

# Method of Attack: A Supplemental Model for Hate Crime Analysis

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## INTRODUCTION

On October 28, 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) was signed into law by President Barack Obama.<sup>1</sup> Two years later, between September and November of 2011, members of a Bergholz, Ohio, Amish community allegedly carried out five attacks in which they forcibly restrained, and cut the hair and beards of, members of other Amish communities.<sup>2</sup> In September of 2012, a jury rendered a verdict in *United States v. Mullet* and found sixteen members of the Bergholz community—including Samuel Mullet, bishop of the community—guilty of HCPA violations.<sup>3</sup> These were the first convictions for religion-based hate crimes under the new statute.<sup>4</sup>

Under the HCPA, a hate crime is committed when someone “willfully causes bodily injury to any person . . . because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person. . . .”<sup>5</sup> At trial, the judge instructed the jury that the “because of” requirement could be proven by showing that the victim’s religion was “a significant motivating factor.”<sup>6</sup> In 2014, while *Mullet* was awaiting decision on appeal, the Supreme Court decided *Burrage v. United States* and noted that, especially in the interpretation of criminal statutes, which are subject to the rule of lenity, the causation standards “because of,” “based on,” and “results from” have the ordinary meaning of requiring but-for causation.<sup>7</sup>

All three judges on the appellate panel in *Mullet* agreed that the district court’s jury instruction that the victims’ religion must have been a “significant factor” in the motivation for the attacks was incorrect and should have comported with the *Burrage* holding.<sup>8</sup> The judges split two to one, however, regarding the disposition of the

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1. Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2190, 2835–44 (2009) (rider to the National Defense Authorization Act for Fiscal Year 2010).

2. *United States v. Miller*, 767 F.3d 585, 589 (6th Cir. 2014). While the Amish identity of the Bergholz group is debated, the community has not renounced the label. With wide diversity among the Amish as a result of minimal church hierarchy, it is difficult to show that, despite their irregularities, the community is not Amish. *See infra* note 27.

3. Verdict Forms, *United States v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012) (No. 5:11 CR 594), 2012 WL 7089376, *rev’d sub nom.* *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014) [hereinafter Verdict Forms]. Although the case was captioned *United States v. Miller* on appeal, this Note refers to the case at all of its stages as *Mullet*.

4. DONALD B. KRAYBILL, RENEGADE AMISH: BEARD CUTTING, HATE CRIMES, AND THE TRIAL OF THE BERGHOLZ BARBERS ix–x (2014).

5. 18 U.S.C. § 249(a)(2)(A) (2012).

6. *Miller*, 767 F.3d at 591 (emphasis omitted).

7. *Burrage v. United States*, 134 S. Ct. 881, 889–91 (2014).

8. *See Miller*, 767 F.3d at 589; *id.* at 603–04 (Sargus, J., dissenting). For an argument against extending the *Burrage* requirement of but-for causation to antidiscrimination statutes, including the HCPA, see Aaron J. Creuz, New Development, *But-For the Beard: An Analysis*

appeal. The majority opinion, written by Judge Sutton, remanded the case to the district court and held that, because the motivation behind the attacks was at issue, a new trial—this time using the proper causation standard—is necessary.<sup>9</sup> In dissent, Judge Sargus would not have remanded the case because using the incorrect causation standard was harmless error.<sup>10</sup> The defense did not establish that the *method of attack* would have been the same if the victims had not been Amish adherents. Thus, using the incorrect causation standard was harmless error.<sup>11</sup>

There are three commonly used models of causation for hate crime statutes: “racial animus,” “discriminatory selection,” and “because of.”<sup>12</sup> The “because of” construction is the most ambiguous model—because the “because of” language is consistent with the analysis under either of the other models<sup>13</sup>—and is the model used in the HCPA.<sup>14</sup> Judge Sargus’s dissent would expand “because of” to include a new model for hate crime analysis: method of attack.<sup>15</sup> This expansion serves the purposes of protecting classes from fear of attack due to their class membership and of giving heightened punishment to those who decide to perpetrate a crime based on protected characteristics. This new model of hate crime analysis ought to be adopted as a supplemental means of showing that a protected class member was attacked “because of” his or her class membership. If adopted, this supplemental analysis would recognize that, even assuming the *Mullet* victims were not chosen because of their religion, the attackers still made decisions based on the victims’ religion.

In this Note, Part I provides an overview of facets of the Amish faith relevant to understanding the conflict between the defendants and the victims in *Mullet*. Part II recounts the conflicts and attacks and then looks to the litigation of the case from trial through appeal. Part III briefly recounts the HCPA’s namesakes and legislative history and presents the different models for hate crime statutes and their corresponding analyses, including Judge Sargus’s expanded interpretation of “because of.” Part IV argues that when, but for the victim’s protected class, an inherently class-based method of attack would not have been selected, the “because of” requirement of the HCPA should be deemed satisfied.

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*of Causation Under United States Code Section 249*, 16 RUTGERS J. L. & RELIGION 200 (2014). This argument is in line with Justice Ginsburg’s concurring opinion in *Burrage*. See Creuz, *supra*, at 202; see also *Burrage*, 134 S. Ct. at 892 (Ginsburg, J., concurring).

9. *Id.* at 602. After the defendants were resentenced following the appeal, the prosecution filed notice that it would not seek retrial on the convictions overturned by the Sixth Circuit. Notice to Court of Government’s Decision Not to Retry the Defendants of Substantive Hate Crimes Offenses, *United States v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012) (No. 5:11 CR 594), ECF No. 645, *rev’d sub nom.* *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014).

10. *Id.* at 603 (Sargus, J., dissenting). Judge Sargus, a district court judge for the Southern District of Ohio, sat on the panel by designation. *Id.* at 588.

11. *Id.* 605 (Sargus, J., dissenting).

12. See Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI.-KENT J. INT’L & COMP. L. 31, 93 (2007).

13. FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 37 (1999).

14. See *infra* text accompanying notes 133–35.

15. See *infra* text accompanying notes 137–40.

## I. UNDERSTANDING THE AMISH

Whether due to the romance of the “otherness” of the plain Amish lifestyle,<sup>16</sup> the bizarre demands Bishop Samuel Mullet made of his flock,<sup>17</sup> or the unique method of attack, the beard-cutting attacks received international attention from the first reports of the attacks through the verdict and appeal.<sup>18</sup> The dispute between the Bergholz community and the wider Amish church, as well as the violent actions the Bergholz defendants took in response to it, are atypical of the Amish faith.<sup>19</sup> Aspects of the Amish faith that are salient to a better understanding of the context surrounding the events at issue are clarified below.

## A. Historical Formation

The Amish belong to a Christian subgroup called Anabaptists that began as a result of the Radical Reformation, an offshoot of the Protestant Reformation, in the sixteenth century.<sup>20</sup> Distinguishing characteristics of the Anabaptist movement were viewing Christianity as discipleship, meaning they expected internal faith to have an external effect on adherents’ lives; voluntary church membership, which led the Anabaptist reformers to be rebaptized as adults and not baptize children;<sup>21</sup> and an ethic of love that led to the Anabaptist stance of pacifism.<sup>22</sup> Around the turn of the

16. See DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* xi–xiii (rev. ed. 2001).

17. These demands included requiring “the men to demonstrate their devotion to him by giving up their wives. He expect[ed] the women to leave their families—husbands, children, and all—to live with him, to have sex with him, and to learn from him how to satisfy their husbands.” *United States v. Mullet*, 868 F. Supp. 2d 618, 621 (N.D. Ohio 2012). Mullet’s demands also included confining members of his congregation to “Amish jails”—dog kennels, goat pens, or chicken coops—for offenses such as “having dirty thoughts.” KRAYBILL, *supra* note 4, at 68–70. At least two men incurred frostbite injuries during their “sentences.” *Id.* at 69.

18. See, e.g., John Seewer, *Amish Woman Testifies Against Bishop*, IOL NEWS (Aug. 30, 2012), <http://www.iol.co.za/news/world/amish-woman-testifies-against-bishop-1.1373099#>.Us HNbrQVU0Y (S. Afr.); Adam Zwi, *Hate Crimes and Ohio’s ‘Renegade Amish,’* AUSTRALIAN BROADCASTING CORP. (Nov. 10, 2014), <http://www.abc.net.au/radionational/programs/latenightlive/hate-crimes-and-ohios-renegade-amish/5879174> (Austl.); *Beards and Hair Shorn in Amish-on-Amish Attacks*, BBC NEWS (Oct. 7, 2011), <http://www.bbc.co.uk/news/world-us-canada-15219225> (U.K.); *Religionsstreit in Amerika: Bartklau in Christensekte – FBI nimmt Verdächtige fest* [*Religious Dispute in America: Beard Removal in Christian Sect – FBI Arrests Suspects*], DER SPIEGEL (Nov. 24, 2011), <http://www.spiegel.de/panorama/gesellschaft/religionsstreit-in-amerika-bartklau-in-christensekte-fbi-nimmt-verdaechtige-fest-a-799720.html> (Ger.).

19. Donald Kraybill, an expert on the Amish, compiled a list of twenty-five practices of the Bergholz Amish group that were atypical of Amish congregations, including “[c]ondoning physical punishment to discipline adults,” “[r]ejecting a Christian identity,” and [m]aking death threats to law enforcement officers.” KRAYBILL, *supra* note 4, at 139.

20. KRAYBILL, *supra* note 16, at 3–4.

21. JOHN A. HOSTETLER, *AMISH SOCIETY* 26 (4th ed. 1993). The term “Anabaptist” literally means “rebaptizer.” *Anabaptism*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (last modified Dec. 1, 2014), <http://gameo.org/index.php?title=Anabaptism>.

22. See HAROLD S. BENDER, *THE ANABAPTIST VISION* 31–33 (1944).

eighteenth century, Jakob Ammann and his followers broke away from the Swiss Anabaptists; Ammann's group became known as the Amish.<sup>23</sup>

Before the split, Ammann tried to reform the Anabaptist church, wanting excommunicated members to be shunned completely—that is, he wanted to impose social avoidance of the excommunicated in addition to removal from church fellowship.<sup>24</sup> Unable to achieve this reformation, Ammann excommunicated several Swiss Anabaptist leaders, creating an irreconcilable divide and splitting the Anabaptists into two groups: Amish and Mennonite.<sup>25</sup> In addition to teaching social avoidance of excommunicated members, Ammann “taught against trimming beards, rebuked those with fashionable dress, and administered a strict discipline in his congregations.”<sup>26</sup> The Amish have retained many of Ammann's tenets in their religious practice.

### B. Current State and Structure

There are over 2100 Amish congregations and around forty “affiliations”—groups of Amish congregations.<sup>27</sup> The bishop is the spiritual leader of an Amish

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23. See John A. Hostetler, *The Amish Use of Symbols and Their Function in Bounding the Community*, 94 J. ROYAL ANTHROPOLOGICAL INST. GR. BRIT. & IR. 11, 11 (1964).

24. KRAYBILL, *supra* note 16, at 7–8.

25. *Id.* at 8.

26. *Id.*

27. KRAYBILL, *supra* note 4, at 17. Ohio, home to the Bergholz community and all of the victims in *Mullet*, has approximately 500 Amish congregations with a total membership of over 60,000—about twenty-three percent of the total North American Amish population. *Id.* at 170. Whether the Bergholz community itself is Amish is debatable, especially in light of its many irregular practices, such as cessation of worship services, denouncing a Christian identity, and rejecting the counsel of other Amish ministers. See *id.* at 139. Furthermore, Amish in other communities have spoken out, declaring that “[the Bergholz community is] not Amish anymore, they just dress Amish” and that “Sam Mullet’s behavior violates the core of Amish faith . . . . His behavior is so contrary to the Amish faith.” *Id.* at 138 (quoting interviews with an unidentified Amish preacher and unidentified Amish bishop, respectively). An Amish scholar affirms these opinions: “They removed themselves from the Amish world when they stopped having church services.” *Id.* (quoting correspondence with an unidentified Amish scholar). This scholar’s opinion raises the interesting issue of the nature of “being Amish”: is it an ethnicity, a culture, a religion, or some combination of these elements? *Id.* at 138; see also HOSTETLER, *supra* note 21, at 10 (“Amish life is distinctive in that religion and custom blend into a way of life. The two are inseparable.”). Congress, also aware that lines can become blurry, noted as a finding of fact regarding the HCPA that some religions were regarded as races at the time the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified. Pub. L. No. 111-84, § 4702(8), 123 Stat. 2190, 2836 (2009). Ultimately, the local autonomy enjoyed by each congregation, absence of written documents of governance, lack of enforceable regulations regarding church names, and lack of trademark protection of the term “Amish” make it difficult to say that the Bergholz community (despite its irregularities) is not Amish. KRAYBILL, *supra* note 4, at 137–41. In any case, the HCPA covers crimes committed because of the *victim’s* religion, not the perpetrator’s religion, 18 U.S.C. § 249(a)(2)(A) (2012), and intragroup violence is not exempt from the HCPA’s reach, see *infra* notes 93–94 and accompanying text. As a consequence, whether the Bergholz community is properly categorized as an Amish group need not be resolved.

congregation, though two or three ministers and a deacon may also serve the congregation.<sup>28</sup> Amish bishops are “the incarnate symbol[s] of church authority”; the personality of the bishop will greatly influence how the congregation interprets church doctrine as well as the lifestyle requirements made of the congregation.<sup>29</sup> Without a central, pope-like leader, there is great diversity between Amish congregations: different Amish affiliations have different colors of buggy tops or have uncovered buggies, and individual congregations may or may not allow “cell phones, indoor plumbing, power lawnmowers, LED lights, and fax machines.”<sup>30</sup> Despite this diversity, “one constant is the beard. All Amish men sport this public symbol of cultural and religious identity. . . . Beard wearing is so firmly entrenched in Amish tradition that it rarely needs to be justified or encouraged.”<sup>31</sup>

### C. Cultural and Religious Symbolism of Hair and Beards

The distinct, plain mode of Amish dress is due to their strict rules regarding personal appearance. An Amish woman’s hair “must be long and uncut, parted in the middle only, and combed down the sides.”<sup>32</sup> For men, “[t]he beard must begin to appear at baptism for Amish men though the young men during the courtship period manage to keep it very short. At marriage they dare no longer to trim it.”<sup>33</sup> Socially, the beard of an Amish man and hair of an Amish woman symbolize the wearer’s identity as a member of the faith; “[t]he language of dress [including hair and beard fashion] forms a common understanding and mutual appreciation among those who share the same heritage.”<sup>34</sup>

Restrictions on hair and beard styling have a religious meaning as well. Submitting to community standards is a facet of the Amish religious principle of *Gelassenheit* (“yieldedness” or “inner surrender”)<sup>35</sup>, a complex idea that encompasses nonresistance and the refusal to serve in armed forces.<sup>36</sup> Furthermore, the trimming or shaving of a man’s beard and cutting of a woman’s hair are forbidden

28. KRAYBILL, *supra* note 16, at 94.

29. *Id.*

30. KRAYBILL, *supra* note 4, at 17.

31. *Id.*

32. Hostetler, *supra* note 23, at 13.

33. *Id.* Showing once again that individual congregations have discretion concerning rules in their own communities, Donald Kraybill notes instead:

Men shave until marriage, at which time they grow a beard, which serves the symbolic function of a wedding ring . . . and as a rite of passage to manhood . . . .

An untrimmed, full beard from ear to ear is encouraged for adult men; however, many trim their beards for neatness.

KRAYBILL, *supra* note 16, at 63. In any case, the principle remains that there are rules within Amish communities governing how an Amish man is to wear his beard.

34. Hostetler, *supra* note 23, at 18.

35. Robert Friedmann, *Anabaptism and Protestantism*, 24 MENNONITE Q. REV. 12, 22 & n.17 (1950).

36. See KRAYBILL, *supra* note 16, at 29–32, 66. This principle also leads Amish men to shave their upper lips, a practice that began contemporaneous with, and likely in response to, the popularity among French soldiers of wearing moustaches without beards. See Hostetler, *supra* note 23, at 13.

because these mandatory grooming standards are clear demarcations of the sexes;<sup>37</sup> most alterations of a woman's natural hair are seen as blasphemous attempts to improve upon God's creation.<sup>38</sup> The Amish also find biblical support for their requirements of beard wearing for men and uncut hair for women.<sup>39</sup>

#### D. Church Discipline

Discipline of members in the Amish church can be severe, but the Bergholz attacks on members of other Amish congregations are a clear departure from normal Amish practice.<sup>40</sup> The most extreme form of church discipline in the Amish faith is the *Bann*—excommunication.<sup>41</sup> As the namesake of the Amish, Jakob Ammann, taught, the *Bann* includes social avoidance—commonly known as shunning or *Meidung*—in addition to religious exclusion.<sup>42</sup> Outlined in a 1632 confession of faith that the Amish still follow,<sup>43</sup> there are two motivations for imposing the *Bann*: purity of the congregation and reformation of the errant member.<sup>44</sup> Retribution and revenge are not proper reasons for church discipline.<sup>45</sup> At its core and as it is intended, church discipline—including the *Bann*—is not imposed because of hatred; it is done to convince those punished to return to the church.<sup>46</sup> Instead of hate, love is central to

37. KRAYBILL, *supra* note 4, at 18 (citing Elmo Stoll, *The War of the Whiskers*, FAMILY LIFE, Aug.–Sept. 1983, at 8–10).

38. See KRAYBILL, *supra* note 16, at 60. This prohibition extends to “curling hair, shaving legs, and trimming eyebrows.” *Id.*

39. KRAYBILL, *supra* note 4, at 18–19. An Amish manual notes that “to have one’s beard cut was humiliation (II Sam. 10:4, 5), a form of punishment (Isa. 7:20), or a mark of sorrow and distress, the same as wearing sackcloth (Isa. 15:2; Jer. 48:37).” 1001 QUESTIONS AND ANSWERS ON THE CHRISTIAN LIFE 137 (1992), *quoted in* KRAYBILL, *supra* note 4, at 18–19.

40. See KRAYBILL, *supra* note 4, at 137–39.

41. KRAYBILL, *supra* note 16, at 135–37.

42. HOSTETLER, *supra* note 21, at 85. It is worth noting that many portrayals of Amish shunning in popular culture are inaccurate. See VALERIE WEAVER-ZERCHER, THRILL OF THE CHASTE 206–09 (2013) (noting the inaccurate portrayal of shunning—with regard to frequency, method, and triggering actions—in Amish romance novels). Communication is permitted between those under the *Bann* and members in good standing. KRAYBILL, *supra* note 16, at 138. Shunning creates a “one-way relationship” in which members in good standing “are encouraged to help, assist, and visit” those shunned, but a shunned person may not help the member in good standing. *Id.* “[M]embers may not shake hands or accept anything directly from the offender.” *Id.*

43. See KRAYBILL, *supra* note 16, at 28.

44. See *Dordrecht Confession of Faith (Mennonite, 1632)*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (last modified Dec. 19, 2014), [http://gameo.org/index.php?title=Dordrecht\\_Confession\\_of\\_Faith\\_%28Mennonite,\\_1632%29](http://gameo.org/index.php?title=Dordrecht_Confession_of_Faith_%28Mennonite,_1632%29) [hereinafter *Dordrecht Confession*].

45. Additionally, “[s]hunning does not reflect personal animosity. . . .” KRAYBILL, *supra* note 16, at 138.

46. Article Seventeen of the Confession clarifies the motivation behind shunning in the Anabaptist tradition:

Concerning the withdrawing from, or shunning the separated . . . if any one, either through his wicked life or perverted doctrine, has so far fallen that he is separated from God . . . the same must, according to the doctrine of Christ and

the disciplinary process; it is hoped that, through loving reproof, disciplined members will repent and return.<sup>47</sup>

## II. ATTACKS, CONFLICT, AND LITIGATION

Acrimony between the Bergholz community and the victims—whether caused by religion or not—led to five attacks in the fall of 2011 and the arrest of the sixteen defendants.<sup>48</sup> From September 6 to November 9, 2011, members of the Bergholz community carried out the attacks on a total of nine individuals.<sup>49</sup> The attackers forcibly restrained their victims and used horse mane shears and clippers to cut off the men’s beards and one female victim’s hair.<sup>50</sup> None of the defendants were convicted for the September 24 attack on David Wengerd.<sup>51</sup> Details of the four attacks that resulted in convictions, the possible causes motivating the attacks, and the resulting litigation are provided below.

### A. Attacks

The first attack, occurring late on September 6, was perpetrated against Martin and Barbara Miller—brother-in-law and sister to Bishop Mullet—at their home three counties north of Bergholz.<sup>52</sup> They were attacked by their children and children’s spouses, leaving both of them shorn and bruised and Martin bleeding and razor burned.<sup>53</sup>

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His apostles, be shunned . . . by all the fellow members of the church . . . and no company be had with him that they may not become contaminated by intercourse with him, nor made partakers of his sins; but that the sinner may be made ashamed, pricked in his heart, and convicted in his conscience, unto his reformation.

*Dordrecht Confession*, *supra* note 44.

47. The Confession also clarifies the proper attitude of the congregation toward those under the *Bann*:

Therefore, we must not count them as enemies, but admonish them as brethren, that thereby they may be brought to a knowledge of and to repentance and sorrow for their sins, so that they may become reconciled to God, and consequently be received again into the church, and that love may continue with them, according as is proper.

*Id.*

48. *United States v. Miller*, 767 F.3d 585, 589–90 (6th Cir. 2014). Though the appeal reversed the convictions for the Bergholz defendants, “[n]o one questions that the assaults occurred, and only a few defendants question their participation in them. The central issue at trial was whether the defendants committed the assaults ‘because of’ the religion of the victims.” *Id.* at 589.

49. *Id.* at 590.

50. *See* Government’s Sentencing Memorandum as to All Defendants at 3–4, *United States v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012) (No. 5:11 CR 594).

51. Brief for the United States as Appellee at 10, *United States v. Miller*, 767 F.3d 585 (No. 13-3177); Verdict Forms, *supra* note 3.

52. KRAYBILL, *supra* note 4, at 3.

53. *Id.* at 4–5; Brief for the United States as Appellee, *supra* note 51, at 30–31.

Two more attacks happened on October 4. The first targeted Holmes County, Ohio Bishop Raymond Hershberger at his home.<sup>54</sup> Samuel Mullet's son Johnny—himself a Bergholz preacher<sup>55</sup>—led the attack.<sup>56</sup> The Bergholz members held Bishop Hershberger down, and, using horse shears and hair clippers, trimmed his chest-length beard to within an inch of his chin, removed chunks of his head hair, and left him bleeding.<sup>57</sup> The second attack of the evening was against Myron Miller,<sup>58</sup> a young Amish bishop.<sup>59</sup> Myron lost all but one and a half inches of his beard in the attack.<sup>60</sup>

The final attack occurred on November 9 against Melvin and Anna Shrock at the Bergholz home of their son Emanuel, who was married to one of Samuel Mullet's daughters.<sup>61</sup> Melvin and Anna were wary of the invitation they received—via U.S. mail—to visit their son, but after alerting local police of their intended visit and receiving assurance from Emanuel of their safety, the Shrocks visited their son.<sup>62</sup> Two of Melvin's grandsons held him down while Emanuel cut his hair and beard—injuring his cheek in the process—and daughter-in-law Linda grabbed Anna to keep her from alerting the police.<sup>63</sup>

### B. Conflict

#### 1. The Prosecution's Argument

The prosecution in *Mullet* contended that the dispute between the Bergholz community and the wider Amish church began when a gathering of Amish bishops in Pennsylvania decided to overrule Bishop Mullet's decision to place families who had left his congregation under the *Bann*.<sup>64</sup> The bishops decided that placing those members under the *Bann* was not in line with Amish theology.<sup>65</sup> Given the autonomy usually enjoyed by individual bishops and congregations in the Amish faith,<sup>66</sup> this decision was a shocking break from precedent, which—according to the prosecution—provoked Mullet and the other defendants to retaliate in the form

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54. Brief for the United States as Appellee, *supra* note 51, at 34.

55. KRAYBILL, *supra* note 4, at 28.

56. *Id.* at 9.

57. Brief for the United States as Appellee, *supra* note 51, at 35, 37; KRAYBILL, *supra* note 4, at 9–10.

58. Myron Miller is not related to any of the other Millers heretofore mentioned. KRAYBILL, *supra* note 4, at 11.

59. *Id.*

60. *Id.* at 12.

61. Brief for the United States as Appellee, *supra* note 51, at 42; KRAYBILL, *supra* note 4, at 14.

62. Brief for the United States as Appellee, *supra* note 51, at 43–44; KRAYBILL, *supra* note 4, at 14.

63. Brief for the United States as Appellee, *supra* note 51, at 45; KRAYBILL, *supra* note 4, at 14.

64. Brief for the United States as Appellee, *supra* note 51, at 112.

65. *Id.* at 23–24.

66. See *supra* notes 29–30 and accompanying text.



of beard- and hair-cutting attacks against those who stood against Bergholz on religious grounds.<sup>67</sup>

Martin and Barbara Miller's children in the Bergholz community called their parents hypocrites, and Martin and Barbara left the Bergholz community for religious reasons after a short tenure there.<sup>68</sup> The prosecution deemed the attack "ritualistic religious violence."<sup>69</sup> During the attack on Bishop Raymond Hershberger, but before shaving Hershberger's hair and beard, Johnny Mullet confirmed that Hershberger had taken part in the Pennsylvania meeting that overruled Samuel Mullet's decisions.<sup>70</sup> Though Hershberger's son Andy did not press charges, the attackers started to remove his beard after noting "[y]ou're a preacher *as well*."<sup>71</sup> Bishop Myron Miller had given sanctuary to Samuel Mullet's son Bill and Bill's family after Bill broke fellowship with his father and was placed under the *Bann* by Mullet.<sup>72</sup> Bishop Miller's religious offense was not honoring Bergholz's *Bann*.<sup>73</sup> Melvin and Anna Shrock were former members of the Bergholz community and had been placed under the *Bann* after Melvin raised concerns about Mullet's leadership.<sup>74</sup> The defendants plotted to lure Melvin and Anna to Bergholz in order to cut Melvin's hair because he was "against Sam Mullet," the religious leader of Bergholz.<sup>75</sup>

## 2. The Defense's Rebuttal

The defense, on the other hand, presented the attacks in nonreligious contexts.<sup>76</sup> After all, church discipline within the Amish faith employs the *Bann*, not physical attack, as its most severe form.<sup>77</sup> Acts perpetrated against religious people need not be motivated by the victims' religion.<sup>78</sup> For example, the defense asserted that the

67. John Seewer, *Amish Shunning is Central to Ohio Hate Crime Trial*, ASSOCIATED PRESS (Sept. 15, 2012), <http://bigstory.ap.org/article/amish-shunning-central-ohio-hate-crime-trial>. Mullet himself did not actually participate in any of the attacks but was convicted for his involvement as the ringleader of the group and his approval and encouragement of the attacks. See Government's Sentencing Memorandum as to All Defendants, *supra* note 50, at 8–11. Regarding the other bishops' actions, Mullet said, "[t]hey changed the rulings of our church here, and they're trying to force their way down our throat, make us do like they want us to do, and we're not going to do that." *FBI Arrests 7 Amish on Hate Crimes Charges*, CBS NEWS (Nov. 24, 2011), <http://www.cbsnews.com/news/fbi-arrests-7-amish-on-hate-crimes-charges/>.

68. Brief for the United States as Appellee, *supra* note 51, at 25–26. The Millers had moved to Bergholz in order to be near their family and to try to heal the family rift. *Id.*

69. *Id.* at 27.

70. *See id.* at 34–35.

71. *Id.* at 36 (emphasis added).

72. *Id.* at 39.

73. *Id.* at 113 n.33.

74. *Id.* at 42.

75. *Id.* at 43 (quoting the trial transcript).

76. *United States v. Miller*, 767 F.3d 585, 594 (6th Cir. 2014).

77. See *supra* Part I.D.

78. After all, as the Supreme Court has recognized that atheism enjoys Religion Clause protection, it appears that all victims have some degree of protected religious beliefs—even if the beliefs are atheistic. See *Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that a "principle at the heart of the Establishment Clause" is "that government should not prefer

attack on Martin and Barbara Miller—perpetrated exclusively by close relatives—was the result of family discord.<sup>79</sup> The parents had long disrespected their children at Bergholz: they refused to attend their son Raymond’s wedding at Bergholz, withheld financial help when their son-in-law Freeman Burkholder was at risk of losing his home, refused to welcome their daughters-in-law into their home, did not invite their Bergholz children to the wedding of a non-Bergholz son, and publicly censured their children at an Amish horse auction.<sup>80</sup>

The defense presented the other attacks as variations on the same nonreligious theme. Raymond Hershberger was targeted for the role he played in a 2006 custody dispute over the two children of Wilma and Aden Troyer after Wilma—Samuel Mullet’s daughter—separated from her husband and left the Bergholz community.<sup>81</sup> The defense argued that, had the bishop gathering not reversed the Bergholz discipline, including the *Bann* on Wilma, Wilma and Aden may have reconciled.<sup>82</sup> Because of this interpersonal—but irreligious—conflict, the defendants attacked Hershberger.<sup>83</sup> Likewise, Myron Miller’s attack could have been the result of Miller’s interference with internal Mullet family affairs—in his case, the aid he gave to Samuel Mullet’s son Bill after Bill parted with Mullet and Bergholz.<sup>84</sup> Additionally, Miller also told Bill to return a horse and buggy—gifts from his father—to Bergholz, and this could have been perceived by Mullet as a personal insult, not a religious affront.<sup>85</sup> Finally, Melvin and Anna Shrock, similarly to Martin and Barbara Miller, were attacked only by family members, so the attack may have been the result of familial discord—aggravated by the parents’ decision to arrive escorted by local law enforcement—distinct from any religious motivation.<sup>86</sup>

### C. Litigation

#### 1. Trial

A federal grand jury charged sixteen members of the Bergholz community in a ten-count indictment issued in March 2012.<sup>87</sup> The defendants were accused of federal hate crimes and other ancillary crimes.<sup>88</sup> The defendants moved to dismiss the

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one religion to another, or religion to irreligion”).

79. *See Miller*, 767 F.3d at 594.

80. *Id.* at 595.

81. *Id.* at 597.

82. *Id.*

83. *See id.* at 597–98.

84. *Id.* at 598. The Mullet family/Bergholz community distinction is hard to draw, largely because almost all of the community at the time of the attacks was related to Samuel Mullet by blood or marriage. KRAYBILL, *supra* note 4, at 40. Of the sixteen defendants, only Levi F. Miller had no familial connection to Mullet. *Id.* at 104.

85. *Miller*, 767 F.3d at 598–99.

86. *Id.* at 596–97.

87. *United States v. Mullet*, 868 F. Supp. 2d 618, 620 (N.D. Ohio 2012), *rev’d sub nom. United States v. Miller*, 767 F.3d 585 (6th Cir. 2014).

88. *Id.* at 620 & n.2. Concise tables of the charges and against whom they were brought can be found in KRAYBILL, *supra* note 4, at 103–04.

charges and presented three arguments to support their motion: the HCPA exceeds Congress's Commerce Clause power, the HCPA infringes the defendants' First Amendment rights protecting religion and expression, and Congress did not intend the HCPA to apply to intrareligious acts.<sup>89</sup> All three arguments failed. The Commerce Clause argument failed because the HCPA includes a jurisdictional element that "requires the Government to allege and prove beyond a reasonable doubt a jurisdictional nexus," which must explicitly connect the actions at issue to interstate commerce.<sup>90</sup> Here, the use of the United States Postal Service to lure the Shrocks to Bergholz, the defendants' travel on highways to get to other victims, and the interstate travel of the shearing instruments provided the nexus needed under the Commerce Clause.<sup>91</sup> The First Amendment argument failed because "[t]he First Amendment does not protect violence,"<sup>92</sup> and because the religion of the defendants was irrelevant—it is the religion of the victims that triggers the HCPA.<sup>93</sup> Finally, the district judge noted that "history is replete with examples of internecine violence" and "in the absence of any language suggesting [intragroup violence is not covered by the HCPA], the Court is not going to create such an exception."<sup>94</sup>

At trial, the defense and prosecution presented different proposed jury instructions regarding the term "because of" in the HCPA.<sup>95</sup> The defendants proposed an instruction requiring that the victims' religion be a but-for cause of the attacks, and the prosecution's proposed instruction—which the court used—required only that the victim's religion be a significant motivating factor.<sup>96</sup> The jury found all sixteen defendants guilty of conspiracy to violate the HCPA and also found individual defendants guilty of additional charges, including direct violations of the HCPA.<sup>97</sup> Samuel Mullet received a fifteen-year prison sentence, while the rest of the defendants received sentences ranging from one year and one day to seven years.<sup>98</sup>

89. *Mullet*, 868 F. Supp. 2d at 621.

90. *Id.* at 623. Another district in the Sixth Circuit, the Eastern District of Kentucky, also upheld the constitutionality of the HCPA against a Commerce Clause challenge in *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012). The *Jenkins* court also rejected equal protection, substantive due process, and First Amendment challenges to the HCPA's constitutionality. *Id.* at 764.

91. *Mullet*, 868 F. Supp. 2d at 623.

92. *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)). *Claiborne's* declaration that violence is not a protected exercise of religion is also a reason why a claim that the HCPA violates the Religious Freedom Restoration Act, raised in an amicus brief, fails. *Id.* at 624.

93. *Id.* at 623.

94. *Id.* at 624; cf. R Zachary Karanovich, Note, *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*, 47 IND. L. REV. 565 (2014) (arguing that, instead of determining whether intragroup violence is covered under the HCPA, differences and distinctions between the victim and offender should be used to show that they are members of separate groups—even if that places them in groups of one).

95. See *United States v. Miller*, 767 F.3d 585, 589 (6th Cir. 2014).

96. *Id.*

97. See *id.*

98. Trip Gabriel, *Amish Sect Leader Sentenced to 15 Years in Hair-Cutting Attacks*, N.Y. TIMES, Feb. 9, 2013, at A11.

## 2. Appeal

All sixteen defendants filed appeals for their hate crime convictions.<sup>99</sup> During the pendency of the appeal, the Supreme Court decided *Burrage v. United States*,<sup>100</sup> which “provides definitive guidance concerning the appropriate construction of the term ‘because of’” in the HCPA, namely that “because of” requires but-for causation.<sup>101</sup> While the prosecution did not concede that but-for causation is required,<sup>102</sup> all three judges on the circuit court panel agreed, and no other Sixth Circuit judge requested a vote on the prosecution’s request for rehearing en banc.<sup>103</sup>

While the dispute between “but-for” causation and “significant motivating factor” appeared to be momentarily settled—at least in the Sixth Circuit—the appellate panel in *Miller* did not reach a unanimous decision.<sup>104</sup> The difference between the opinions lies in which decisions based on the victims’ protected class can render an act a hate crime. Judge Sargus, in dissent, looked to the decision to use a particular form of attack while the majority looked to the motive behind the decision to attack the victims. For Judge Sargus, “[t]he pertinent but-for causality inquiry, then, is whether, even if all of the other contributing or but-for factors remained, the prohibited conduct (the beard and hair cutting) would have occurred but for or in the absence of the victims’ Amish religion.”<sup>105</sup> On the other hand, Judge Sutton’s majority opinion holds that “[f]or an assault to be a federal hate crime, the victim’s protected characteristic must be a but-for cause behind the defendant’s decision to act.”<sup>106</sup> This difference led the majority to remand the case for a new trial,<sup>107</sup> while the dissent would have held that the error in the causation standard was harmless.<sup>108</sup>

### III. THE FEDERAL HATE CRIME STATUTE AND MODELS OF ANALYSIS

#### A. The HCPA’s Namesakes and Legislative History

The brutal murders of Matthew Shepard and James Byrd, Jr. made national headlines in 1998,<sup>109</sup> eleven years before the passage of the HCPA which bears the victims’ names.<sup>110</sup> In June of 1998, James Byrd, Jr., a black man, was walking home

99. *Miller*, 767 F.3d at 589.

100. 134 S. Ct. 881 (2014).

101. *Miller*, 767 F.3d at 603–04 (Sargus, J., dissenting); *see also id.* at 589 (majority opinion).

102. Petition of the United States for Rehearing En Banc at 1, *Miller*, 767 F.3d 585 (No. 13-3177), ECF No. 105.

103. Order, *Miller*, 767 F.3d 585 (No. 13-3177), ECF No. 109. Judge Sargus, however, would have granted rehearing based on the reasoning in his dissent. *Miller*, 767 F.3d at 586.

104. *Miller*, 767 F.3d at 588.

105. *Id.* at 605 (Sargus, J., dissenting).

106. *Id.* at 594.

107. *Id.* at 602.

108. *Id.* at 603.

109. JENNIFER PETERSEN, MURDER, THE MEDIA, AND THE POLITICS OF PUBLIC FEELINGS: REMEMBERING MATTHEW SHEPARD AND JAMES BYRD JR. 1 (2011).

110. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2190, 2835–44 (2009).

when he was offered a ride by three white men. The men beat Byrd, tied him to their vehicle, and dragged him—initially still conscious—for over two miles.<sup>111</sup> Byrd’s killers left his headless body near a predominantly black church in a black neighborhood.<sup>112</sup> The placement of Byrd’s body, the nature of his murder, the content of the killers’ tattoos, and the killers’ possession of white supremacist literature led to the murder’s designation as a hate crime.<sup>113</sup>

On an evening in October of the same year, Matthew Shepard, who was openly gay, left a bar with two men. The two men took Shepard’s wallet and shoes before beating him with a pistol butt and leaving him tied to a fence.<sup>114</sup> Shepard was still alive when found the next day by a mountain biker who first thought Shepard’s battered body was a scarecrow.<sup>115</sup> Shepard succumbed to his injuries five days later.<sup>116</sup> While the then-current hate crime law did not cover crimes motivated by the victim’s sexual orientation,<sup>117</sup> evidence presented at trial suggests the killers’ animus toward Shepard’s sexual orientation motivated the attack: Shepard was kicked repeatedly in his groin, and one attacker taunted Shepard by saying, “It’s Gay Awareness Week.”<sup>118</sup>

111. PETERSEN, *supra* note 109, at 94.

112. *Id.*

113. *Id.*

114. *Id.* at 24.

115. *Id.*

116. *Id.*

117. See H.R. REP. NO. 111-86, at 5 (2009).

118. Kathleen Parker, Editorial, *Hate and a Question of Rights*, WASH. POST, May 3, 2009, at A21. Calling Shepard’s murder a hate crime, however, is not universally accepted. For example, Virginia Foxx, a U.S. congresswoman, called the classification of the murder as a hate crime a “hoax.” PETERSEN, *supra* note 109, at 152. Some widely assumed details of the case have been called into question. A man who was acquainted with both Shepard and attacker Aaron McKinney told reporter Elizabeth Vargas that McKinney himself was bisexual. *New Details Emerge in Matthew Shepard Murder*, ABC NEWS (Nov. 26, 2004), <http://abcnews.go.com/2020/story?id=277685>. While it is possible for intragroup violence to be a hate crime, 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, 1109–15 (2003), McKinney, when also interviewed by Vargas, claimed that on the night of the murder he was simply looking for money to support his drug habit. *New Details Emerge in Matthew Shepard Murder*, ABC NEWS (Nov. 26, 2004), <http://abcnews.go.com/2020/story?id=277685>. Recently, Stephen Jimenez published a book asserting that Shepard’s sexual orientation was not the primary cause of the attack. See STEPHEN JIMENEZ, *THE BOOK OF MATT: HIDDEN TRUTHS ABOUT THE MURDER OF MATTHEW SHEPARD* (2013). The book has received much attention from right-wing media. John Kruzel, *Matthew Shepard’s Enduring Legacy*, SLATE (Oct. 3, 2013), [http://www.slate.com/blogs/outward/2013/10/03/even\\_if\\_matt\\_shepard\\_s\\_murder\\_wasn\\_t\\_a\\_hate\\_crime\\_the\\_legislation\\_that.html](http://www.slate.com/blogs/outward/2013/10/03/even_if_matt_shepard_s_murder_wasn_t_a_hate_crime_the_legislation_that.html). If, in fact, Shepard was not chosen as a victim because of his sexual orientation, then the kicks to Shepard’s groin are evidence that point toward the possible conclusion that the method of attack was chosen because of Shepard’s sexual orientation. If the method of attack was chosen due to Shepard’s sexual orientation, the attack would be considered a hate crime under the supplemental analysis this Note endorses (assuming, counterfactually, that the attack had taken place after sexual orientation received recognition as a protected characteristic). See *infra* notes 137–140 and accompanying text.

Outcry after these murders led Congress to expand the federal government's ability to address hate crimes by updating the federal hate crime statute.<sup>119</sup> The change was not immediate, however. Nine years after the attacks on Shepard and Byrd, a hate crime bill passed both houses as a rider to a 2008 defense appropriations bill,<sup>120</sup> but President Bush vetoed the bill, citing foreign policy and commercial interests related to the reconstruction of Iraq.<sup>121</sup> In 2009, the HCPA, once again attached to a defense appropriations bill, was signed into law by President Obama.<sup>122</sup> The new HCPA expanded protection to crimes based on sexual orientation, gender, gender identity, and disability and replaced the federally protected activity requirement with a new Commerce Clause hook.<sup>123</sup>

Hate crime statutes increase punishment for crimes committed against victims because of their protected characteristics.<sup>124</sup> Despite opponents' arguments that this singles out certain members of the population for special protection,<sup>125</sup> everybody has a race, a gender, a sexual orientation, and—including atheism and agnosticism—a religion.<sup>126</sup> Hate crime statutes are the result of legislatures determining that defendants who consider a victim's protected class in carrying out a crime are deserving of increased punishment.<sup>127</sup>

### B. Hate Crime Statute Models

There are three main categories of causation standards used in hate crime statutes: "racial animus," "discriminatory selection," and "because of."<sup>128</sup> The "racial animus" model—perhaps an outdated term now that most statutes protect many more categories than race from hate crimes—requires a showing of hatred, animus, prejudice, or the like for conviction.<sup>129</sup> For example, Florida increases the severity of a crime "if the commission of such felony or misdemeanor evidences prejudice based

119. See Karanovich, *supra* note 94, at 569; 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).

120. Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1585, 110th Cong. § 1023 (2007), 153 CONG. REC. 26,536 (2007).

121. GEORGE W. BUSH, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING NOTIFICATION OF THE VETO OF H.R. 1585, THE "NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008," H.R. Doc. No. 110-88 (2008).

122. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2190, 2835–44 (2009) (rider to the National Defense Authorization Act for Fiscal Year 2010).

123. Kim, *supra* note 119, at 496–97, 498 n.26. Classifications that are badges or incidents of slavery do not require this Commerce Clause hook and fall under federal purview due to the Thirteenth Amendment. See 18 U.S.C. § 249(a)(1)–(2) (2012) (excepting "[o]ffenses involving actual or perceived race [or] color" from the interstate commerce requirement).

124. 24 C.J.S. *Criminal Law* § 2107 (2006).

125. See PETERSEN, *supra* note 109, at 77–82.

126. See *supra* note 78.

127. See FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 45–63 (1999).

128. Ramer, *supra* note 12, at 93 (citing LAWRENCE, *supra* note 13, at 30).

129. LAWRENCE, *supra* note 13, at 34.

on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim.”<sup>130</sup> Another is the “discriminatory selection” model, which requires that the victim’s protected characteristic was the reason the victim was chosen but does not require showing the perpetrator held any bias toward that characteristic.<sup>131</sup> Wisconsin’s penalty enhancement statute follows this model: the maximum sentence is increased when the perpetrator “[i]ntentionally selects the [victim] . . . in whole or in part because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry” of the victim.<sup>132</sup>

The third model is the “because of” model, which is sometimes also worded as “by reason of.”<sup>133</sup> This model is the most common form in use, and it is the model the HCPA follows.<sup>134</sup> Its meaning is also less certain than the other models; it does not preclude use of either of the other models, nor does it mandate adoption of their analyses.<sup>135</sup> In the

130. FLA. STAT. ANN. § 775.085(1)(a) (West Supp. 2015) (emphasis added); *see also* R.I. GEN. LAWS § 12-19-38 (2002) (providing sentencing enhancement for crimes committed “because of the actor’s hatred or animus toward the actual or perceived disability, religion, color, race, national origin or ancestry, sexual orientation, or gender of” the victim).

131. LAWRENCE, *supra* note 13, at 30. Professor Frederick M. Lawrence gives the following example: “[C]onsider the mugger who preys solely upon white victims because he believes that white people, on average, carry more money than nonwhites. He . . . has selected his victim on the basis of race but has done so without bias motivation.” *Id.*

132. WIS. STAT. ANN. § 939.645(1)(b) (West 2005). The Supreme Court upheld this statute despite a First Amendment challenge in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). *See also* DEL. CODE ANN. tit. 11, § 1304(a)(2) (Supp. 2014) (declaring that a person who commits a crime and intentionally “[s]elects the victim because of the victim’s race, religion, color, disability, sexual orientation, gender identity, national origin or ancestry, shall be guilty of a hate crime”).

133. LAWRENCE, *supra* note 13, at 35–36.

134. 18 U.S.C. § 249(a)(2) (2012) (providing for enhanced penalties for someone who “willfully causes bodily injury . . . because of” a protected classification); LAWRENCE, *supra* note 13, at 35–36.

135. *See* LAWRENCE, *supra* note 13, at 37 (“Classification of *because of* bias crime statutes is thus made difficult by the fact that these laws are consistent with either the discriminatory selection model or the racial animus model.” (emphasis in original)). *But see* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 32 (1998) (arguing “because of” hate crime statutes would likely require class prejudice instead of mere class consciousness “because [prosecutors and judges] recognize the legislative intent to penalize prejudice”). The HCPA’s legislative history is replete with references to the perpetrator’s bias, but no animus requirement made it into the statutory text. For example, the House Judiciary Committee report reads: “Hate crimes involve the purposeful selection of victims for violence and intimidation based on their perceived attributes; they are a violent and dangerous manifestation of *prejudice* against identifiable groups.” H.R. REP. NO. 111-86, at 5 (2009) (emphasis added). This report further clarifies Congress’s intent that the proposed legislation be used to “provide[] the Federal Government the tools to effectively pursue the significant Federal interest in eradicating *bias-motivated violence*.” *Id.* at 6 (emphasis added). Perhaps the strongest language is housed in the legal analysis done to assuage federalism concerns:

[T]he bill requires proof that the violence be motivated by animus based on actual or perceived sexual orientation, gender, gender identity, or disability. *This statutory animus requirement, which the Government must prove beyond a*

*Mullet* appeal, neither the majority nor the dissent considered the racial animus analysis. The majority adopted the discriminatory selection model analysis, and the dissent would have used a supplemental analysis not found in either model: method of attack.<sup>136</sup>

The “method of attack” model Judge Sargus endorses involves a broader application of “because of.” The HCPA imposes criminal liability on whomever “willfully causes bodily injury to any person . . . because of the actual or perceived” protected class of the victim.<sup>137</sup> Where the discriminatory selection model only applies “because of” to victim selection, Judge Sargus’s model applies “because of” to the method of attack that led to the bodily injury.<sup>138</sup> According to Sargus’s model, where a defendant attacks his or her victim in a manner chosen specifically because of the victim’s protected class, the particular bodily injury occurred because of the victim’s protected class. The requirement of but-for causation remains the same: the difference turns on whether the protected class is a but-for cause of this specific bodily injury (method of attack model)<sup>139</sup> or a but-for cause of bodily injury to this specific person (discriminatory selection model).<sup>140</sup>

*reasonable doubt*, will limit the pool of potential Federal cases to those in which the evidence of bias motivation is sufficient to distinguish them from ordinary crimes of violence left to State prosecution.

*Id.* at 14 (emphasis added). The report makes specific reference here to sexual orientation, gender, gender identity, and disability because those are the protected classes new to the HCPA. The text of both the HCPA as passed and the bill include religion in this category. 18 U.S.C. § 249(a)(2); H.R. REP. NO. 111-86, at 3–4 (draft of the proposed bill).

Despite these statements in the legislative history, however, reading an animus requirement into “because of” is a remote possibility due to the *Burrage* opinion. *Burrage* definitively determined that the phrase “because of” means but-for causation in criminal contexts. *Burrage v. United States*, 134 S. Ct. 881, 887–92 (2014). *Burrage* abated the need to reference legislative history. Although “because of” in the HCPA received a couple different interpretations pre-*Burrage*, none of these interpretations included an animus requirement. *See United States v. Miller*, 767 F.3d 585, 589 (6th Cir. 2014) (post-*Burrage* reversal of trial court’s pre-*Burrage* use of “a significant motivating factor” in jury instructions); *United States v. Jenkins*, No. 12-15-GFVT, 2013 WL 3338650, at \*6 (E.D. Ky. July 2, 2013), *aff’d*, Nos. 13-5902 & 13-5903 (6th Cir. 2014) (giving jury instruction that the protected category must be “the substantial reason” for selecting the victim); Jury Instructions at 12–13, *United States v. Mason* (D. Or. Feb. 3, 2014) (No. 3:13-cr-00298-01-SI), 2014 WL 986662 (instructing jury that protected category must be “but for” cause for selecting the victim). *But see United States v. McGee*, 173 F.3d 952, 957 (6th Cir. 1999) (finding racial animus as “a substantial reason” to be a sufficient—though not a *necessary*—condition to satisfy the causation requirement in the HCPA’s predecessor). In addition to referring to a different statute than the HCPA, *McGee* is not controlling because the defendant did not argue that he did not have animus; his argument was that the victim’s intoxication gave the defendant a legitimate reason to deny the victim entrance to the club. *See id.* Animus as a causation requirement was not litigated.

136. *See Miller*, 767 F.3d at 595–96.

137. 18 U.S.C. § 249(a)(2)(A).

138. *Miller*, 767 F.3d at 603 (Sargus, J., dissenting).

139. “The pertinent but-for causality inquiry, then, is whether, even if all of the other contributing or but-for factors remained, the prohibited conduct (*the beard and hair cutting*) would have occurred but for or in the absence of the victims’ Amish religion.” *Id.* at 605 (emphasis added).

140. *Id.* at 591 (majority opinion) (agreeing with the defense that “the phrase ‘because of’



The case of *United States v. Epstein* provides further illustration of this nuance.<sup>141</sup> The defendants in *Epstein* were arrested as the result of a sting operation undertaken in response to reports of the kidnapping and torture of Orthodox Jewish men.<sup>142</sup> Specifically, the reports described attacks on recalcitrant husbands carried out in order for each husband's wife to obtain a *get*—a religious divorce—from her uncooperative spouse.<sup>143</sup> The defendants are charged with committing federal kidnapping crimes, though, not with violating the HCPA.<sup>144</sup> These attacks are more distinctly driven by interpersonal conflict, even though that conflict concerns a religious ceremony. The motivation for the attacks is the husbands' refusal to deliver the *get*, not the husbands' Jewish identity. Although it is difficult to imagine anyone outside the Jewish faith being asked to deliver a *get* and refusing to do so, there is no indication that the defendants would not have committed the same acts against an outsider. Suppose, however, that the defendants had chosen to cut their victims' *payot*—their religiously mandated sidelocks—or force-feed them pork products. The motivation behind the decision to attack remains the same, but now the attackers have taken the victims' religion into account when carrying out the alleged acts in order to intentionally cause religious offense.

#### IV. THE ARGUMENT FOR EXPANSION

In arguing that the method of attack model should be adopted to supplement the racial animus and discriminatory selection models, it is important to ground this new model in the framework traditionally provided to justify increased punishment for hate crimes. As a foundational matter, punishment for a crime must be proportional to the offense.<sup>145</sup> Therefore, hate crimes under the method of attack model should show at least the same level of seriousness as the other hate crime models.<sup>146</sup>

“The seriousness of a crime . . . is a function of the offender's culpability and the harm caused.”<sup>147</sup> Under culpability analysis, hate crime offenders are more blameworthy because their motivation “violates the equality principle, one of the most deeply held tenets in our legal system and our culture. To the extent that crime seriousness is designed to capture a deontological concept of blameworthiness, bias crimes are more serious than other crimes.”<sup>148</sup> Under the discriminatory selection model, no ill will toward any protected class is required, only selection because of that class.<sup>149</sup> If added hate crime punishment is available as a result of assuming something positive about a protected class—perhaps that the members have more

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requires but-for causation—a showing that they *would not have acted* but for the victim's actual or perceived religious beliefs”) (emphasis in original omitted and emphasis added).

141. *United States v. Epstein*, No. 14-287, 2015 WL 1255008 (D.N.J. Mar. 19, 2015).

142. Joseph Goldstein & Michael Schwartz, *U.S. Accuses 2 Rabbis of Kidnapping Husbands for a Fee*, N.Y. TIMES, Oct. 11, 2013, at A18.

143. *Id.*

144. *Epstein*, 2015 WL 1255008, at \*1.

145. LAWRENCE, *supra* note 13, at 45.

146. *See id.* at 58–59.

147. *Id.* at 58.

148. *Id.* at 61.

149. *Id.* at 73.

valuable possessions to steal<sup>150</sup>—then taking protected class into account in order to cause especial harm should be at least as offensive to the societal value placed on equality. Both offend the same equality principle by considering protected classes in making criminal decisions.

Under harms analysis, hate crimes under the discriminatory selection and racial animus models are deemed worthy of increased punishment because of increased harm in the form of psychological damage to victims and feelings of threat that extend to the entire class.<sup>151</sup> This increased harm is evident in the aftermath of the Bergholz attacks. All of the male victims testified that, after their beards were cut, they avoided public appearance due to embarrassment.<sup>152</sup> “Beard cutting was a clever way of doing short-term damage that struck at the heart of Amish identity and caused several months of public embarrassment.”<sup>153</sup> On the class level, fear spread throughout Amish communities, leading individuals to carry pepper spray, keep shotguns loaded, and entirely avoid being out of doors at night.<sup>154</sup> The Amish have been targeted as victims before,<sup>155</sup> but these are the attacks that led them to take action.

After establishing why it is proportional to add method of attack analysis to hate crime determinations, it also must be established that the HCPA includes protection of this model. The language of the HCPA is broad—unlike some statutes, it uses neither the “racial animus” model nor the “discriminatory selection” model.<sup>156</sup> Furthermore, it does not add a “maliciousness” requirement, a common add-on to “because of” statutes that points toward use of the racial animus model of analysis.<sup>157</sup> Additionally, the HCPA was intended to be an expansion of coverage, as evidenced by the broad Commerce Clause wording and the removal of the federally protected activity requirement.<sup>158</sup> Congress has not precluded the use of “method of attack” analysis under the HCPA. A reading of the HCPA text itself does not restrict the reading of “because of” to apply only to a currently recognized model: to “willfully cause[] bodily injury to any person . . . because of the actual or perceived religion” of the victim should cover crimes where the religion of the victim is the but-for cause

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150. *Id.* at 30; *see also* Fairfax, *supra* note 118, at 1138–40.

151. LAWRENCE, *supra* note 13, at 61.

152. KRAYBILL, *supra* note 4, at 19.

153. *Id.* One victim, an Amish bishop, did not preach at his congregation for six months after he was attacked and was too embarrassed to be seen in public at his grandson’s wedding two days after his beard was shaved. *Id.*

154. *Id.* at 15–16. For adherents—including bishops—of a pacifist group, choosing to take up even mild weapons such as pepper spray indicates the high level of fear of attack the Bergholz defendants caused. *See id.*

155. *See, e.g.*, Bryan Byers, Benjamin W. Crider & Gregory K. Biggers, *Bias Crime Motivation: A Study of Hate Crime and Offender Neutralization Techniques Used Against the Amish*, in CRIMES OF HATE 118, 118–19 (Phyllis B. Gerstenfeld & Diana R. Grant eds., 2004) (studying offenders of *clapping*—Amish-specific harassment); Jannaya Andrews, *Police: Mom Told Teens to Rob Amish*, DECATUR DAILY DEMOCRAT (Decatur, Ind.) (Sept. 21, 2012), <http://www.decaturdailydemocrat.com/content/police-mom-told-teens-rob-amish> (Amish targeted while driving buggies in northeast Indiana).

156. *See supra* notes 128–132 and accompanying text.

157. *See* LAWRENCE, *supra* note 13, at 35–36.

158. *See supra* note 123 and accompanying text.

of that specific bodily injury.<sup>159</sup> As Judge Sargus noted, “[T]he majority has adopted an unduly restrictive interpretation of the statute.”<sup>160</sup>

Like the currently recognized hate crime analyses, method-of-attack hate crimes indicate heightened blameworthiness and harm caused over their non-hate-crime analogs. Given that inclusion of method-of-attack hate crimes is a plausible reading of the HCPA’s text that satisfies proportionality of punishment, it ought to be a supplemental analysis available in establishing that a hate crime under the HCPA occurred.

However, to avoid reaching an absurd result, this expansion should not be extended when an attacker chooses a different mode of attack in order to avoid causing especial offense based on a protected class. For example, imagine anti-abortion activists who throw animal blood on doctors who perform abortions. Further suppose these activists normally use pig’s blood, but when attacking Jewish or Muslim victims, they switch to a different animal’s blood. In this case, the victims’ religion led the attackers to choose a different method of attack, but this change was made in order to honor the victims’ protected class, not to inflict harm particular to that protected class. Such decisions ought not raise the actions to the level of hate crime because the decision derived from the victims’ protected class led to a less offensive attack.

#### CONCLUSION

The prosecution of the Bergholz defendants can hardly be considered a typical case. It involves allegedly intrareligious violence within an insular religious group, and the violence at issue would not be typically seen as particularly egregious outside of the victims’ religion. While the *Mullet* trial court used an incorrect causation standard, the proper, but-for causation standard should be considered satisfied not only if the victims’ religion was the but-for cause of victim selection but also if the victims’ religion was the but-for cause of the method of attack.

The religious symbolism of the method of attack employed by the Bergholz defendants must be understood in order to make sense of why the HCPA’s protection should extend to this case. To the uninformed outsider, interpreting beard and hair trimming as a hate crime can be viewed as a gross misuse of the justice system’s time and effort.<sup>161</sup> “If the assaults were simply a grown-up version of Amish pranks, were they worthy of the attention and resources of an outside system of justice?”<sup>162</sup> The inherently religious nature of the specific method of attack chosen, however, removes these actions from the realm of mere prank. While haircutting may not be

159. 18 U.S.C. § 249(a)(2)(A) (2012).

160. *United States v. Miller*, 767 F.3d 585, 603 (6th Cir. 2014) (Sargus, J., dissenting).

161. Correspondence filed with the court expresses this view. A newspaper clipping sent to the court bearing the headline “Amish Convictions Should Be Upheld, Prosecutors Say” is annotated: “No way! Shouldn’t you be more concerned [with] murderers, drunk drivers who kill [the] innocent[?]” The writer continues on a separate piece of paper: “Get real! We have far more important crimes being done—concentrate on them[:] child abuse that kills children[:] I could go on and on—” Correspondence, *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014) (No. 13-3177), ECF No. 67 (emphasis omitted).

162. KRAYBILL, *supra* note 4, at 20.

particularly hurtful to the average person, it violates a long-held and much-valued religious tradition in the Amish faith.<sup>163</sup> The Bergholz defendants “attacked [the victims’] way of life by robbing them of an outward appearance meant to express their faith and closeness to God.”<sup>164</sup> The defendants asserted their superiority “by launching an attack steeped in religious significance, which they knew would shake their devout victims more than any other mode of attack.”<sup>165</sup> Even assuming that the victims were not chosen because of their religion, the attacks were not devoid of decision making based on the victims’ religion.<sup>166</sup>

The HCPA’s scope reaches crimes committed against victims because they are members of a protected class, and excluding the decision to use a method of attack particularly offensive to a protected class cuts against the broad wording of the HCPA’s text.<sup>167</sup> Congress expressed no intention to espouse either the discriminatory selection or racial animus model of hate crime analysis. While the “because of” construction has generally been considered to include one or both of the other two models,<sup>168</sup> there is no obligation to restrict it to only these two models. Having chosen a victim for reasons outside of the HCPA’s scope, a defendant should not be allowed to cause harm directed specifically at the victim’s protected class and avoid the HCPA’s reach.

Ultimately, whether the members of the Bergholz community chose to attack their specific victims because of the victims’ religion is a question of fact. That a crime was committed is clear, but whether the selection of the victims satisfies the requirements of the federal hate crime statute remains unresolved; the basis of the dispute may or may not be religious. Without a doubt, however, the method of attack chosen by the defendants is full of religious symbolism, and the defense failed to show that such actions would have been taken against non-Amish victims. The HCPA’s broad wording should encompass the supplemental method of establishing causation—method of attack—which mandates conviction of the Bergholz defendants.

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163. *See supra* Part I.C.

164. Creuz, *supra* note 8, at 214.

165. *Id.* at 214–15.

166. “Overwhelming and uncontested evidence adduced at trial demonstrates that ‘but for’ the victims’ Amish religion, their beards and hair would not have been cut. . . . [T]he record contains no evidence undermining the conclusion that the victims’ Amish religion was a but-for cause of the injury . . . .” *United States v. Miller*, 767 F.3d 585, 603 (6th Cir. 2014) (Sargus, J., dissenting).

167. *See supra* notes 156–60 and accompanying text.

168. *See Fairfax, supra* note 118, at 1104.