTERCEPT (July 27, 2015, 5:43 PM), <https://theintercept.com/2015/07/22/departement-justice-didnt-charge-dylan-roof-domestic-terrorism>.

131. See, e.g., Andrew C. McCarthy, *Federal Civil-Rights Case Can Wait—Let Virginia Prosecute Field*, NAT'L REV. (Aug. 14, 2017, 10:39 PM), <https://www.nationalreview.com/corner/federal-civil-rights-case-can-wait-let-virginia-prosecute-field>; Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), <https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism>.

132. German, *supra* note 128.

133. Jonathan Greenblatt & George Selim, *Addressing the National Security Threat of White Supremacist Terrorism*, LAWFARE (Oct. 18, 2019, 2:52 PM), <https://www.lawfareblog.com/addressing-national-security-threat-white-supremacist-terrorism>.

134. MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., *WRONG PRIORITIES ON FIGHTING TERRORISM* 5–9 (Oct. 31, 2018), <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism>.

135. Burgess Everett, *GOP Sen. Martha McSally Drafts Bill Making Domestic Terrorism a Federal Crime*, POLITICO (Aug. 14, 2019, 10:59 AM), <https://www.politico.com/story/2019/08/14/martha-mcsally-domestic-terrorism-1462301>; Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (2019); Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. (2019)

crimes and not terrorism.<sup>136</sup> And Representative Randy Weber, a Republican who sponsored a different bill, claimed that, “[u]nlike international terrorism which has penalties, domestic terrorism exists in federal law but lacks penalties,” and therefore crimes that amount to domestic terrorism “must be charged under non-terrorism statutes.”<sup>137</sup>

These arguments flatten nuance, though correcting them is beyond the scope of this Essay. Rather, the point in tracing them is to show that, within the hate crime or terrorism debate, the federal government’s framing of White supremacist violence is of particular concern.

This leads into the second point: a state equivalent to federal counterterrorism does not exist. Consider Sinnar’s rendition of the terrorism frame. To be sure, states have laws that criminalize terrorism, most of which adopt language from older federal terrorism statutes.<sup>138</sup> But federal counterterrorism neither begins nor ends with the enforcement of criminal statutes in the wake of violence. Just as federal hate crime prosecutions fit within a broader strategy to enforce civil rights,<sup>139</sup> the criminal legal system is but one of several battlegrounds within the federal government’s “war on terror.”<sup>140</sup> As Sinnar notes, counterterrorism lies at the intersection of war, national security, criminal law, immigration enforcement, and government surveillance.<sup>141</sup> In some of these areas, the federal government exerts near-exclusive control; while in others, federal power and resources far exceed those of the states. The result is federal predominance over U.S. counterterrorism, which is apparent in Sinnar’s description of the terrorism frame.<sup>142</sup>

In short, if the hate crime or terrorism debate centers on the federal response to White supremacist violence, then distinctions between state and federal hate crime enforcement are relevant. And that is despite the fact that state enforcement defines the hate crimes frame. The hate crimes and terrorism frames shape, influence, and constrain public understandings of White supremacist violence and its treatment within the U.S. legal system. And Sinnar’s argument that neither frame advances civil rights or promotes racial justice is clear and convincing. “Addressing White supremacist violence,” she concludes, “should

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136. Press Release, Rep. Adam Schiff, Schiff Introduces Legislation to Create a Federal Crime of Domestic Terrorism (Aug. 16, 2019), <https://schiff.house.gov/news/press-releases/schiff-introduces-legislation-to-create-a-federal-domestic-terrorism-crime>.

137. Press Release, Rep. Randy Weber, Weber, McCaul, Cuellar Introduce Bill to Combat Domestic Terrorism (Aug. 15, 2019), <https://weber.house.gov/news/documentsingle.aspx?DocumentID=540>.

138. Margot Williams & Trevor Aaronson, *How Individual States Have Criminalized Terrorism*, INTERCEPT (Mar. 23, 2019, 8:30 AM), <https://theintercept.com/2019/03/23/state-domestic-terrorism-laws>.

139. See *supra* text accompanying notes 95–102.

140. See generally Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L REV. 821 (2019).

141. Sinnar, *supra* note 7, at 515–20.

142. See *id.* at 524–37.

begin with recognizing the frames that have shaped the social and legal treatment of political violence and that continue to limit our imagination.”<sup>143</sup> On one hand, state hate crime enforcement’s narrow, isolated focus on criminal punishment and individual accountability neither vindicates individual rights nor challenges the systemic elements of bias-motivated violence. On the other hand, U.S. counterterrorism’s blunt, all-systems offensive on purported existential threats has justified the suspension of individual rights, not to mention other constraints on government power, in the name of national security.

But rather than just looking beyond these competing frameworks of state hate crime enforcement and U.S. counterterrorism, we should also consider the space between them. Federal hate crime enforcement shares some characteristics with its state equivalent. But where the latter falls short in advancing racial justice, the former takes at least some steps in the right direction. And even if the hate crime or terrorism debate turns on abstractions, the underlying legal and policy implications are material. So long as federal hate crime enforcement represents a bulwark against an ever-expanding security state, we should continue to consider alternatives, but we should also be ready to take sides.

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143. *Id.* at 565.