# The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime

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*Four little girls were killed in Birmingham yesterday. A mad, remorseful, worried community asks, "Who did it? Who threw that bomb? Was it a Negro or a white?" The answer should be "We all did it." Every last one of us is condemned for that crime and the bombing before it and the ones last month, last year, a decade ago. We all did it.*

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*A short time later, white policemen kill a Negro and wound another. A few hours later two young men on a motorbike shoot and kill a Negro child. Fires break out and, in Montgomery, white youths assault Negroes.*

*And all across Alabama, an angry, guilty people cry out their mocking shouts of indignity and say they wonder "why?" "who?" Everyone then "deplores" the "dastardly" act.*

*But you know the "who" of "Who did it?" is really rather simple. The "who" is every little individual who talks about the "niggers" and spreads the seeds of his hate to his neighbor and his son. The jokester, the crude oaf whose racial jokes rock the party with laughter. The who is every governor "who" ever shouted for lawlessness and became a law violator. It is every Senator and every Representative who in the halls of Congress stands with mock humility and tells the world that things back home aren't really like they are . . . . We are ten years of lawless preachments, ten years of criticism of law, of courts, of our fellow man; a decade of telling school children the opposite of what the civics books say. We are a mass of intolerance and bigotry and stand indicted before our young. We are cursed by the failure of each of us to accept responsibility, by our defense of an already dead institution . . . .*

*And who is really guilty? Each of us. Each citizen who has not consciously attempted to bring about peaceful compliance with the decisions of the Supreme Court of the United States, each citizen who has ever said "they ought to kill that nigger," every citizen who votes for the candidate with the bloody flag; every citizen, school board member, school teacher, principal, businessman, judge, and lawyer who has corrupted the minds of our youth; every person in this community who has contributed during the past several years to the popularity of hatred is at least as guilty, or more so, than the demented fool who threw that bomb.*

Charles Morgan, Birmingham attorney and Civil Rights Supporter[1]

## INTRODUCTION

My father once told me that the saying "take the low road" was once quite popular in parts of Alabama. To this day, neither of us is exactly sure what that saying means, although we do know that the choice to take a low road has often made a disturbing difference for those dragged along it against their will. When Steven Eric Mullins and Charles Butler traveled such a road in Alabama in February 1999, they did it with Billy Jack Gaither—a gay man—stuffed in the trunk of his

1. Charles Morgan addressed his speech on the bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, to the Birmingham Young Men's Business Club the morning after the bombing. The speech, which became the subject of national debate in 1963, is reprinted in its entirety *in* CHARLES MORGAN, A TIME TO SPEAK 10-14 (1964).

own car, bleeding from the wounds they inflicted to his throat and chest.[2] For Mr. Gaither, the last low road he took brought him to a place where he would be bludgeoned to death, a place where his body of broken bones and tattered skin would be set on fire.

Like all that is tragic in Alabama, the story surrounding Mr. Gaither's death was not without its peculiar twists. For the first time in history, Alabama law enforcement officials publicly aligned themselves with national gay rights organizations, insisting that Mullins and Butler confessed to killing Gaither simply "because he was queer,"[3] even though neither suspect had actually made such an unqualified confession. And Mullins even claimed that God told him to confess to the killing, though, in the end he pled "not guilty" to a murder charge anyway. Ultimately, though, the story of Mr. Gaither's death devolved into yet another low-roadkill tale: According to Mullins, Mr. Gaither made a pass at him over the telephone, so, naturally, he felt he had to take Mr. Gaither down to Peckerwood Creek and kill him.

Sufficiently abstracted, the story of Mr. Gaither's murder may have seemed "mysterious," something beyond understanding, made all the more curious by the swirl of unconvincing theories that have arisen about antigay hate crime.[4] In the years leading up to the murder, many commentators insisted that religious organizations and right-wing political groups encouraged antigay violence through antigay rhetoric, even though most antigay murderers have historically not been active in such organizations or groups.[5] Other theorists maintained that specific sex crime laws legitimized bodily violence against lesbians and gay men,

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2. The full details of the Gaither murder are set forth in § II.B.1 *infra***.**

3. *Compare* Val Walton, *Two Plead Not Guilty in Killing of Gay Man*, BIRMINGHAM NEWS, May 21, 1999, at 2A *and* Tracy St. Pierre, *And Then There Were Three: Hate Crimes Prevention Act Gains Momentum with Gaither Killing*, HUM. RTS. CAMPAIGN Q., Summer 1999, at 7.

4. *See* Elaine Witt, *Grouping Tragedies Not Going to Help Problem*, BIRMINGHAM POST-HERALD, Aug. 7, 1999, at C1 (describing the motives behind the murder of Billy Jack Gaither as unknown but probably "the combination of alcohol, boredom, violence and stupidity"). Other commentators have generally claimed that antigay hate crime is an ambiguous phenomenon. *See, e.g.*, Bruce Schulman, *Hate Crimes amid the Prosperity*, L.A. TIMES, Apr. 18, 1999, at 2 (arguing that the "recent epidemic" of hate crime is "startling," "puzzling," and does not seem to "fit" assumptions); Julie Cart, *Simplistic Views of Matthew Shepard and the Men Accused of Killing Him Could Be Broadened as Trial Begins*, L.A. TIMES, Mar. 24, 1999, at A11 (describing the motives for the killing of Shepard as "ambiguous"); *see also* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1 (1993).

5. *Compare, e.g.*, Frank Rich, *The Road to Laramie*, N.Y. TIMES, Oct. 14, 1998, at A23 (claiming a link between the Family Research Council, hate, and the murder of gay college student Matthew Shepard); Kevin T. Berrill, *Antigay Violence and Victimization in the United States*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter Herek & Berrill] (challenging the link).

even though antigay violence has persisted in states that have long since repealed their laws criminalizing gay intimacy.[6] And a peculiar assortment of authorities who claim to speak with knowledge on homosexuality posited that antigay violence is a natural response to gay people being openly gay and requesting equality, even though excessive antigay violence has always been the hallmark of the most primitive legal regimes, particularly those that closet and punish lesbian and gay sexuality.[7]

Placed in its proper context, the killing of Billy Jack Gaither is much more understandable as an exercise of brute Alabama power. Days before the murder, Alabama legislators defended their ban on the sale of sexual devices in the state by claiming that they simply failed to read the law they passed, as if not reading a law before voting for it could ever be a good thing.[8] As Gaither's killers took credit for his murder, several

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6. *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COL. L. REV. 1431, 1486 n.194 (1992) (finding no causal connection between sodomy laws and homophobia but suggesting that sodomy laws "legitimize" violence); *see also* Gryczan v. Montana, 942 P.2d 112, 120 (Mont. 1997) ("there is evidence to show that there is a correlation between homosexual sodomy laws and homophobic violence").

Of course, California decriminalized consensual sodomy in 1975, *see* Act of May 12, 1975, ch. 72, § 7 1975 CAL. STAT. 131, 133, and court opinions in California still report extraordinary antigay violence. *See, e.g.*, *In re* M.S., 896 P.2d 1365, 1369 (Cal. 1995) (finding a group of juveniles and adults attacked gay men and kicked one victim into unconsciousness, claiming they were provoked by shouts of "We are going to kill you, you are all going to die of AIDS"); People v. Wharton, 809 P.2d 290, 301 (Cal. 1991) (finding that defendant confessed to kicking to death "a homosexual" who allegedly made a pass at him); People v. Miller, 790 P.2d 1289, 1293 (Cal. 1990) (describing defendant's murder of four gay men and attacks on several others, the attacks causing blunt force trauma on each by multiple blows to the head); People v. Turner, 789 P.2d 887, 890-93 (Cal. 1990) (finding that former felon stabbed alleged gay engineer forty times in the abdomen, chest, neck, arms, and back, after cutting the telephone cords to the victim's home and stealing from him, purportedly because the victim made a pass at him).

7. Representatives for the Roman Catholic Church have expressly linked antigay violence to claims for lesbian and gay equality. *See* Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, *reprinted in* 5-6 THE VATICAN AND HOMOSEXUALITY (Jeanne Grammick & Pat Furey eds., 1988). And, of course, the Judeo-Christian tradition is scarred by advocacy for antigay violence. *See* GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 120-24 (1991). Christian institutions are not alone, however, in raising conflicting assumptions about increases of antigay violence. *See, e.g.*, Herek and Berrill, *supra* note 5, at 1-2 (suggesting a long history of violence against lesbians and gay men while noting potential increases in antigay violence to increased gay and lesbian visibility).

Throughout this Article, antigay violence and discrimination can be seen as historically directed against persons "perceived" as gay or lesbian, including persons who suppress or deny gay and lesbian identity. In this sense, violence directed against persons identified as gay or seeking equality is redirected violence, not new.

8. *See generally* Elaine Witt, *Ban on Sex Toys Remains Mystery*, BIRMINGHAM POST-HERALD, Feb. 27, 1999, at C1.

It is noteworthy that the failure of Alabama legislators to read the legislation they sponsor has been termed by one recent Alabama legislator as far from "unusual." *See Lawmaker: Probe of Bill Nonsense*, BIRMINGHAM NEWS, July 24, 1999, at 11A. Alabama legislators have long been

Alabama legislators publicly affirmed their support for the state Constitution's ban on interracial marriage,[9] even though more than thirty years ago the United States Supreme Court condemned such bans as unconstitutional, not to mention an utterly backward-thinking byproduct of White Supremacy.[10] And to top things off, so to speak, as Mullins and Butler became renowned for their antigay hate, Alabama's Lieutenant Governor made his mark on the national political scene by urinating into a thermos on the floor of the state Senate, claiming he was afraid of losing control of the state's legislative agenda if he left the Senate to take a proper pee.[11]

The importance of contextualizing the story of Mr. Gaither's death becomes obvious when one realizes that his was not the first brutal murder of a gay man in Alabama, or, for that matter, even the first bludgeoning and burning of a gay man in Alabama.[12] Nor was Gaither's murder particularly distinguishable from antigay violence in other states as diverse as New York[13] and Georgia.[14] The only thing surprising about

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known to rely on lobbyists to tell them what is in legislation, rather than read legislation before voting on it. *See Simple Question: Why Can't Lawmakers Read the Bills They Vote on*, BIRMINGHAM NEWS, July 16, 1999, at 12A. In fact, legislators have attempted to further insulate themselves from reading legislation by proposing to charge lobbyists with "perjury" for misrepresenting legislation to legislators. *Id.*

9. At the time of the Gaither murder, approximately twenty percent of Alabama legislators declined to support removal of the interracial marriage ban from the Alabama Constitution. *See* Bill Poovey, *End of Race Ban Favored*, MONTGOMERY ADVERTISER, Mar. 1, 1999, at 3C; *see also* Suzi Parker, *Erasing a Remnant of Jim Crow South from Law Books*, CHRISTIAN SCI. MONITOR, Mar. 23, 1999, at 2. A narrow majority of voting Alabamians finally repealed the ban by referendum in November 2000, *see Alabama Repeals Ban Against Interracial Marriage*, CHATTANOOGA TIMES, Nov. 8, 2000, at B2.

10. *See* Loving v. Virginia, 388 U.S. 1, 7 (1967).

11. *See* Bob Johnson, *Jug Incident's Effect on State Image No Laughing Matter*, MONTGOMERY ADVERTISER, Apr. 11, 1999, at 3C; Kim Chandler, *Windom Claims Victory*, MONTGOMERY ADVERTISER, Mar. 31, 1999, at 1A.

12. Confirmed killings are detailed at notes 349-350, *infra*.

13. Recent highly publicized New York cases include: the 1999 murder of nineteen-year old gay African-American, Steen Fenrich, who was dismembered by his white stepfather and buried in plastic containers because his stepfather disapproved of his homosexuality, *see* David M. Herszenhorn, *Signs in Grisly Killing Point to Bias and Stepfather Who Killed Himself*, N.Y. TIMES, Mar. 24, 2000, at B5; and two brutal slayings in 1990: one of Julio Rivera in Queens by a gang of teens, *see* Joseph P. Fried, *A Murder Verdict Becomes a Rallying Cry*, N.Y. TIMES, Nov. 24, 1991 § 4, at B6; Allesandra Stanley, *The Symbols Spawned by the Killing*, N.Y. TIMES, Nov. 18, 1991, at B1; and the other of James Zappalorti on Staten Island, who was sought out and killed by two men because they thought he was gay, *see* James C. McKinley, Jr., *S.I. Man, 44, Stabbed Dead on His Beach*, N.Y. TIMES, Jan. 25, 1990, at B1. For a sampling of other New York cases of antigay murders reflected in reported decisions in the 1990s alone, see *People v. Spaich*, 688 N.Y.S.2d 324,325 (N.Y. App. Div. 1999) (finding defendant stabbed his neighbor with a hunting knife claiming he made "homosexual advances" toward him); *2*, 660 N.Y.S.2d 97, 97 (N.Y. App. Div. 1997) (finding two minors bludgeoned and slashed the throat of foster father claiming he made "unwanted homosexual advances"); *People v. Childs*, 615 N.Y.S.2d 232, 233 (N.Y. App. Div. 1994) (finding that defendant who insisted he was "not a homosexual" massaged

Mr. Gaither's murder is that it has received so much more attention nationwide than similar antigay violence, violence that the public has largely ignored. Though newspapers have repeatedly documented cases of graphic violence against lesbians and gay men, many television and news magazine reporters have recently claimed not only to be "flabbergasted" by homophobic violence, but have intimated that Mr. Gaither's murder symbolized some "secret" about antigay hate in rural American towns.[15] Even Congress has claimed a need for more data on

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victim and then stabbed him in the throat, chest, and back after the victim allegedly grabbed his penis); *People v. Robles*, 569 N.Y.S.2d 704, 705 (N.Y. App. Div. 1991) (stating defendant claimed that "fear[ing] eternal damnation" he "ferociously fought off a homosexual assault"); *People v. Reese*, 564 N.Y.S.2d. 204, 205 (N.Y. App. Div. 1990) (finding defendant stabbed his victim to death after victim made a "homosexual proposition," even though defendant had already knocked his victim to the ground); *People v. Baird*, 563 N.Y.S.2d 274, 275 (N.Y. App. Div. 1990) (finding defendant "snapped" and "repeatedly struck" his victim after the victim purportedly made a "homosexual advance" toward him); *People v. Foster*, 553 N.Y.S.2d 489, 490 (N.Y. App. Div. 1990) (finding gay man was "viciously beaten about the head . . . and died as a result of multiple and severe head . . . injuries" after he tried to evict defendant from a hotel he managed, while defendant claimed he rebuffed the victim's "homosexual advance"). *See also* note 270, *infra*.

14. *See* Johnson v. State, 389 S.E.2d 238, 239 (Ga. 1990) (finding two individuals killed "a homosexual" by beating him with a pipe and shooting him between the eyes); Flourney v. State, 357 S.E.2d 574, 575 (Ga. 1987) (finding co-defendant claims his co-conspirator in murder of a gay man had a reputation of "messing with homosexuals"); Lobdell v. State, 256 Ga. 769, 771 (Ga. 1987) (finding defendants murder and rob a man after deciding to "roll a queer"); McClain v. State, 502 S.E.2d 266, 267 (Ga. Ct. App. 1998) (finding defendant tossed gasoline on and "struck a match" to perceived gay victim for purported sexual advances); McKinney v. State, 175 S.E.2d 893, 895 (Ga. Ct. App. 1970) (finding defendant fired a pistol several times at "homosexuals" to "frighten them and make them run," killing one man). *See also* Lee Condon, *Investigations Pending*, THE ADVOCATE, Nov. 11, 1997, at 41 (chronicling fifteen murders of African-American transvestites and transsexuals in Atlanta, Ga.); Lee Condon, *Executive Order: Enough Hate Already*, THE ADVOCATE, Oct. 14, 1997, at 29, 30 (discussing the bombing of a lesbian bar in Atlanta, Georgia).

15. For example, on at least three occasions, ABC News extensively reported on antigay violence occurring nationwide. *See 20/20: Crossing Over: Police and Firefighters Come Out of the Closet* (ABC television broadcast, Aug. 1, 1997); *Nightline: An American Family* (ABC television broadcast, May 24, 1993) [hereinafter *An American Family*]; *Nightline: Violent Hate Crimes Against Gays* (ABC television broadcast, Jan. 26, 1990). Yet, in reporting on the murder of Billy Jack Gaither, ABC News expressly cast the killing as a "secret" of small-town America and set its narrative of the murder to a gothic film score. *See 20/20: Small Town Secrets* (ABC television broadcast, Mar. 10, 1999).

This phenomenon of minimizing antigay hate crime was not limited to the murder of Billy Jack Gaither. CBS News has repeatedly bashed lesbians and gay men since its notorious broadcast of the 1967 documentary "The Homosexuals." *See, e.g.*, Chris Bull, *Andy We Hardly Knew Ye: And Now for a Few Homophobic Minutes with Andy Rooney*, *in* WITNESS TO REVOLUTION: THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS, 1967-1999, at 244-46 (describing CBS News' reprimand of Andy Rooney for broadcasting his claim that homosexuality is "inherently dangerous" and deadly); JOHN LOUGHERY, THE OTHER SIDE OF SILENCE 405-06 (1998) (describing "The Homosexuals" and public reprimand of CBS News' use of "questionable editing practices" and harassment of pro-gay officials by CBS staff). But Cynthia Bowers, the CBS News correspondent assigned to cover the killing of gay college student Matthew Shepard, told THE ADVOCATE that she was "flabbergasted" by the murder and "couldn't believe that he had been hung up like a scarecrow." Apparently for the first time,

antigay hate crime,[16] despite having held detailed hearings since 1986 on antigay violence perpetrated by private citizens and law enforcement officials alike.[17]

Denial of awareness of tragedy, of course, does not always impute sinister motive or insensitivity, but governmental denials of responsibility for hate crime have historically camouflaged official misconduct with mock civility. Particularly in states like Alabama, mock civility in the face of hate crime has been a part of a governmental scheme to refuse to protect minorities from violence, a scheme coupled with efforts to preserve discrimination against those minorities by force of law. If, as some observers have suggested, states like Alabama have now taught some American politicians the art of mock civility,[18] public officials responsible for law enforcement nationwide should be suspect for denying ability to control breakdowns of law and order, particularly when law enforcement officials inflict further injurious discrimination on the victims of hate crime.

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Bowers realized only that the killing "seemed to symbolize in graphic terms the treatment of homosexuals in this country." *See* Chris Bull, *All Eyes Were Watching*, THE ADVOCATE, Nov. 24, 1998, at 33, 35.

Curiously, media coverage of both the Gaither and Shepard murders grossly distorted the rural qualities of the victims' hometowns and neglected to mention the similarity of crimes occurring in large metropolitan areas. Contrary to any evidence, NEWSWEEK even claimed that "most" of Gaither's hometown—more than half of 13,000 residents—had chickens for pets. *See* Daniel Pedersen with Arlyn Tobias Gajilan, *A Quiet Man's Tragic Rendezvous with Hate*, NEWSWEEK, Mar. 15, 1999, at 65 (describing Sylacauga and Laramie as quiet mid-American towns where really bad things happen); *see also* Julie Cart & Edith Stanley, *Rural Life Can Be Lonely and Risky for Gays*, L.A. TIMES, Mar. 21, 1999, at A1 (explaining how the murder of Billy Jack Gaither equates "small town" fears with "gay bashing . . . in the national consciousness").

16. *See* Associated Press, *Senate Panel Asks for Hate Crime Data*, BOSTON GLOBE, May 12, 1999, at A26. The latest federal hate crime reports, despite underreporting, recorded 1260 bias-reported crimes committed on the basis of the sexual orientation of their victims, including 4 murders and 570 assaults. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME STATISTICS 1998, at 13 (1999) (hereinafter UCR 1998). Nevertheless, Senator Orrin Hatch, who led the request for "more data," specifically proposed hate crime legislation that would exclude from federal law hate crimes targeting victims for their sexual orientation. *See* Elizabeth Shogren, *Senate OKs Expanding Federal Reach on Hate Crime*, L.A. TIMES, July 23, 1999, at A18. Hatch then told Utah Republicans to take pride because Republicans "don't have the gays and lesbians with us." *See* John Heilprin, *Hatch Says He's Misunderstood, but Some Say His Antigay Bias Is Clear*, SALT LAKE TRIB., Aug. 13, 1999, at A1.

17. *See* URVASHI VAID, VIRTUAL EQUALITY 11 (1995). Congress has been aware of antigay police violence since 1983 at least. *See, e.g.*, U.S.H.R. Comm. on the Judiciary, *Police Misconduct: Hearing Before the Subcommittee on Criminal Justice of the Committee of the Judiciary* (Serial No. 98-50) (1983).

18. *See* DAN CARTER, THE POLITICS OF RAGE 465-68 (1995). *See also* PETER APPELBOME, DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE (1996); ALAN CRAWFORD, THUNDER ON THE RIGHT: THE "NEW RIGHT" AND THE POLITICS OF RESENTMENT(1980).

As Part I of this Article will show, widespread, bias-motivated bodily violence in the United States has always occurred in the context of widespread governmental discrimination, never in a sociopolitical vacuum. To be sure, sporadic hate crime may always plague imperfect pluralistic cultures. But the United States Supreme Court has repeatedly reported that bias-motivated bodily violence can be triggered by varied forms of governmental discrimination, particularly when discrimination instills expectations of power in one class over another, or when citizen violence curries favor with biased law enforcement. Put simply, pandemic hate crime has never occurred in the United States in periods of full equality for the victim classes. As this Article will show, such pandemic hate crime generally has only arisen in climates in which the states and federal government have also discriminated against the victims of hate crime and have scapegoated the victim class as a threat to the population or deserving of injury.

As Part II of this Article will explain, the rhetorical parallels between antigay policy statements and murderers' confessions provide additional powerful evidence that there may be a causal link between government misconduct and hate crime. Both antigay government officials and murderers have cloaked their injuries to lesbians and gay men in disturbingly familiar mock civility, insisting upon their commitment to fairness and righteousness and claiming helplessness in preventing the excesses of their abuses. But government alone has the authority to communicate that law favors injury to gay people, as well as the ability to teach criminals that antigay rhetoric is useful in defending unlawful acts of violence.[19] As Part II will show, if antigay murderers are undeterred from violence by mixed messages of opposition to

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19. Some governmental authorities have expressly condoned antigay violence. In the context of gay bashings, a trilogy of comments made by judges in the 1980s have often been cited as evidence of bias: a Texas judge claimed he put "prostitutes and gays at about the same level," adding that he would be "hard put to give somebody life for killing a prostitute"; a California judge blamed a victim killed for allegedly making a gay pass, concluding that the victim "contributed in large part to his own death" by his "reprehensible conduct"; and a Florida judge joked that "times really have changed" when informed that it is a crime to "beat up" and "kill" homosexuals. *See* MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 191-92 (1999) (citing cases); *see also* Herek and Berrill, *supra* note 5, at 294-95 (citing cases).

Outside the context of antigay violence, patterns of judicial homophobia are more subtle but have been confirmed by several authors. *See* Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation & Dissemination Efforts*, 41 WAYNE L. REV. 1, 37, 37 n.135 (1994); Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: "Queer Baiting" from the Bench*, 3 POL. BEHAV. 31 (1981); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979). For examples of authorities other than judges condoning violence, *see infra* notes 281-284, 367 and accompanying text.

homosexuality and opposition to violence, it is most likely that the government has encouraged the resulting chaos.

This Article concludes, therefore, that the breakdown of law and order that has taken the lives of countless lesbians and gay men in the United States is the byproduct of pervasive antigay governmental discrimination. The record of dismemberment, torture, and destruction of the bodies of lesbians and gay men is one that would not likely be tolerated if the victims were members of political majorities. It is, moreover, no rhetorical accident that many opponents of hate-crime legislation claim to be defenders of equality for murder victims while supporting discrimination against lesbians and gay men in virtually every walk of American life.[20] Those of us who include ourselves in the community of sexual minorities—especially those of us who have bled from antigay violence or have lost friends and loved ones to it—know full well that we will be treated equally by far too many Americans if and only if we are dead. If equality of law enforcement is necessary to protect lesbians and gay men from violence, it is reasonable to acknowledge that a widespread lack of equality may be what is most deadly to us.

## I. LEARNING FROM CULTURE

> *Senseless killing—Tom had been given due process of law to the day of his death; he had been tried openly and convicted by twelve good men and true; my father had fought for him all the way. Then Mr. Underwood's meaning became clear: Atticus had used every tool available to free men to save Tom Robinson, but in the secret courts of men's hearts Atticus had no case. Tom was a dead man the minute Mayella Ewell opened her mouth and screamed.*
>
> Harper Lee, To Kill a Mockingbird[21]

The theory that law acts as a catalyst for violence is not new. It is well settled that law sanctions violence,[22] inflicts it,[23] and encourages it,[24]

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20. *See* Frank Rich, *Family Values Stalkers*, N.Y. TIMES, Jan. 13, 1999, at A19; *see also* David Byrd, *Making Hate a Federal Crime*, NAT'L J. 968 (1999) (quoting Robert Knight of the Family Research Council on opposition to hate crimes legislation, as saying, "Why should a homosexual have greater protection than my grandmother?" and, "It's all part of a master strategy to crush dissent in the homosexuality debate."); Katherine Q. Seelye, *Citing "Primitive" Hatreds, Clinton Asks Congress to Expand Hate Crime Law*, N.Y. TIMES, Apr. 7, 1999, at A18 (quoting Knight's description of hate crimes legislation as unequal protection for various classes of citizens and teaching tolerance in schools as advancing a "homosexual agenda" and "hate crime against parents").

21. HARPER LEE, TO KILL A MOCKINGBIRD 244 (Popular Library ed., 1960).

22. A classic example of government-sanctioned violence is licensure of husbands to batter and rape their wives. *See* Reva B. Siegel, "*The Rule of Love:" Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (detailing the American legal tradition

determining what forms of violence are permissible. In the Salem witch trials, for example, criminalization of supposed compacts with the devil, enforced in crudely constructed quasi-legal courts, proved early in American history that law can channel public hysteria into illegal mass executions, connecting disaggregate prejudices to give form to desires for violence.[25]

In the United States, the history of hate crime overwhelmingly shows that official discrimination and widespread bias-motivated violence have rarely been merely coincidental. Indeed, as this Part shows, first through a national survey of American governments' mistreatment of minorities, and then through a detailed look at bias-motivated violence in a single state, widespread hate crime has repeatedly occurred in the United States when the states and federal government have inflicted varied forms of more "civil" bias-motivated harm upon minority classes. In fact, because minorities in the United States have suffered pandemic hate crime *only* when those classes have simultaneously been victims of government discrimination, as an

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allowing husbands to "chastise" their wives with brutality short of permanent injury and death); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941 (1995) (detailing the history of marital rape exemptions as mechanisms for reinforcing the subordination of women); Robin West, *Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 71-76 (1990) (discussing how the fourteenth amendment is implicated by marital rape exemptions).

23. Regarding state-inflicted violence through law enforcement and war, see AUSTIN SARAT & THOMAS R. KEARNS, LAW'S VIOLENCE 1-21 (1992); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

24. *See, e.g.*, DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 229-76 (1990) (discussing law "civilizing" varieties of killings and how the rhetoric of punishing fixes blame on the punished for the violence they suffer); Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *in* LAW'S VIOLENCE, *supra* note 23, at 175-210 (discussing how violence between private individuals "represents an act of law-making or law enforcement for the perpetrator," and how it "often serves as the operative law of his or her culture").

25. There is little doubt that Salem's legal system played a central role in legitimizing the town's paranoia and thirst for scapegoating. Once false accusers were allowed to testify publicly, particularly about their spectral visions, their testimony could only be withdrawn under penalty of perjury. PETER CHARLES HOFFER, THE DEVIL'S DISCIPLES: MAKERS OF THE SALEM WITCH TRIALS 120-130, 167-172 (1996). Invariably, their "testimony" fueled multiple trials. For a discussion of how criminal process gave audience and fuel to accusations and confessions, *see id.* For additional insight into the connection between law and hysteria in Salem, see BRIAN P. LEVACK, THE WITCH HUNT IN EARLY MODERN EUROPE 205-06 (1993) (describing the role that the law proscribing demonic compacts had both on preventing mass accusations of demonic behavior and playing a central role in the Salem prosecutions); MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS: A MODERN ENQUIRY INTO THE SALEM WITCH TRIALS 215-256 (Dolphin Books ed. 1961) (discussing the role of authorities in controlling executions, pardoning the convicted, and dismantling the Salem system). Whatever inspired the initial hysteria that captured Salem in 1692, the law clearly channeled that hysteria, gave it form, and was the only means of stopping it from continuing.

empirical matter, government discrimination should be regarded as the primary influence on hate crime, as well, perhaps, as a necessary ingredient for it.

### *A. The Devolution of Discrimination to Bias-Motivated Violence Throughout United States History*

The collected opinions of the United States Supreme Court arguably serve as the most well-maintained and comprehensive record of national governmental misconduct available in America. Through these opinions, one can find an extraordinary array of bias-motivated violence connected with the legalization of prejudice. Indeed, the Court has documented that when the federal government and the states have targeted "nonwhite" tribal peoples,[26] African-Americans,[27] women,[28] children,[29] and the mentally handicapped[30] for discrimination, each of

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26. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-590 (1823) (describing "whites" as aggressors in taking land from multiple tribes with "frequent and bloody" force); *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) ("That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied.").

Racism has been quite overt in many of the Justices' opinions on the varied tribes, which sweepingly attribute misconduct to all "Indians" collectively. *See Sioux Nation of Indians*, 448 U.S. at 435 (1980) (Rehnquist, J., dissenting) (grouping "Indians" to claim that they "did not lack their share of villainy"); *Johnson*, 21 U.S. at 590 (1923) (stating that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war . . . .").

27. The array of "private" violence inflicted against African-Americans and recorded in Court opinions is almost too voluminous to contain in a single footnote. For examples, see notes 40-41, 45-46, 55-56, 77 *infra*.

28. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270-71 (1993) (reasoning that, under civil rights laws, women have less rights to protection against violence while exercising unique abortion rights than Orthodox Jewish males would have to wear yarmulkes); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992) (holding that despite substantial evidence of domestic violence and rape committed by men against women, women have qualified rights of bodily autonomy to serve state's interests in potential human life on the theory that the "liberty of the woman is at stake in a sense unique to the human condition and so unique to the law"); Frontiero v. Richardson, 411 U.S. 677, 685 (1973) ("[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."); Roe v. Wade, 410 U.S. 113, 153-154 (1973) (drawing on misogynist legal traditions and comparisons of the rights of women to the rights of the sick and mentally incapacitated to hold that women may be compelled to suffer "[p]sychological harm" and threats to "[m]ental and physical health" to serve the state's interests in potential life).

29. *See, e.g.*, DeShaney v. Winnebago County Dep't Soc. Serv., 489 U.S. 189, 191-202 (1989) (holding that, though "undeniably tragic," the beating of a child into a state of profound retardation after state deferred to parental rights of father's possession of his child was not a violation of child's substantive due process rights because the state placed him "in no worse position" a state of continual beatings "than that in which he would have been had [the state] not acted at all"); Parham v. J.R., 442 U.S. 584, 602 (1979) (holding that commitment of children to

these groups has also suffered spectacular bodily violence. And for three classes of peoples with very different histories—Native Americans, African-Americans, and Jehovah's Witnesses—the Court's opinions contain strong evidence that the bias-motivated violence these groups have suffered can be directly attributed to government abuse.

Though the Court once cryptically made references to White citizen violence against Native Americans, the Court's opinions ultimately correlated that violence with the American government's discriminatory treatment of numerous tribes.[31] Historical records corroborate those cor-

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mental institutions by their parents can be presumed to be benign because "historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"); Ingraham v. Wright, 430 U.S. 651, 670 (1977) (holding that while in school "the schoolchild has little need for the protection" under the eighth amendment against violent corporal punishment).

For more on the violence children suffer because of their status, *see* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 52, 66-68 (1996); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1045-1051 (1992); RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 30-32, 34 (1989).

Strong research continues to suggest that much American violence may stem from the way children, like animals, are treated as possessions subject to custodial abuse. *See* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE (Frank R. Ascione & Phil Arkow eds., 1999).

30. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding sterilization of persons deemed mentally retarded because "[I]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough."); *see also* Washington v. Glucksberg, 521 U.S. 702, 732 (1997) (noting that the handicapped are at risk of extermination under a system that tolerates controls of the mentally ill, because "[i]f physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs"); Heller v. Doe, 509 U.S. 312, 319 (1993) (holding that under an equal protection standard that tolerates classifications that may be unwise, unfair, illogical, and unsupported by facts, the mentally retarded may be subjected to treatments that are "intrusive" to their bodies); Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (recognizing that institutionalized persons have been held in unsafe conditions comparable to cruel and unusual punishment).

31. The Court's opinions are carefully written to obscure the Court's view of whether unequal treatment of tribes by the United States was unjustified. But the correlations of violence to the legal inferiority of tribes remain clear:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, *the people of the States where they are found are often their deadliest enemies.* From their very weakness and helplessness, *so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised*, there arises the duty of protection, and with it the power.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (emphasis added). For earlier, more cryptic references, *see* Worcester v. Georgia, 31 U.S. 515, 552 (1832) (noting that "acts of violence" and "reciprocal murder" followed European invasion and dominion over tribes and that Georgia illegally continued to assert jurisdiction over lands); Cherokee Nation v. Georgia, 30 U.S. 1, 10, & 17 (1831) (dismissing tribal claims that Georgia enforced laws in a "harassing and

relations. During a period in which the Court perceived Native Americans "not as individuals" but wards "in a state of pupilage,"[32] the federal and state governments committed extensive illegal and aggressive acts against the tribes, and citizen violence against the tribes thrived. In addition, crimes committed by Whites were often coordinated with government campaigns against the tribes, including bounties for tribe members' scalps and propaganda portraying tribes as threats warranting elimination.[33] In the words of the Federal Board of Indian Commissioners, "the border white man's connection with the Indians" left "a sickening record of murder, outrage, robbery, and wrongs committed by the former as the rule."[34]

Having promoted antitribal hostilities, early American governments simply could not maintain adequate enforcement of criminal law to protect tribes against White-generated, bias-motivated violence. As historian Francis Paul Prucha has noted:

> [T]he crimes [by whites committed against Indians] were so numerous and widespread that their control by judicial means proved impossible. The frequency of offenses committed against Indians by frontier whites, among which outright murder was commonplace, was shocking. It was often a question of who was more aggressive, more hostile, more savage—the Indian or the white man. The murders and other aggressors of whites

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vexatious" manner to attack tribes who "look to our government for protection [and] rely upon its kindness and its power"); Johnson v. M'Intosh, 21 U.S. (8 Wheat) at 589-90 (requiring that on tribal lands "acquired and maintained by force" the conquered should not be "*wantonly* oppressed," and acknowledging that "frequent and bloody wars in which whites were not always the aggressors, unavoidably ensued" because the conquerors typically found "some excuse" for their violence in their categorical perception of tribes as "fierce savages") (emphasis added).

32. *See Ex parte* Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556, 569 (1883) (summarizing dehumanized status of tribes under theory that White government's dominion over "Indians" was designed to ensure that they could "advanc[e] from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society").

33. *See, e.g.*, Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (describing how murders by settlers were used to justify further assimilation of tribes by government); James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 387-388 (1996) (describing scalpings, kidnappings, and murders in the late 1800s coordinated with government hostilities); Laurence Hauptman, *Group Defamation and the Genocide of American Indians*, *in* GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE 9, 16 (Monroe H. Freedman & Eric M. Freedman eds., 1995).

For a detailed illustration of the government-sanctioned murder that occurred in the midst of these crimes, *see* Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

34. *See* 1869 BD. OF INDIAN COMM'RS ANN. REP. 7

> against Indians provided one of the great sources of friction between the two races. Lack of enforcement made a mockery of the statutes.[35]

Bias-motivated violence against tribes particularly flourished when state and federal governments overtly supported settlers' illegal encroachments into tribal lands in defiance of a federal treaty and judicial authority.[36] In Georgia and Alabama, for example, where government-sponsored atrocities were "particularly notorious,"[37] beatings, rapes, and property assaults followed state-supported aggressions into Cherokee lands. Moreover, such violence was ignored by state law enforcement, except to the extent necessary to justify removal of the Cherokee.[38]

The violent history of the American governments' mistreatment of various Native American tribes is, perhaps, only matched in scope by the governments' equally violent mistreatment of African-Americans. Once American law finally brought an end to the state-sanctioned violence of slavery, the Court's opinions still documented that mere citizenship for African-Americans, without a commitment to formal equality, provided no real hope that African-Americans would be protected against extraordinary hate crimes committed by Whites. Instead, as long as the states and the federal government fostered expectations of White privilege, the very suggestion of full African-American citizenship and equality became a bizarre pretext for bias-motivated violence committed by Whites.

The Court's own role in such atrocities should not be understated. In the late nineteenth century, the Court confessed that it did not merely seek to preserve an institutional structure in a legal vacuum in imposing judicially fabricated limits on the Constitution's express guarantees of equal protection and privileges and immunities. Rather, the Court endeavored to prevent "serious . . . far-reaching and pervading" changes to the "spirit of our institutions,"—not just to "the relations of the state and federal governments to each other," but to the relations of "both these governments to the people."[39] Under these strictures, all levels of

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35. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 105 (1984).

36. *See* Worcester v. Georgia, 31 U.S. 515 (Mem) (1832) (holding that the state of Georgia could not extend its authority over Indian lands).

37. *See* PRUCHA, *supra* note 35, at 240.

38. For a specific account of how bias-motivated violence against Native Americans escalated as federal and state governments encouraged Georgians to extend state control over Cherokee lands, see JAMES WILSON, THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA at 165-72 (1998).

39. *The Slaughterhouse Cases*, 83 U.S. 36, 78 (1873). This expression of motive is disturbing in light of likelihood that the decision was an error. *See, e.g.*, Laurence Tribe, AMERICAN CONSTITUTIONAL LAW, § 7-3 at 1306-08 (1999) (arguing that *Slaughterhouse* is not only "probably erroneous" but contrary to history and based on misquotations of the Fourteenth

American government knowingly allowed racists to slaughter thousands of African-Americans, even interfering with the effective punishment of Ku Klux Klansmen who publicly massacred hundreds of African-Americans at a time,[40] as well as with the effective punishment of lynch mobs who had beaten and executed African-Americans in police custody.[41] With the Court's assistance, African-American victims of bias-motivated crimes were effectively left looking to the state governments for "security and protection,"[42] even though the Southern states themselves had already resorted to the violence of the Civil War to defend slavery.

Since the purpose of embedding such bias in law was to perpetuate prejudice by force,[43] the Court's favor for segregation understandably resulted in thick documents of racial violence flowing from that

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Amendment); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992) (arguing that the Framers of the Fourteenth Amendment clearly intended the Privileges and Immunities Clause to compensate for inadequacies of the Equal Protection clause); DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT 341-351 (1985) (arguing that the Court erred in failing to hold the Fourteenth Amendment's Privileges and Immunities Clause a prohibition of discrimination over and above equality of treatment); William Winslow Crosskey, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 1089-1119 (1953) (arguing that *Slaughterhouse* made the text of the Fourteenth Amendment "nugatory").

40. *See* United States v. Cruikshank, 92 U.S. 542, 552-54, 557 (1876) (holding, in a case in which Klansmen massacred over 280 African-Americans, that no general privileges and immunities were guaranteed by the Fourteenth Amendment, and that and a criminal indictment for interference with civil rights was defective where attack on the basis of race was not clearly charged).

41. *See* United States v. Harris, 106 U.S. 629, 639-40 (1883) (holding a sheriff department's allowing a mob to bludgeon and kill four African-Americans was not sufficient state action to sustain a charge of civil rights deprivation).

42. *The Slaughterhouse Cases*, 83 U.S. at 78.

43. As historian Grace Elizabeth Hale has written, segregation was, a "theater of racial difference" designed to teach racism to generations of future whites:

> Since southern black inferiority and white supremacy could not, despite whites' desires, be assumed, southern whites created a modern social order in which this difference would instead be continually performed. For whites, this performance, in turn, made reality conform to the script. African Americans were inferior because they were excluded from the white spaces of the franchise, the jury, and political officeholding . . . because they attended inferior schools and inferior jobs . . . and perhaps most publicly . . . because they sat in inferior waiting rooms, used inferior restrooms, sat in inferior cars or seats, or just stood. African-Americans dined at blocked-off, racially marked, and inferior tables . . . . For southern African-Americans visibly to violate the rituals, to refuse to play the role of blackness that white southerners continually assigned, was to invite the threat of violent retribution that the spectacle lynching periodically and very publicly staged.

GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH: 1980-1940, at 284-85 (1998). *See also* Regina Austin, *The Black Public Sphere and Mainstream Majoritarian Politics*, 50 VAND. L. REV. 339, 345 (1997); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 7-67 (1996) (discussing the cultural association between blackness and socioeconomic inferiority).

prejudice. Initially, the Court suggested that government was powerless to stop such prejudice,[44] but the Court was soon forced to admit that hate crime occurred under government watch, especially when it caught Chattanooga Sheriff Joseph Shipp leading a lynch mob to kill African-American Ed Johnson—hanging him, shooting him five times in the head, and riddling his body with bullets—in graphic violation of the Court's own stay of Johnson's execution.[45] By the onset of World War I, government-backed segregation had fostered so much racial antagonism that the Court had to acknowledge that threats of White violence were directly linked to efforts to keep African-Americans from moving into White enclaves. Rather than portray equality as the cause of violence, beginning with *Buchanan v. Wharley*, the Court finally began to back equality as the means necessary to push American culture past class stratification and threats of bloodshed.[46]

In the years that followed *Buchanan*, the Court repeatedly stressed the importance of government-enforced equality as a stopgap against all forms of tyranny, at least with regard to favored areas of Constitutional jurisprudence, such as religion and speech. By the 1930s, the United States had found itself internationally scandalized by its own legacy of discrimination and bias-motivated violence, particularly as it attempted to oppose the spread of fascism throughout Europe where governments, driven by democratic impulses, also proved prone to mob rule and genocide.[47] Ironically, while American government fought perceived

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44. *See* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (claiming "[w]e cannot accept" the idea "that social prejudices may be overcome by legislation," and suggesting that inequality was natural such that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

45. *See* Emily Yellin, *Lynching Victim is Cleared of Rape—100 Years Later*, N.Y. TIMES, Feb. 27, 2000, at A24. The Court, apparently infuriated, held a rare criminal contempt trial for the sheriff and his fellow mobsters. *See* United States v. Shipp, 214 U.S. 386 (1909); United States v. Shipp, 203 U.S. 563 (1906). Johnson maintained his innocence until his death and was recently declared innocent by a Tennessee court. For an account of the impact the Johnson killing had on the Court, see MARK CURRIDEN & LEROY PHILLIPS, CONTEMPT OF COURT: THE TURN OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM (1999).

Of course, a few years later, the Court would hold that abundant evidence of mob prosecution did not necessarily violate a defendant's right to a fair trial in the infamous Leo Frank case. *See* Frank v. Magnum, 237 U.S. 309 (1915). Though likely proven innocent, Frank was also lynched to death. *See* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, Mar. 8, 1982, at A12.

46. 245 U.S. 60, 81 (1917) (rejecting the notion that "segregation will promote the public peace by preventing race conflicts" because "preservation of the public peace . . . cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution").

47. The leading works suggesting international shaming of the United States as influence on protection of political minorities are Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289-97 (1982) (analyzing the development of the Court's recognition of "discrete and insular minorities" in *United States v. Carolene Products Co.,*

tyranny abroad, it also tried to squelch perceived subversion in the United States, causing civil libertarians to articulate theories of how government could manipulate "'pathological' tendenc[ies]" to destroy democracies.[48] Apparently affected by these observations, the Court reached out to protect minorities of one form or another, guarding them against government authoritarianism and the potential for violence and injury that flowed from it.[49]

When the Court faltered in its protection of minorities on the eve of American involvement in World War II, a third wave of bias-motivated violence emerged in the Court's opinions—this time in the context of violence against Jehovah's Witnesses. Immediately after the Court upheld the constitutionality of loyalty oaths in *Minersville District v. Gobitis*,[50] the Department of Justice documented sharp increases in waves of bias-motivated violence against members of the Jehovah's Witnesses,[51] in many cases directly linked to the loyalty oaths effectively endorsed by the Court.[52] When the Court finally struck down compulsory flag salutes in *West Virginia State Board of Education v. Barnette*, its rhetoric, however poetic, exposed an understanding that its sanction of divisive law may have unwittingly caused violence:

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304 U.S. 144, 153 n.4 (1938)) and Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (surveying governmental pressures for elimination of equality as reactions to international hostility to racial violence in the United States). *See also* HALE, *supra* note 43, at 286-87.

48. Tony Freyer, *The First Amendment and World War II*, J. SUP. CT. HIST. 83, 90 (1986). For a discussion of how this jurisprudence formed the foundations of the Court's equality jurisprudence, see Louis Lusky, *Minority Rights in the Public Interest*, 52 YALE L.J. 1-41 (1942).

49. In fact, the Court protected minorities whom governments had scapegoated for promoting disorder. Rejecting that scapegoating, the Court repeatedly favored protection of minorities as a means of promoting social stability. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (stating disturbance of peace convictions could not be applied to Jehovah's Witness for distribution of literature offensive to Catholics); Herndon v. Lowry, 301 U.S. 242, 255-64 (1937) (reversing conviction of African-American Communist and activist for possessing publications supporting radical government change); De Jonge v. Oregon, 299 U.S. 353, 354 (1937) (reversing conviction for criticism of police misconduct); Stromberg v. California, 283 U.S. 359 (1931) (holding state cannot prohibit peaceful and orderly opposition to government as expressed through display of red flag by activists). As Professor Freyer notes, the case of *Near v. Minnesota*, 283 U.S. 697 (1931), could have raised concern that the Court promoted prejudice because Near's writings frequently "appealed to the public's anti-Semitic sentiments," but the Court saw a form of equal protection of minority views essential to ultimate protection of democratic values. *See* Freyer, *supra* note 48, at 90.

50. *See* 310 U.S. 586, 598-600 (1940).

51. *See* DAVID MANWARING, RENDERING UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 163-167 (1962) (detailing documentation of sharp increases in mob attacks on Jehovah's Witnesses who refused to salute the flag and take loyalty oaths, describing attacks as "thick" and "fast" within days of the Court's decision in *Gobitis*).

52. *Id.*

> Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . .Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[53]

By the mid-twentieth century, the Court's experience with government-inspired hatred and violence severely impacted its opinions. Shortly after the Court began to commit to formal racial equality, even the most conservative justices were willing to accept that law could actually alter the thoughts of generations of citizens on matters of equality.[54] Of course, in cases such as *Brown v. Board of Education*, the all-White Court viewed government-inspired prejudice as an African-American problem (learned low self-esteem), rather than a White problem (learned White Supremacy). But when confronted with the racist violence segregationists threatened in response to anti-discrimination measures, the Court continued to recognize that violence was a byproduct of a culture of official segregation.[55]

In perhaps the most dramatic admission that government commitment to discrimination could inspire violent assaults, the Court in *Cooper v. Aaron* found that mere promises to resist desegregation, without any additional incitement to violence, could inspire hate crime.[56] Observing that Arkansas state officials had expressly committed to fighting desegregation orders, the Court concluded that "extreme public hostility . . . had been engendered largely by the official attitudes and

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53. 319 U.S. 624, 640-41 (1943).

54. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 (1954) (surveying psychological effects of segregation on "colored children," stating "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

55. *See, e.g.*, Watson v. Memphis, 373 U.S. 526, 535-36 (1963) (noting that Whites urged gradual desegregation on a facility-by-facility basis and thereby denials of constitutional rights "because of hostility to their assertion or exercise" including "interracial disturbances, violence, riots, and community confusion and turmoil"); Wright v. Georgia, 373 U.S. 284, 293 (1963) (rejecting predominantly White government claim that "the possibility of disorder by others" could "justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present").

56. 358 U.S. 1, 16 (1958).

actions of the Governor and the Legislature,"[57] which, *in turn*, led to "chaos, bedlam and turmoil," including "violence directed against the Negro students and their property . . . tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents . . . ."[58] In sum, the Court concluded all of this chaos followed upon the actions of the state of Arkansas.[59]

Through *Cooper*, the Court's chronicle of government-inspired violence left only one real question about widespread hate crime: how *much* public discrimination would be needed to trigger it. To be sure, in the years since *Cooper*, the Court has authorized a vast array of discrimination against classes of people, suggesting that the Court does not view all governmental discrimination as posing the risk of chaotic violence.[60] And yet, the Court's own history of tolerating mob violence through the nineteenth century sufficiently undercuts such a benign view of discrimination, particularly since the Court's own opinions document its awareness that violence is still suffered by groups against whom the Court has sanctioned lesser forms of discrimination.[61] Thus, even if the justices today could argue that their ambivalence toward discrimination and bias-motivated violence has been constitutionally compelled, the failure of the Court to take action against such violence would do nothing to diminish the evidence that pandemic and recurrent hate crime depends on governmental compliance with it.

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57. *Id.*

58. *Id.*

59. *Id.* at 12-13 (quoting district court's findings).

60. The violence suffered by women, children, and those deemed mentally handicapped apparently has not moved the Court to strictly scrutinize discrimination against these groups. *See supra* notes 28-30.

61. On a token level, of course, the Supreme Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (citing F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). More recently, the Court has claimed that the theory that "the Constitution neither knows nor tolerates classes among its citizens" is now "understood to state a commitment to the law's neutrality where the rights of persons are at stake." Romer v. Evans, 517 U.S. 620, 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J, dissenting)). But by refusing to heighten scrutiny for all classes of persons, the Court has assumed that where states assert that "individuals in the group affected by a law have distinguishing characteristics" that are "relevant" to their interests, the Court has been "reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441 (1985). The result is that discrimination is often sanctioned for classes of persons perceived as a matter of *opinion* to be "unlike" others. *See Plyler*, 457 U.S. at 216 ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'") (quoting Tigner v. Texas, 310 U.S. 141, 147).

In fact, in recent years, the Court has recognized that government discrimination generates mass hatred.[62] The Court has, for example, instructed that "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[63] Likewise, the Court has acknowledged that gender classifications rooted in stereotypes not only exploit prejudice but "ratify" and "perpetuate" it.[64] To be sure, the individual justices have not consistently adhered to this position in scrutinizing discrimination against all classes of persons.[65] But at least one justice has invoked the specter of hate-crime as a categorical outgrowth of governmental race classifications, claiming, "When we depart from this American principle [of nondiscrimination on the basis of race], we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[66]

To date, the Court's opinions permit no expectation that discriminatory governments can safeguard minorities from violence in a climate of discrimination. For states like Alabama, where progress toward equality has been agonizingly slow and violent, the Court has even accused government officials of evading desegregation orders through "subterfuge,"[67] applying facially-neutral statutes in a persistently

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62. Amazingly, many of the justices have reached this conclusion without any evidence whatsoever, linking the perpetuation of hatred to race-based remedies of the societal effects of past discrimination. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part) (asserting without any empirical evidence that even remedial racial classifications can be as "poisonous and pernicious as any other form of discrimination"); *Croson*, 488 U.S. 469, 519, 520 (1989) (Kennedy, J., concurring) (arguing without any data that racial preferences may "cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well"). Of course, the most grotesque violence against African-Americans actually *decreased* over time in a period devoted to desegregation and affirmative action, as detailed *infra* at § II.B.

63. Richmond v. Croson, 488 U.S. at 493; *see also Adarand Constructors, Inc.*, 515 U.S. at 229 (1995) (asserting that the perceptions of those who are granted "special preference" under a quota being less qualified is a perception at risk, "*especially when fostered by the Congress of the United States*" and "can only exacerbate rather than reduce racial prejudice" and "will delay the time when race will become a truly irrelevant, or at least insignificant, factor") (emphasis added).

64. J.E.B. v. Alabama, 511 U.S. 127, 130-131 (1994) ("[W]e reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.")

65. Justice Scalia, for example, has failed to apply this logic to matters of sexuality and gender. *See* Romer v. Evans, 517 U.S. 620, 645 (Scalia, J., dissenting) (arguing that the equation of antigay discrimination "to pointless, hate-filled 'gay-bashing' is so false as to be comical"); *J.E.B.*, 511 U.S. at 160 (Scalia, J., dissenting) (arguing that there is no "discrimination and dishonor" in being stricken from a jury by a preemptive strike on the basis of gender).

66. *Croson*, 488 U.S. at 527 (Scalia, J., concurring in the judgment).

67. Gilmore v. City of Montgomery, 417 U.S. 556, 567 (1974).

discriminatory manner,[68] and thwarting efforts to remedy "pervasive, systematic, and obstinate discriminatory conduct" in the most basic matters of public safety.[69] The Court has reprimanded Alabama for continuing practices that the Court had previously declared unconstitutional[70] and, as recently as 1999, has even implicitly chided the state for its officials' inability to follow the most basic Supreme Court decisions.[71] And so, if states cannot be expected to refrain from purveying racism,[72] sexism,[73] and civil liberties violations,[74] the historical

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68. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (holding unconstitutional a facially neutral Alabama law developed as part of a scheme to protect White Supremacy by empowering disenfranchisement of voters for "moral turpitude"); Hadnott v. Amos, 394 U.S. 358, 362-64 (1969) (holding that Alabama Corrupt Practices Act, though facially neutral, discriminatorily applied to disqualify African-American candidates for office).

69. United States v. Paradise, 480 U.S. 149, 167 (1987) (Brennan, J., plurality opinion) (finding that the Alabama Department of Public Safety repeatedly and consistently failed to hire and promote African-Americans into the State Troopers).

70. Despite the U.S. Supreme Court's prohibition using preemptive challenges on the basis of race in *Strauder v. West Virginia*, 100 U.S. 303 (1871), Alabama prosecutors persistently tried to exclude African-Americans from juries. The Supreme Court had to declare such practices in Alabama unconstitutional three times. *See* Coleman v. Alabama, 389 U.S. 22, 23 (1967) (finding the Alabama Supreme Court's explanation of the state's lack of compliance with the Constitution not "sufficient"); Norris v. Alabama, 294 U.S. 587, 589 (1935) (finding "no controversy" in holding unconstitutional Alabama's exclusion of grand jurors on the basis of race); Rogers v. Alabama, 192 U.S. 226 (1904) (declaring Alabama's exclusion of African-Americans from juries unconstitutional). But for a judicial blip, Alabama's unconstitutional juror selection scheme would have been struck down a fourth time. *See* Swain v. Alabama, 380 U.S. 202 (1965) (holding that a lack of African-American jurors in a particular case was insufficient to prove systematic use of race-based peremptory strikes), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

71. *See* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 166 (1999) [hereinafter *South Central Bell*]. In years prior to *South Central Bell*, the Supreme Court had twice held that Alabama could not discriminate against out-of-state businesses in imposing taxes and fees upon them. *See* Chem. Waste Mgmt., Inc., v. Hunt, 504 U.S. 334 (1992); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985). It had also unanimously held "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." McKesson Corp. v. Div. of Alcohol & Tobacco, 496 U.S. 18, 31 (1990). Unfazed, Alabama not only defended its discriminatory franchise tax in *South Central Bell* but claimed that the Eleventh Amendment barred Supreme Court review of the Alabama Supreme Court's decision upholding the tax's constitutionality. *See South Central Bell*, 526 U.S. at 165-66. The Court rejected the state's arguments, summarily dismissing the state's more procedurally embarrassing and inappropriate arguments with great restraint. *See id.* at 167-71 (noting first, that Alabama argued that a lower decision by the Alabama Supreme Court rested on *res judicata* grounds then argued before the Supreme Court that it did not rest on such grounds, and, second, that the state asked the Court, without any prior notice, to overrule 150 years of precedent by reversing the Court's Negative Commerce Clause jurisprudence).

72. For Alabama as an example, *see* Gilmore v. City of Montgomery, 417 U.S. 556, 566-68 (1974) (finding that, despite desegregation orders, Montgomery, Ala., had continued to allocate state resources to private, white-only students and abandoned maintenance of facilities serving black population); Lee v. Washington, 390 U.S. 333 (1968) (declaring Alabama's segregated prison system unconstitutional despite state's orders reflecting awareness of Constitutional commands for nondiscrimination); Gomillion v. Lightfoot, 364 U.S. 339, 347

record should preclude the assumption that such states can be expected to stave off bias-motivated violence.

Although in some cases American governments have been able to combat bias-motivated violence while still subjecting the victim class to discrimination,[75] nothing in the Court's opinions supports the presumption that American police forces can be trusted to protect minorities when controlled by discriminatory government.[76] In fact, the

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(1960) (holding unconstitutional city's definition of boundaries to exclude and disenfranchise entire black population).

73. Alabama's resistance to gender equality, for example, was long. *See* Marjorie Fine Knowles, *The Legal Status of Women in Alabama: A Crazy Quilt*, 29 ALA. L. REV. 427-515 (1978). For a view that change is rapid and possible under influence of federal law enforcement, see Marjorie Fine Knowles, *The Legal Status of Women in Alabama, II: A Crazy Quilt Restitched*, 33 ALA. L. REV. 375, 406 (1982) (noting that the laws of Alabama were made "gender-free" but that progress could be reversed without an equal rights amendment). Of course, as late as 1986, Alabama legalized the rape of any woman who cohabited with a man, including wives of husbands. *See* Merton v. State, 500 So.2d 1301, 1305 (Ala. Ct. Crim. App. 1986) (striking down "marital exemption" for forcible rape). To date, Alabama continues to have definitions of rape dependent on gender stereotypes. *See* ALA. CODE 1975 § 13A-6-61-62 (1975 & 1999 Supp.) (basing classes of rape on degrees of male violence only against women).

74. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 159 (1969) (holding ordinance restricting parade permits unconstitutionally vague, demonstrated by city's rampant discriminatory practices in restricting speech of African-American citizens); Mills v. Alabama, 384 U.S. 214, 220 (1966) (declaring unconstitutional law banning election day editorials in a case in which a local newspaper opposed Birmingham abuses of power by Bull Connor); New York Times v. Sullivan, 376 U.S. 254, 264 (1964) (holding unconstitutional state court efforts to entertain libel suits against press for reporting charges of discrimination by public official); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958) (holding Alabama's efforts to obtain membership records from NAACP an infringement of due process and freedom of association); Powell v. Alabama, 287 U.S. 45 (1932) (reversing capital murder convictions of "Scottsboro boys," falsely accused of rape, for state's deprivation of effective assistance of counsel).

75. For example, the Department of Justice conducted anti-violence campaigns in the wake of *Gobitis* and was able to stave off much of the violence against Jehovah's Witnesses. *See* MANWARING, *supra* note 51, at 180.

76. With regard to antigay violence, for example, the Court has certainly expressed its awareness for the potential for abuse and violence. *See* Houston v. Hill, 482 U.S. 451, 454 n.2, 455-56 n.4 (describing questionable, repeated arrests of gay rights activist and threats of police violence). If any doubts exist about how police officers treat gay and lesbian civilians, a sampling of cases showing how they treat gay and lesbian police officers provides strong evidence of a propensity for abuse. *Compare* Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347, 351 (E.D.N.Y. 1999) (describing how police officer admitted to depicting in cartoons a gay police man as "a child-molester, a transvestite and a sadomasochist," attributing his conduct to the "stress and tension" of being a police officer); Klein v. McGowan, 36 F. Supp. 2d 885, 887 (D. Minn.1999) (describing sheriff department employee's allegations that he was persistently harassed as a "queer" and "homo" by officials within the department); Segreto v. Kirschner, 977 F. Supp. 553, 559 (D. Conn. 1997) (describing police officers' undenied handcuffing, dragging, and beating fellow officer perceived to be gay).

Antigay violence and discrimination perpetrated by police is otherwise well documented. *See* COMSTOCK, *supra* note 7, at 152-62; *see also* Kirstin S. Dodge, *"Bashing Back": Gay and Lesbian Street Patrols and the Criminal Justice System*, 11 LAW & INEQ. 295, 295, 309-11 (1993) (describing acts of police brutality and abandonment of gay victims to violence in cities such as Los Angeles, Milwaukee, New York). *See also* United States v. Boylan, 898 F.2d 230, 255-56

Court has found American police capable of "shocking and revolting" racially-motivated violence,[77] just as rogue police officers have also been found capable, in other contexts, of engaging in procedures so "close to the rack and the screw" that they "shock[] the conscience."[78] The Court has even seen police acting in ways that threaten "a high risk of injury or death," even "in situations where [they are threatened with] neither death nor serious bodily injury."[79] And so, in light of the Court's documentation of rogue police violence in general, any notion that police can be relied upon to protect minority citizens in a culture of official government discrimination would have to be fantasy at best.[80]

Viewed panoramically, the Court's consistent findings that discrimination causes class hostility are broadly supported by historical data on violence. Reductions in bias-motivated violence in the United States have only followed gains in substantive equality, as well as the infusion of resources into law enforcement to ensure that government protects hate crime victims from harm.[81] One might theorize that

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(1st Cir. 1990) (describing efforts of police officers convicted of racketeering in extortion scheme against gay bars); Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994) (holding that gay men are allowed to bring suit against federal and state law enforcement agents for police brutality while shouting homosexual epithets at them); United States v. Braasch, 505 F.2d 139, 142 (7th Cir. 1974) (upholding convictions of police officers in a "brazen extortion scheme" of harassing gay clubs, among others, and harassing gay patrons); Hughes v. Rizzo, 282 F. Supp. 881, 883, 884 (E.D. Pa. 1968) (voiding "mass arrests" designed to rid a community of "'hippies' thought to be homosexuals, narcotics-users, or otherwise especially undesirable").

77. Screws v. United States, 325 U.S. 91, 92-93 (1945) (describing the bludgeoning of an African-American man into unconsciousness by Georgia police who bore a grudge against their victim).

78. Rochin v. California, 342 U.S. 165, 172 (1966) (declaring the forcible extraction of stomach contents through the mouth of a suspect to violate the suspect's substantive due process rights).

79. City of Los Angeles v. Lyons, 461 U.S. 95, 99 (1983).

80. A significant minority of the Court, at least, appears aware that police relations with minorities are widely considered poor throughout the United States. *See* Illinois v. Wardlow, 528 U.S. 119, 132-34 (2000) (Stevens, J., dissenting in part).

81. All available evidence suggests that racist violence is much lower today than it was in eras of racially-motivated mob violence. Indeed, according to the Federal Bureau of Investigation, while 4321 hate crimes racially-motivated were reported in 1998, only eight of those crimes involved murder, five involving the murder of whites and three involving the murder of African-Americans. *See* UCR 1998, *supra* note 16, at 13. Of course, horrific racial lynchings still occur, though rarely. *See* Rick Lyman, *Man Guilty of Murder in Texas Dragging Death*, N.Y. TIMES, Feb. 24, 1999, at A1 (describing the murder of African-American James Byrd, who was dragged behind a pickup truck and decapitated in June 1998).

But so, too, by virtually every index, African-Americans throughout the South also continue to be disproportionately socioeconomically disadvantaged as a class, where African American men, in particular, of all educational levels are disparately unemployed, underemployed, and underpaid. *See* MDC, THE STATE OF THE SOUTH 30-31 (1998) [hereinafter MDC 1998]. Median income for African-American families in the South is fifty-five percent of the median for whites. *Id.* at 38. Moreover, in Alabama, the state's educational system is still riddled with bias, held by

declines in violence and gains in equality have been simultaneous and, therefore, independently attributable solely to an increasingly benevolent American public, but the historical record simply does not support such a claim. Each step in the struggle for racial and gender inequality in the United States, for example, has taken place in the midst of ongoing violence and, the majority of "private citizens" who have abandoned violence have done so only in the wake of preceding government commitments to racial and gender equality, commitments coupled with governmental crackdowns on violence.[82] To the extent that bias-motivated violence continues to thrive against politically powerless classes in the United States, so do many forms of inequality, a fact strongly suggesting that bias-motivated violence symbiotically depends on public approval for its empowerment.[83]

### *B. The Alabama Experience with Discrimination and Violence*

To understand that discrimination and widespread hate crime are not mere coincidences, one need only look at the history of an American state that has become well-known for promoting hate through state-sanctioned prejudice and violence. No state may be better suited for

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state courts to violate both the state and federal constitutions in providing unequal funding to the state's poorest schools. *See* Opinion of the Justices, 624 So. 2d 107 (Ala. 1993).

82. The most dramatic evidence of this argument can be found of detailed assessments of violence against African-Americans in the southern United States, detailed in § II.B.1, *infra*.

83. For example, regarding bias-motivated violence against women, since American governments sanctioned marital rape and domestic violence for centuries, arguments that women were raped and beaten less in periods of discrimination are baseless. Years of efforts by women's rights advocates have been required to eliminate legal assumptions that men in heterosexual relationships have a right to rape, or that victims of rape invite it. For a sampling of the rich literature on this subject, see Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALA. L. REV. 973 (1995) (explaining critical role legal reform played in reductions of violence against women); Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983-985 (1991) (describing legal traditions of shielding family violence in privacy have influenced government officials to deny incidence of violence); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671-72 (1990) (explaining how judges, prosecutors, police and other members of the legal system harass victims of domestic violence and frustrate efforts to remedy domestic violence); Catharine A. MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE 172-178 (1989) (surveying how the law communicates values to rapists and rape victims about limits on rights of women to consent to sex and object to rape); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1102-05 (1986) (explaining how law diminishes motives of men to obtain consent to sex). By the best available evidence, as formal gender equality has increased, rape finally appears to be in steady decline, *see* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1999 [hereinafter UCR 1999] (2000) at 216 (showing 26.4% decrease in rape arrests between 1990 and 1999). The South continues to account for the highest incidence of rape arrests in the United States. *See* UCR 1999 at 25, and throughout the South, evidence of gender discrimination continues to mount as women are still paid less overall, though they are employed in professional positions at a faster rate than men in larger numbers. *See* MDC 1998 at 31-32.

such scrutiny than Alabama, with its deeply troubled record of government and citizen collaboration in hate crime.[84] As the former capital of the Confederacy and a place where people have been enslaved, beaten, and murdered in a centuries-long struggle for civil rights, Alabama has always been a modern Federalists' nightmare, a state where minority citizens have received protection against government and citizen violence only by supervening federal force.[85]

To be sure, the "violent and uniformly inept policies" of Alabama officials may have unfairly smeared all Alabamians with "a lingering residue of negative national stereotypes that proved that history is never over, history is never past, and generations unborn carry the burdens of their parents."[86] And certainly, many heroic Alabamians—those "isolated high blips on the graph of human nature, offsetting a dozen or so sociopaths"—have proven with their lives that the strength of Alabama's bigots has never lain in numbers.[87] And yet, even though

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84. Just a few of the episodes that focused the civil rights movement in Alabama include: The Montgomery Bus Boycotts the struggles to integrate the University of Alabama in Tuscaloosa; the repeated acts of White police and citizen terrorism in Birmingham; and the beating of civil rights workers in Selma. *See generally* CARTER, THE POLITICS OF RAGE, *supra* note 18; *see also* Martin Luther King, *Letter from a Birmingham Jail*, *reprinted in* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 76-95 (1964):

> Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than any city in this nation . . . . Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters and there are some counties without a single Negro registered to vote despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?

*See also* Charles Babington, *Clinton Decries Racial Breaches That Endure*, WASH. POST, Mar. 6, 2000, at A02 (citing recognition that the Voting Rights Act was "signed in ink in Washington" but "first signed in blood in Selma"); MARJORIE L. WHITE, A WALK TO FREEDOM: THE REVEREND FRED SHUTTLESWORTH AND THE ALABAMA CHRISTIAN MOVEMENT FOR HUMAN RIGHTS, 1956-1964 (1998) (quoting Shuttlesworth, founder of the modern civil rights movement in Alabama, as describing that national civil rights struggle as bearing "a peculiar and special relationship" to Alabama).

85. Even in cases where innocents have suffered grotesque physical pain under Alabama's "care," federal law enforcement officials have observed that "the only way you can get the state of Alabama to react is at the end of a court order with a threat of contempt." *See* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 290 (1993) (quoting former U.S. Attorney, now Federal District Court Judge, Ira DeMent, on the intense suffering of innocent Alabamians warehoused in mental institutions).

86. WILLIAM WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 566 (1994).

87. Historian Taylor Branch used this phrase to describe Rosa Parks, a person "everyone agreed gave more than she got." *See* TAYLOR BRANCH, PARTING THE WATERS: THE KING YEARS 125 (1988). For more on Ms. Parks, see ROSA PARKS WITH JIM HASKINS, ROSA PARKS: MY STORY

Alabama's governmental misconduct may have been designed to appease only the state's most powerful thugs,[88] it is important to acknowledge that state-backed discrimination and violence did, in fact, occur in Alabama—much of it is literally breathtaking, aimed most clearly at African-Americans.

Sorting out government influence on "private" racially-motivated violence in Alabama is often a daunting task. Indeed, the fusion of public and private prejudice for much of Alabama history has been so complete that "law" and lawlessness in the state have often been one and the same. Alabama officials, for instance, once commonly held membership in organizations known for stirring up violence, such as the White Citizens Councils (WCCs) and the Klan.[89] In fact, all three Montgomery City Commissioners leading the opposition against the

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(1992). Other extraordinary Alabamians who have fought for equality under threats of violence include Henry Aaron, Frank M. Johnson, Jr., and the Reverend Fred Shuttlesworth, to name but a few. *See* HANK AARON ET AL., HOME RUN: MY LIFE IN PICTURES (1999); GEORGE PLIMPTON, ONE FOR THE RECORD: THE INSIDE STORY OF HANK AARON'S CHASE FOR THE HOME-RUN RECORD (1974), FRANK SIKORA, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. (1992); ANDREW M. MANIS, A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH (1999).

88. Bayard Rustin, one of the organizers of the Montgomery Bus Boycotts, documented his impressions of Montgomery Whites and concluded that majority White opinion was not uniformly represented by Montgomery's city officials and most violent racists. *See* BAYARD RUSTIN, DOWN THE LINE 58-61 (1971). *See also*, Harrison Salisbury, *Fear and Hatred Grip Birmingham: Racial Tension Smoldering After Belated Sitdowns*, N.Y. TIMES, Apr. 12, 1960,at 1, 28 (describing how Birmingham officials terrorized both Whites and Blacks in the Civil Rights Movement).

Similarly, many first-hand observers noted that George Wallace's "stand" in the door of the University of Alabama to prevent its desegregation was staged to appease "state's rights" advocates and Alabama's most racist elements, not the majority of Tuscaloosa citizens, or, for that matter, students and faculty of the University of Alabama, most of whom were at least willing to comply with desegregation orders. *See* HOWELL RAINES, MY SOUL IS RESTED 339-41 (1977) (describing interview with former Attorney General Nicholas Katzenbach, detailing welcoming of students at the University); *see also* WYATT COOPER, FAMILIES: A MEMOIR AND A CELEBRATION 79-80 (1975) (providing a first-hand account of the peaceful integration of the University of Alabama in 1963).

89. Various cells of the Ku Klux Klan were famous for violence, and many of Alabama's public officials were Klan members, including U.S. Supreme Court Justice Hugo Black, Alabama Governor Bibb Graves, and Attorney General Charles C. McCall. *See* DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 80 (Quadrangle Paperback ed.) (1968); KENNETH JACKSON, THE KU KLUX KLAN IN THE CITY, 1915-1930, at 82-83 (1992). But the Klan had no monopoly of influence on violence in the state. Because many Alabamians purportedly opposed Klan tactics, particularly direct participation in secret acts of violence, White Citizens' Councils proliferated as "an upscale version of the Klan for farmers and businessmen" as well as some of the "brightest legal minds in the state" including judges and government officials. *See* ROGERS, *supra* note 86, at 548. This was true even though WCC spokesmen were responsible for spreading and preying upon "subterranean white fear of black sexual aggression." *Id.* For a discussion of the White Citizens' Councils and their origins, see NEIL R. MCMILLEN, THE CITIZENS' COUNCIL 207-16 (1971).

Montgomery Bus Boycotts held memberships in the local WCC,[90] an organization that had staged rallies where images of African-Americans and Whites were burned together in effigy.[91] At the height of violence directed against the Civil Rights movement, Klan leaders served on George Wallace's staff—a staff whose followers had committed some of the most infamous acts of violence throughout Alabama.[92] And by most accounts, Birmingham police conspired with those Alabamians who bombed African-American homes and churches in Birmingham in the 1960s.[93]

It is certainly also fair to say that Alabama officials committed hate crimes, since their actions constituted unlawful "harassment, intimidation, coercion, threatening conduct, and, sometimes, brutal mistreatment" of African-Americans.[94] Governor Wallace hired segregationist Al Lingo—a man who became known as "hell on niggers"—to take over the Alabama Highway Patrol.[95] Lingo expressly admitted that he knew his tactics risked death.[96] His State Troopers, operating under Confederate flags, repeatedly "prodded, struck, beat[ ] and knocked down" law-abiding protesters, the most infamous instance coming at the March 7, 1965 Selma-Montgomery March on Edmund Pettus Bridge, which Wallace ordered stopped with any force possible short of murder.[97] On that "Bloody Sunday," Lingo's Troopers used tear gas, clubs, and riot gear to beat African-American protesters under cries of "get the niggers."[98]

Though some theorists might not consider much of Alabama officials' misconduct to be "hate crime" since technically the conduct was not "criminal," Alabama officials still facilitated tremendous

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90. *See* DAVID L. CHAPPELL, INSIDE AGITATORS 70-71(1994).

91. *See id.* at 56, 80.

92. Klan leader Asa Carter, a speechwriter for Wallace, operated a cell with members that had castrated an African-American man; murdered an eighteen-year old African-American male for flagging them down to help him fix a car; fired weapons into black homes and churches; and attacked Nat King Cole on stage. *See* CARTER, *supra* note 18, at 106-07, 230.

93. *See* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING AND THE SOUTHERN LEADERSHIP CONGRESS 232 (1986); NUMAN V. BARTLEY, THE NEW SOUTH: 1945-1980, at 331 (1995).

94. *See* Williams v. Wallace, 240 F. Supp. 100, 105 (M.D. Ala. 1965) (noting that the state's violence was not "enforcing any valid law of the State of Alabama or furthering any legitimate policy of the State of Alabama").

95. GLENN ESKEW, BUT FOR BIRMINGHAM 301-303 (1997).

96. *See id.* (detailing Lingo's public admission that he knew his law enforcement tactics were going to "kill somebody").

97. *Id.*

98. *Id.*

"extralegal" and bias-motivated violence in intricate ways.[99] Under the state's contract labor system, for example, African-Americans were subjected to aggravated assaults and torturous imprisonment.[100] The system was, of course, illegal—declared to be so twice by the United States Supreme Court,[101] and condemned by Alabama's own Governor as "a relic of barbarism."[102] But the Alabama Legislature still worked for more than a decade to reinforce the system, passing laws that criminalized the breaking of labor contracts, thereby preventing laborers from freeing themselves of the brutality inflicted by their employers, even though the Legislature knew that "worker" mortality rates referred to injuries suffered primarily to African-Americans.[103]

Despite the layers of legalism constructed over such violence, most Alabamians knew that state officials falsely criminalized African-Americans in order to stock the *de facto* slave labor system with African-American bodies. Even White-owned Alabama newspapers acknowledged that Alabama officials were crafting dubious criminal charges against African-Americans for crimes such as "vagrancy" as a means of supplying "criminals" who would have to purchase their freedom in a system of contract labor.[104] Because bounties were used to pay the salaries of sheriffs and other court officials, all-White law enforcement had every incentive to target disenfranchised, politically powerless African-Americans and trump up prosecutions.[105] This was all

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99. *See* Carl V. Harris, *Reforms in Government Control of Negroes in Birmingham, Alabama, 1820-1920*, 38 J. S. HIST. 567, 568 n.4 (1972):

> Though extralegal force also played a role in the caste system, most uses of coercion against Negroes required the support, or at least the acquiescence, of the legal authorities. And any systematic and effective use of coercion to discipline the Negro as unreliable worker and menacing criminal clearly required the authority and resources of local government.

100. For a description of the "shocking" mortality rates, assaults, and confinement of contract laborers under the system, see William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 51-53 (1976).

101. The United States Supreme Court twice struck down Alabama's criminal contract labor laws as unconstitutional. *See* United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911).

102. GEORGE BROWN TINDALL, THE EMERGENCE OF THE NEW SOUTH 1913-1945, at 213 (1967) (quoting Governor Thomas Kilby's description of the system at the turn of the century).

103. The overwhelming targeting of blacks by the labor system precludes a reduction of the violence of the system to mere capitalistic excesses. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Penage Cases*, 82 COL. L. REV. 646, 650-55, 692-93 (1982).

104. For an exhaustive survey of Alabama newspapers expressing these opinions, see Harris, *supra* note 99, at 567-700. The roundups of vagrants to accommodate business shortages of labor is also well-documented. *See* Cohen, *supra* note 100, at 51-53.

105. *See* Pete Daniel, *Up From Slavery and Down to Peonage: The Alonzo Bailey Case*, 57 J. AM. HIST. 656-58 (1970) (describing the "corrupt local-law enforcement officials and

too easy, since Alabama's notorious "justice" system was racially engineered for African-American "guilt," marked by all-White juries and evidentiary rules prohibiting African-Americans from testifying on behalf of African-American defendants.[106]

While industrialism freed some African-American workers from the control of agricultural powers in Alabama, it also stirred racist White minds to believe that African-Americans were no longer receiving "character training" from their farm masters and "discipline from the White race."[107] In particular, unemployed African-Americans, so-called "vagrants," and saloon patrons became the targets of White hysteria. As Professor Carl Harris explained:

> Under the new urban conditions, Negroes had paychecks, unsupervised free time, and easy access to liquor, knives, razors, and guns; and city whites came to fear the "menace of the liquor filled negro." . . . To Birmingham whites there seemed to be an inordinate amount of violent crime in the segregated but nearby Negro communities, and whites feared that the violence . . . would spill over into the white areas . . . . Whites also expressed concern because in some saloons the separation of whites and blacks was not strictly enforced. Still worse, many of the "low Negro dives" harbored prostitutes who attracted white as well as black clients. Members of respectable white families were occasionally discovered in such "dives" of ill repute, which were therefore seen as a menace to the family morals of the entire community."[108]

Though White Alabamians knew the contract labor system was chiefly responsible for dumping African-Americans in mining towns and creating "menacing" African-American communities, many sexually craven Whites also pushed for more governmental "crackdowns," furthering Whites' perception of African-American identity as a criminal one.[109]

It should come as no surprise, then, that hate crime flourished during this period, most graphically through the mutilations, burnings, beatings, hangings, and dismemberments of African-Americans captured under the rubric of "lynching." Though these crimes were generally assumed to be purely "private," they were not. Police forces in Alabama, as in other southern states, directly participated in lynchings, if by no other means than by accommodating scurrilous White complaints, then

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justices of the peace" that worked in conjunction with stringent state laws to construct a contract labor system).

106. *See id.*; *see also* Bryan Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 432-34 (1999).

107. Harris, *supra* note 99, at 570.

108. *Id.* at 571-72.

109. *Id.*

recklessly capturing and detaining African-Americans on spurious charges so they could not escape the lynch mobs.[110] In at least one Alabama case, Tuscaloosa sheriff's deputies turned accused African-Americans directly over to "private" firing squads for execution.[111] Yet, like so many other lynchings throughout the South, government-aided lynchings escaped public prosecution, largely because they had widespread public approval.[112]

Indeed, because lynchings were often staged public events, lynch mobs in Alabama appeared to have operated under the dual assumption that murder laws did not apply to them and that the government approved of the conduct. This, of course, was not unique to Alabama. In neighboring states, the murders and torture of African-Americans were even publicized as entertainment, and body parts were scavenged as "souvenirs."[113] But feeble government opposition to lynching in

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110. All available historical records suggest that both lynching and public acceptance of it were rampant in Alabama, where whites often debated the lynching problem primarily as damaging to the state's reputation. *See* CHAPPELL, *supra* note 90, at 33-37 (describing reform conferences on the persistence of lynching problems well into the 1930s).

A few macabre examples prove the commonness of more mundane lynchings in the state. In 1895, Alabama's mass lynching of five African-American men and women made national news when fifty Whites hung African-Americans, displaying them in trees. *See* Juanita W. Crudele, *A Lynching Bee: Butler County Style*, 42 ALA. HIST. Q. 59-71 (1980) (surveying news of the lynching). In 1930, a rampaging lynch mob in Emelle, Alabama slaughtered an African-American family because one of the family members had allegedly "murdered" a white man, even though all accounts agreed that the white man had fired the first shots at one of the victims. A detailed account of the man-hunt can be found in ARTHUR F. RAPER, TRAGEDY OF LYNCHING 59-84 (1969). The very first victim of the rampage, Esau Robinson, was not only innocent of the shooting but was known to be so by the sheriff who tied Robinson to a post and left him under the charge of two local whites. *See id.* at 61. Robinson was then shot to death by nearly fifty whites from Alabama and Mississippi and suspended in a roadside display for the public. *See id.* When the sheriff ordered the body to be taken down, several men scavenged the body for souvenirs. *See id.* In 1934, Alabama played a key role in the lynching of Claude Neal, who, based on inconclusive evidence, had been accused of murdering and raping a white woman. *See* JAMES R. MCGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL 55-66 (1982). *Id.* at 55-65. Neal was held by Brewton, Alabama authorities on behalf of officials in Florida. *Id.* at 55. Though Brewton police were swift enough to extract a curious confession from Neal to the murder, they detained Neal in Brewton and failed to anticipate the need to protect him from the mob that kidnapped him. Word of the lynching spread, and Dothan, Alabama media outlets actively advertised it. *See id.* at 74. A lynch mob of unknown composition in nearby Florida castrated Neal, forcing him to eat his own genitals, then burned, stabbed, strangled, and tortured him. His body was hung nude in the courthouse square and his body parts were put on display as souvenirs. For more graphic accounts of the Neal murder, see WALTER HOWARD, LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930S, 60-61 (1995); *see also* MCGOVERN, *supra*, at 80-83.

111. For a detailed account of the lynching and lack of action taken against it, see DAN CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 276-77(1969).

112. *Id.*

113. *See, e.g.*, JOHN M. BARRY, RISING TIDE 124 (1997) (surveying Mississippi newspapers announcing scheduled lynchings and post-mortems in which reported in one instance:

Alabama faded easily into acquiescence, thoroughly demonstrating that its state and local governments were often under the control of frenzied mobs,[114] and effectively sanctioning lynchings to continue. Indeed, both federal and state government officials overtly refused to take action against such violence,[115] and even some "reformers" defended lynchings as a deterrent to crime committed by African-Americans, as a means of keeping African-Americans "in their place."[116]

Worsening matters, officials in Alabama fueled the anti-rape hysteria that was used to justify lynchings with questionable criminal laws. Throughout time, of course, the best available evidence shows that fears of African-American rape of White women have been repeatedly exaggerated.[117] But before the Civil War, Alabama officials legitimized

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> [b]lacks were forced to hold out their hands while one finger at a time was chopped off. The fingers were distributed as souvenirs. The ears of the murders [*sic*] were cut off. Holbert was beaten severely, his skull was fractured, and one of his eyes, knocked with a stick, hung by a shred from the socket . . . . A large corkscrew . . . was bored into the man and woman . . . and then pulled out, the spirals tearing out big pieces of raw, quivering flesh.)

*See* RICHARD KLUGER, SIMPLE JUSTICE 89, 90 (1975):

> [O]ne of the more barbaric lynchings of the [Taft Presidency era] was literally staged in Livermore, Kentucky. A Negro charged with murdering a white man was seized and hauled to the local theater, where an audience was invited to witness his hanging. Receipts were to go to the murdered white man's family. To add interest to the benefit performance, seatholders in the orchestra were invited to empty their revolvers into the swaying black body while those in the gallery were restricted to a single shot.

114. The Alabama Constitution allowed for the impeachment of sheriffs who allowed any prisoner to be taken from custody by "neglect, connivance, cowardice, or other grave fault." ALA. CONST. OF 1901, § 138. The first prison sentence imposed on white men for the lynchings of African-American men did not occur until 1902. *See* JAMES CUTLER, LYNCH LAW 255 (1905) (quoting Alabama Governor Jelks). Indeed, prosecutions and investigations for state complicity in lynchings were often frustrated. When Alabama Governor Bibb Graves attempted to use special state officers to investigate the Emelle lynchings, set forth *supra* note 110, and accompanying text, local citizens actively interfered in the proceedings. Governor Graves' department for investigating lynchings, credited by some as responsible for a lull in lynchings, was abolished by his successor. *See* RAPER, *supra* note 110, at 13-17.

115. For a summary of how lynchings were not prosecuted throughout the South, see RAPER, *supra* note 110, at 14-16; KLUGER, *supra* note 113, at 89-90 (comparing the Administration of President Taft, which refused to intervene federally in the southern states' affairs, to the radical reforms of the Truman Administration, which made the first calls from the Presidency to make lynching a federal offense).

116. The primary motivations of these reformers for reductions in lynchings appear to have been a desire to improve the image of Southern culture. *See* CHAPPELL, *supra* note 90, at 33-37.

117. Throughout the United States, the earliest documentation of lynchings showed that African-Americans were lynched for rape based on "no stronger evidence than 'entering the room of a woman' or brushing against her." *See* THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING 1899-1918 at 10 (1919). Even today, heightened fears of interracial rape are statistically illogical, since women are most susceptible to rape from members of their own race. In Alabama, for example, confirmed

interracial sex panic by prosecuting and executing slaves for attempted assault with intent to rape in instances where men had been observed "following" and speaking to White women.[118] The state continued such prosecutions well into the 1950s, legitimizing the assumption that "virtuous" White women would not have sex with African-American men.[119] Ramping sexual hysteria upward even further, Alabama not only proscribed interracial marriage but specially penalized interracial cohabitation and sex,[120] even though these prosecutions, ironically, proved that some White Alabamians did have desires for interracial sex.[121]

Alabama's overt abuse of criminal law to stigmatize and harass African-Americans continued well into the 1960s, encouraging even

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interracial rape offenses in 1999 represented only eleven percent of all rapes, while seventy percent of all arrested rapists committed their crimes against victims of their own race. Even if nonwhite men were assumed to have perpetrated all rapes of white women where the race of the offender was unknown in Alabama in 1999 (eighteen percent), white men in 1998 would still have raped white women in Alabama at a rate 2.4 times higher than nonwhite men. *See* ALABAMA CRIMINAL JUSTICE INFORMATION CENTER, CRIME IN ALABAMA: VIOLENT CRIME 5 (1999). *See* ALABAMA CRIMINAL JUSTICE INFORMATION CENTER, CRIME IN ALABAMA 1999: VIOLENT CRIME (2000), *at* http://www.agencies.state.al.us/acjis/pages/cia99/99bMain.htm.

118. *See, e.g.*, Lewis (A Slave) v. Alabama, 35 Ala. 380 (1860) (upholding the indictment of a slave for allegedly asking a white woman to stop, then stopping within ten steps of her, despite the slave's denial of the conduct, and based only on circumstantial evidence and the victim's opinion that the prisoner was the "negro who pursued her").

119. *See, e.g.*, McQuirter v. Alabama, 63 So. 2d 388, 389 (Ala. Ct. App. 1953) (sustaining conviction of an African-American man for attempt to commit an assault with intent to rape for merely following a white woman, based in part on evidence of police officers' uncorroborated claims that McQuirter told them he intended to "get" a white woman); Kelley v. Alabama, 56 So. 15, 16 (Ala. Ct. App. 1911) (holding that jury could find that African-American man committed assault with intent to ravish a white girl by following her in a wagon and taunting her, by "[t]aking into consideration the racial differences existing between the prosecutrix and the defendant"); Pumphrey v. Alabama, 47 So. 156, 156-58 (1908) (upholding a rape of a woman by her African-American neighbor and stating that even though the victim could not tell if her assailant was in fact African-American, a jury could take into consideration that the white woman was presumed "virtuous" and the defendant was a "negro" so that "any idea or expectation of permissive intercourse could not have been entertained by the defendant at any time").

120. *See* Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding imprisonment for interracial fornication and adultery under law that inflicted lesser punishment on intra-racial sex); *see also* Ford v. Alabama, 53 Ala. 150 (1875) (validating Alabama law proscribing differential punishment for interracial adultery); Ellis v. Alabama, 42 Ala. 525 (1868) (same).

In a gross understatement, the United States Supreme Court has invalidated the reasoning of these cases and their racist undercurrents. *See* McLaughlin v. Florida, 379 U.S. 184, 188 (1964) (noting that "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court").

121. Given the White male control of politics in Alabama, as in most states from the Civil War through the early twentieth century, legislative attacks on interracial sexuality may well have been efforts predominantly of White males to reinforce sexual anxiety about African-Americans. *See, e.g.*, Peter W. Bardaglio, *"Shamefull Matches:" The Regulation of Interracial Sex and Marriage in the South Before 1900*, *in* SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY (Martha Hodes ed., 1999).

more racial hostility and violence. Governmental officials criminalized civil rights activism by prosecuting civil rights workers with trumped up charges of vagrancy, violation of labor boycott laws, public disorder, and a wide array of conspiracies to disturb the "peace"—mostly for organizing activity that, had it been performed by Whites, would have been entirely legal and, none of which would have been necessary had the state complied with federal desegregation orders in the first place.[122] While White political organizations ran rampant over the political process and exerted powerful influence over public officials, the state formed investigative offices to harass, investigate, and trump up false charges against African-American civil rights groups.[123] Alabama officials thus left civil rights workers little choice but to risk criminal penalties to exercise constitutional freedoms[124] enabling White-American Alabamians to repeatedly publicly describe civil rights workers as "lawless."

By the mid-twentieth century, Alabama had criminalized African-American identity so thoroughly that little exhortation was needed to stir White thugs to inflict lawlessness as appropriate "punishment" for African-Americans. During the Montgomery Bus Boycotts, for example, City Commissioners established a "get tough" policy by first encouraging White opposition to crackdowns on African-American protests. The "get tough" stance began with a few overt pledges to nonviolent resistance to the boycotts, but quickly devolved into city officials making reckless harangues in public with notoriously violent citizen factions. City officials also appeared at White Supremacist rallies overtly encouraging civilian "militance."[125] Mobs threatened protesters, while police harassed and arrested boycotters.[126] Within a matter of weeks, terrorists bombed Reverend Martin Luther King Jr.'s home. Articulating what would become a familiar response to hate crime, Montgomery's Mayor and City Commissioners claimed they were mystified by the bombing. Dr. King's followers told city officials, "You may express your regrets, but you must face the fact that your public statements created the atmosphere for this bombing. This is the end

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122. *See, e.g.*, BARTLEY, *supra* note 93, at 301-03, 324-27, 331; *see also* WHITE, *supra* note 84, at 30.

123. *See* CARTER, *supra* note 18, at 231-35. Of course, Alabama's abuse of law to harass African-Americans produced landmark First Amendment litigation. *See* NAACP v. Alabama, 357 U.S. 449 (1958).

124. *See, e.g.*, DEREK BELL, AND WE ARE NOT SAVED, (1987) 51-74; Randall Kennedy, *King's Constitution*, 98 YALE L.J. 999, 1010-28 (1989); Walter Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371-90 (1959).

125. *See* CHAPPELL, *supra* note 90, at 70-71, 77-79.

126. *Id.*

result of your 'get tough' policy." But facing Dr. King himself, city officials did nothing to deny their links to the destruction of his home.[127]

By the time the Civil Rights Movement had fully mobilized, Alabama officials could signal their approval of "private violence" simply by withdrawing law enforcement, just as the state had done with lynchings decades earlier. So many bombs blew up in Birmingham that one African-American neighborhood became known as "Dynamite Hill," and the entire city became known as "Bombingham." Arrests were not made for virtually any of the bombings prior to 1963.[128] Yet, while Commissioner of Public Safety Bull Connor and local newspapers accused bombing victims of blowing up their own homes, "scarcely a week went by without an account of police shooting a black suspect, or a brief report, buried in the back pages of the Birmingham News or Post Herald, on the death of a black person in custody."[129] Indeed, many observers assumed the connections between Connor, the Klan, and Birmingham police inherently sent messages to bombers that hate crimes could continue without reproach.[130] By withdrawing protection under the law from African-Americans and by declining to investigate or make arrests for anti-African-American hate crime, government officials were widely perceived as "winking at violence and lawlessness."[131]

With Alabama officials' stoking thug rage, there is little doubt that those officials expected violence to follow from their posturing. In January 1963, George Wallace pledged "segregation forever" and compared the state's "fight" against the federal government to a fight against Nazis.[132] He called on "Alabamians" to "take the offensive" and "tolerate their boot in our face no longer."[133] Years earlier, Bull Connor had told the national press that if "the North keeps trying to cram [desegregation of public facilities] down our throats, there's going to be bloodshed."[134] By the summer of 1963, Connor became openly

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127. *See* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 137 (1958).

128. For a detailed history of the Bombingham chapter of Alabama history, *see* ESKEW, *supra* note 95, at 53-83 (1997). Approximately fifty bombs blew up in Birmingham between 1947 and 1956, *see id.* at 53-62, then intensified thereafter, particularly in the early 1960s. *See also* BARTLEY, *supra* note 93, at 331.

129. CARTER, *supra* note 18, at 116.

130. Angela Davis, who spent her childhood in Birmingham, recalls that Bull Connor would announce where African-Americans were moving into white neighborhoods to the public and would cagily suggest to the press that he was expecting bloodshed. According to Davis and others, within a day or so of Connor's announcements, the named house would be blown up. *See* ESKEW, *supra* note 95, at 83.

131. *See* CHAPPELL, *supra* note 90, at 80.

132. WHITE, *supra* note 84, at 44.

133. *See id.* at 44.

134. *See Birmingham: Integration's Hottest Crucible*, TIME, Dec. 15, 1958, at 16.

violent.[135] When one of his fire hoses slammed Reverend Shuttlesworth into a wall, breaking his ribs, Connor told a reporter "I waited a week to see Shuttlesworth get hit with a hose . . . . I'm sorry I missed it. I wish they'd carried him away in a hearse."[136]

And so, on September 15, 1963, Alabama's quintessential hate crime, the bombing of the Sixteenth Street Baptist Church, became a national symbol for government-inspired violence. Bomber Robert Chambliss mimicked his Governor's militant rhetoric in the days before the crime, predicting to his family that his mayhem would be the high-water mark of Alabama's state's rights struggle.[137] Indeed, Chambliss let his relatives know that he perceived himself to be supporting state law *against* federal law, which Alabama officials and private segregationists had routinely branded as unlawful.[138] Thus, when the church blew up, President Kennedy had no trouble intimating that Alabama officials were to blame for the bombing, stating it arose from "a public disparagement of law and order" that "encouraged violence which has fallen on the innocent."[139] Alabama's own Attorney General directly blamed the bombing on those persons who "were standing in the schoolhouse door"[140]—an allusion was to Wallace, who just months earlier had staged a stand against desegregation at the University of Alabama.

As the 1960s drew to a close, the connection between law and violence in Alabama was proven by what it took to stop it—the removal of law enforcement authority from state officials, and a concerted campaign by federal law enforcement to crack down on bias-motivated violence throughout the South, including violence inflicted by law enforcement.[141] Just as imminent threats of federal crackdowns contributed to the decrease in lynchings in the 1930s and 1940s, once federal law enforcement began to promise full racial equality under the law to African-Americans, Alabama's racial violence of the 1950s and

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135. There is strong evidence that everyone took Connor's death threats seriously. A significant number of Birmingham police officers were so horrified by the tactics of Connor and Lingo that they objected to them on the grounds that violence would follow from their police tactics. Regarding assassination risks for Dr. King, Connor expressly told officers, "Let them blow him up." CARTER, *supra* note 18, at 126-27.

136. CARTER, *supra* note 18, at 124.

137. For a detailed account of Robert Chambliss' reasoning prior to the bombing of the Sixteenth Street Baptist Church, see ELIZABETH H. COBBS/PETRIC J. SMITH, LONG TIME COMING 87-102 (1994).

138. *Id.*

139. *See* CARTER, *supra* note 18, at 180.

140. *See id.* at 182 (quoting Attorney General Flowers).

141. Because nondiscriminatory police protection had effectively collapsed in Alabama, the Kennedy Administration had to take over police functions in protecting civil rights activists. *See* RAINES, *supra* note 88, at 337-39 (quoting former Attorney General Katzenbach).

1960s was relegated to the past—only after federal law enforcement removed longstanding barriers to African-Americans' participation in state politics.[142] And, of course, when faced with threats of riots and African-American revolt, a majority of Alabama Whites finally developed an affection for racially-neutral law and order.[143]

In sum, based on the historical record, it is safe to argue that the wide array of bombings, lynchings, and labor violence that many Whites inflicted on African-Americans in Alabama simply could not have happened without discriminatory White-run government support. Such repeated instances of violence could only have occurred if African-Americans were assumed to be nonfactors in Alabama's political process, individuals who were not entitled to truly equal protection under the law. Just as with national records of rises and falls in bias-motivated violence, the spectacular progress that occurred in Alabama after the Civil Rights era should firmly counter the argument that widespread hate crime operates apart from governmental misconduct.

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142. For a summary of combined reforms needed to restore law, order, democracy, and equality in Alabama, see ROGERS, *supra* note 86, at 564-66. For the leading articulation of the theory that concerted action by the NAACP and threats of government crackdown reduced lynchings, see Robert L. Zangrando, *The NAACP and a Federal Antilynching Bill*, 50 J. NEGRO HIST. 106, 115-17 (1965). Some scholars have made sketchy arguments that question the legal and social forces that brought an end to lynching, claiming economic equality and power for African-American workers necessitated declines in lynchings. *See, e.g.*, STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 202-58 (1995).

143. Amid media panic over riots in 1967, the Supreme Court's decision in *Walker v. Birmingham*, 388 U.S. 307 (1967), was widely hailed in Alabama, primarily for effectively sending Martin Luther King to jail, but also enabling general appeals to law and order. *See Editors, Let's Settle It*, BIRMINGHAM NEWS, June 13, 1967, at 10 ("People who advocate—and practice—violence and destruction to bring about their brand of change are finished in the United States, whether they know it or not. For every ugly and irresponsible incident that erupts, whether it occurs in Prattville, Tampa, or Philadelphia, as it has within the past several days, some part of hard-earned progress slips back a step more and fresh and often painful beginnings must be made.") For a sampling of news coverage, *compare* Larry Corcoran, *Boutwell Feels King Case Ruling Helps Rule of Law*, BIRMINGHAM NEWS, June 13, 1967, at 3 (describing Birmingham Mayor Albert Boutwell's view that law enforcement against civil disobedience "preserved rule of law rather than opening the door to chaos"); *and* Editorial, *The Civilizing Hand*, BIRMINGHAM POST-HERALD, June 13, 1967, at 10 (describing *Walker v. Birmingham* as clearing up concern that the Supreme Court had instilled a "contemptuous attitude" among civil rights workers and giving "new strength" to the "civilizing hand of the law" as "our only protection against the jungle"). For accounts of White panic at race riots, *see* Dan Dowe, *Negroes Riot in Prattville; Guard Called*, BIRMINGHAM NEWS, June 12, 1967, at 1 (marking reactions to Stokely Carmichael's appearance in Alabama, claiming Carmichael warned "We came to tear this town apart."); *Tampa Negroes Loot, Burn Slums*, BIRMINGHAM NEWS, June 13, 1967, at 1.

## II. LEARNING FROM MURDER

> *I don't consider myself a killer. I consider myself someone caught in a bad situation.*
>
> Terry Helvey, Navy Airman
> Convicted of Antigay Murder[144]

> *It is not only our hatred of others that is dangerous but also and above all our hatred of ourselves: particularly the hatred of ourselves which is too deep and too powerful to be consciously faced. For it is this which makes us see our own evil in others and unable to see it in ourselves. . . . In all these ways we build up such an obsession with evil, both in ourselves and others, that we waste all our mental energy trying to account for this evil, to punish it, to exorcise it, or to get rid of it in any way we can. We drive ourselves mad with our preoccupation and in the end there is no outlet left but violence. By that time we have created for ourselves a suitable enemy, a scapegoat in whom we have invested all the evil in the world. He is the cause of every wrong. He is the fomentor of all conflict. If he can only be destroyed, conflict will cease, evil will be done with. . . . Thus we never see the one truth that would help us begin to solve our ethical and political problems: that we are all more or less wrong, that we are all at fault, all limited and obstructed by our mixed motives, our self-deception, our greed, our self-righteousness, and our tendency to aggressivity and hypocrisy.*
>
> Father Thomas Merton
> New Seeds of Contemplation 112-16 (1961)

### *A. The Preservation of Antigay Violence Through Mock Governmental Civility*

On the afternoon of May 5, 1981, William M. Clark walked into a Birmingham, Alabama barber shop and shot Ransom Hullet in the arm and side.[145] Mentally unstable, Mr. Clark had difficulty speaking, and, therefore, could not articulate the anxieties that compelled him to attack his victim. A psychiatrist pieced together Mr. Clark's "reasoning" the best he could and concluded that Mr. Clark believed the barber was trying "to change him into a homosexual" and was affecting his ability to have sex with women. According to the psychiatrist, "[A]ll of this scared Mr. Clark and made him so angry" that he was "obviously psychotic." Medical records also confirmed that Mr. Clark was schizophrenic and paranoid. The Alabama Court of Criminal Appeals reversed Mr. Clark's conviction for attempted murder, concluding that

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144. Cheryl Lavin, *Conversation with a Killer*, CHI. TRIB., Aug. 29, 1994 at C1 [hereinafter Lavin, *Conversation with a Killer*].

145. This narrative is drawn from *William M. Clark v. Alabama*. *See* 475 So. 2d 657, 657-59 (Ala. Crim. App. 1985).

Mr. Clark's actions were "so bizarre, unprovoked, and without a rational basis that there was no evidence from which the jury could reasonably infer that he was sane when the shooting occurred."

While many people probably do not consider themselves comparable to murderers as a matter of course, one might think that government officials, at least, would eschew the rhetoric of homophobic killers. Yet, like Mr. Clark, government officials in Alabama have demonstrated great difficulty in articulating their objections to gay and lesbian intimacy.[146] Like Mr. Clark, Alabama officials have alleged, without evidence, that "homosexuals" as a class tend to recruit heterosexuals, particularly heterosexual youth, to homosexuality.[147] And, like Mr. Clark, Alabama officials have also expressed fears that attempts at gay intimacy threaten sexual relations between the "opposite sexes."[148] Presumably, in Alabama at least, what is assumed to be "bizarre, unprovoked, and lacking a rational basis" in an individual is made rational when proffered by elected officials and spread through the populace.[149] It is a curious form of democratized trauma.

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146. *See, e.g.*, Boyington v. State, 227 So. 2d 807, 808 (Ala. Crim. App. 1969) (describing acts of homosexual intimacy as so "abominable, detestable, unmentionable," and "disgusting" as to preclude clear description and discussion thereof); Parris v. State, 190 So. 2d 564, 565 (Ala. Crim. App. 1966) (stating "We cannot think upon the sordid facts contained in this record without being reminded of the savage horror practiced by the dwellers of ancient Sodom"); *see also* Williams v. State, 316 So. 2d 362, 365 (Ala. Crim. App. 1975) (citing defunct English common law only to reinforce "the record of constant quadrimillennial revulsion of moralistic civilizations from the vice that evoked the total and everlasting destruction of Sodom and Gomorrah"); Horn v. State, 273 So. 2d 249, 250 (Ala. Crim. App. 1973) (citing Boyington).

This sentiment of disgust does not appear to be unique to Alabama. *See* MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962 and Revised Comments 1980) (describing heightened hostility for gay and lesbian sexuality "as much aesthetic as moral," even though the "force [of such objections] is not diminished by the difficulty of specifying exactly what harm is occasioned" by gay and lesbian intimacy). As some have argued, describing homosexual sex as having "unnatural" qualities may have been necessary in order to impose harsh penalties on conduct with unprovable, alleged harms. *See* Karl M. Bowman, M.D. & Bernice Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMPLE L.Q. 273, 314 (1956).

147. *See infra* note 402 and accompanying text.

148. *See, e.g.*, *Williams*, 316 So. 2d at 364 ("A person who has been guilty of so abusing his faculties will not be likely afterwards to have a proper regard for the opposite sex. The tendency is to deprave the appetite and produce in the person insensibility to the most ecstatic pleasure which human nature is capable of enjoying—the society of women.") (internal citations omitted).

149. Of course, such behavior is not unique to Alabama. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES (1983) (chronicling thousands of arrests and discharges from employment of gay men labeled moral threats and security risks in cities such as Washington, D.C. and New York); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940, at 360, 361 (1994) (summarizing tens of thousands of New York arrests of gay men based on scares of perceived spreads of homosexuality).

Intriguing or not, justification rhetoric provides important keys to understanding the reasons violence occurs. When a murderer confesses, the reasons he offers for his crime, if not rebutted, must at least be accepted as the reasons the murderer believes his conduct is understandable. The same holds true for policy statements that reveal motives for discrimination and result in injuries on entire classes of people. In *Bowers v. Hardwick*, for example, the Attorney General of Georgia justified his state's punishment of homosexuality with this lurid fantasy:

> It should be permissible for the [Georgia] General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy . . . is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence. Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases . . . and the concomitant effects of this relationship on the general public health and welfare.[150]

The logic, if it can be called that, should have equally twisted like this:

> Rape is overwhelmingly heterosexual in nature.[151] Within traditional families, women are much more likely to be victims of violence than

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150. Brief of Petitioner Michael H. Bowers, Attorney General of Georgia at 36-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). For criticisms of similar distortions of facts that feign harms posed by lesbians and gay men, see Gregory M. Herek, *Bad Science in the Service of Stigma: A Critique of the Cameron Group's Survey Studies in* STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS (Gregory M. Herek ed., 1998) at 223-55; *see also* SIMON LEVAY, QUEER SCIENCE 211-30, 273-96 (1996).

151. Nationally, perpetrators of forcible rape of women are almost exclusively male (98.7%). *See* UCR 1999, *supra* note 16, at 219. A recent survey of five American cities performed in conjunction with the Federal Bureau of Investigation, for example, found that most sexual assaults were committed by males (95%) against women (83%). *See* ROLAND CHITON ET AL., VICTIMS AND OFFENDERS: A NEW UCR SUPPLEMENT TO PRESENT INCIDENT-BASED DATA FROM PARTICIPATING AGENCIES 10, 13 (1998). To illustrate further, if rape in Alabama tracked national crime rates, with 98.7% of unknown rapes of women perpetrated by men, only eighteen homosexual rapes would have occurred in Alabama, or one percent of all rapes. *See* Alabama Criminal Justice Information Center, Crime in Alabama 1999: Rape (2000), *at* http://www.agencies.state.al.us/acjis/pages/cia99/99bMain.
htm (noting three female-to-female rapes, or 1.3% of 252 rapes where the sex of the rapist was unknown, added to the eleven male-male sexual assaults confirmed by state officials). Even if all 252 rapes of women by unknown perpetrators in 1999 were female, 82% of all rapes in Alabama that year would still have been heterosexual (1128), and only eighteen percent would have been homosexual (263). *See id.*

> outside the traditional family structure.[152] Abortions exclusively appear to be phenomena of heterosexual sex,[153] and heterosexuals appear to be overwhelmingly responsible for abuse and murder of children.[154] While not all heterosexuals are rapists or child murderers, the overwhelming number of rapes and murders committed heterosexually makes it rational to conclude that the traditional heterosexual lifestyle is a more likely precursor to infanticide and rape than homosexuality and requires punishment for the sake of the public good.

Though the United States Supreme Court in *Hardwick* did not expressly approve of Georgia's delusions about homosexuality, it nonetheless embraced its antigay animus as a rational regulation of "morality," purportedly consistent with notions of liberty.[155] And so, whether viewed as ignoring or implicitly approving Georgia's gay panic, the Court effectively validated Georgia's desire to harm gay people on the basis of a peculiar imagination—leaving liberal and conservative scholars alike referring to the Court's defense of Georgia's conduct as unprincipled,[156] cruel,[157] and almost certainly unlawful.[158]

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152. Women represent 71% of all violent crime victims in families and 58% of all violent crime overall, a differential that would require significantly less violence outside of families than inside. *See* UCR 1998, *supra* note 16, at 281.

153. According to the recent statistics accepted for use by Planned Parenthood, 43% of all women in the United States will have at least one abortion by the time that they are forty-five years old. *See* ALAN GUTMACHER, INSTITUTE: FACTS IN BRIEF: INDUCED ABORTIONS 1 (1998). Regardless of how homosexuality in the general population is measured, lesbianism simply cannot account for a significant part of this percentage. No known data indicates that lesbian women are likely to have heterosexual sex, become pregnant, and terminate pregnancies at a rate equal to or greater than heterosexual women. Moreover, no known data indicates that gay and lesbian couples terminate their pregnancies, since by the nature of these couples' sexual orientation, their pregnancies are not likely to be unplanned.

154. Alabamians actually reported 24,586 incidents of domestic child abuse in the state in 1998, involving 36,276 children, or one child every fifteen minutes. ALABAMA DEP'T OF HUMAN RESOURCES, NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM REPORT: FY 1999, May 11, 2000 at 1. According to state officials, 13,773 children were confirmed or reasonably suspected to have been abused this past year, or one child every thirty-eight minutes.

Nationally, heterosexual rape of children overwhelmingly exceeds homosexual rape of children. *See* UCR 1998, *supra* note 16, at 283. As noted above, forcible rape is performed almost exclusively by males against females. *See supra* note 151.

155. *See Hardwick*, 478 U.S. 186 (1986).

156. *See, e.g.*, Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1745 (1998) (citing CHARLES FRIED, ORDER AND LAW 82-83 (1991)) (arguing that laws sanctioned by *Hardwick* violate "fundamental principles of morality, and, therefore, constitutional protections of fundamental rights"); Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POLY 91, 92-93 (1987) (describing the Court's privacy jurisprudence surrounding *Hardwick* and related decisions as incoherent and "hard to take seriously"); George Will, *What "Right" to Be Let Alone*, WASH. POST, July 3, 1986 at A23 (describing *Hardwick* as unprincipled, "revealing the inner impulses of the justices" and "not the inner logic of the Constitution").

157. *See, e.g.*, RICHARD POSNER, SEX AND REASON 346 (1996) (describing sodomy law as "cruel" and the Court as insensitive to uphold such a law); WILLIAM ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 150 (1999) (citations omitted) (noting that a wide

Government rhetoric that attempts to explain or justify extreme punishment of classes of people illuminates how such rhetoric can also preserve bias-motivated violence in a culture purportedly grounded in law and order. As the history detailed in Part I shows, those who have inflicted, supported, or ignored bias-motivated violence have historically done so in the name of some allegedly civil cause. With this perspective, it should come as no surprise that antigay violence persists in the United States, a place where "gay rights" are often perceived as "special rights."[159]

Most perpetrators of antigay violence, like most antigay citizens, appear quite civil in daily life, exhibiting no persistent desire to cause physical harm to lesbians and gay men as a group, much less exterminate lesbians and gay men as a class.[160] Most Americans, like most antigay murderers, even claim to tolerate homosexuality, at least enough to refrain from insisting on the enforcement of sodomy laws or the ouster of gay people from housing and employment.[161] Yet, antigay hate crime

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array of scholars of all genders and sexualities have condemned *Hardwick* as "manipulative, ignorant, inefficient, violent, historically inaccurate, misogynistic, authoritarian"). *See also* Watkins v. United States Army, 837 F.2d 1428, 1457 (9th Cir. 1988) (Reinhardt, J., dissenting) ("*Hardwick* improperly condones official bias and prejudice against homosexuals"); *Wasson*, 842 S.W.2d 487, 501 (noting that *Bowers v. Hardwick* is "a misdirected application of the theory of original intent" and deriding the Court's commitment to equality, claiming "[t]o be treated equally by the law is a broader constitutional value than due process of law as discussed in the *Bowers* case").

158. *See* Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 645-46 n.95 (1990) (surveying scholarship overwhelmingly denouncing *Hardwick* as error).

159. For thorough analysis of the "special rights" campaign against gay rights in a culture of antigay violence, see John Gallagher, *Are We Really Asking for Special Rights?*, THE ADVOCATE, Apr. 14, 1998, at 24-37.

160. For more details, see § II.B.1-3 *infra*. Of course, there are exceptions. *See, e.g.*, *God Is His Defense Attorney*, THE ADVOCATE, Dec. 7, 1999, at 12 (noting that Matthew Williams, who confessed to killing a gay couple in Redding, California claimed he did so because "the laws of the Creator" warranted the extermination); Joe Mozingo, *Man Who Killed 5 Gays in 1980s Gets Life Sentence*, L.A. TIMES, June 22, 1999, at B1 (noting that Juan Chavez pleaded guilty to killing five gay men, claiming "You don't understand, I want to get these men before they get me. They're spreading AIDS.")

161. *See* ALAN YANG, FROM WRONGS TO RIGHTS: 1973 to 1999: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 1-2, 6-14 (1999) (showing dramatic rise in public opposition to discrimination against gay and lesbian Americans in housing and employment while strong resentment remains toward gay marriage and open homosexuality in the military). *See also* ALAN WOLFE, ONE NATION, AFTER ALL 74-76 (1998) (asserting that despite a majority of Americans disapproving of homosexuality, majority also believes in taking a nonjudgmental or libertarian approach to gay and lesbian rights). Here, too, of course, there are exceptions. *See, e.g.*, CONGRESSMAN WILLIAM DANNEMEYER, SHADOW IN THE LAND: HOMOSEXUALITY IN AMERICA 121-139 (1989) (arguing that former congressman claiming that the gay rights movement is an "enemy" of Americans, comparable to both Genghis Kahn's army and Hitler's blitzkrieg.)

continues to flourish in the United States, and most Americans have failed to insist that government put a stop to it.

In order for discrimination and violence to thrive on a national scale, systematic justification must accompany them. Thus, the illusion of the "civility" of antigay sentiment is vital to sustaining antigay animus. It is primarily for this reason that theories of antigay violence fall remarkably flat when they ignore the influence of governmental discrimination. To note but one example, the theory that antigay violence is primarily a public display of masculinity does nothing to explain why antigay violence is sometimes perpetrated by women, or why such violence often occurs in private.[162] Contrary to most theories, the *only* known constant behind all antigay violence is that the perpetrator perceives that antigay animus is somehow justified, either implicitly or expressly, in the context of American law and order.

Theories regarding the causes of hate crime must, therefore, place great weight on the rhetoric of the perpetrators of antigay violence, especially to determine why law fails to deter such violence. From this perspective, government influence on bias-motivated violence emerges quite clearly. Both antigay murderers, like antigay policymakers, defend injury to lesbians and gay men through at least one of two sentiments—

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162. According to the National Coalition of Anti-Violence Programs, records of antigay attacks in thirteen distinct cities, states and/or regions showed 346 antigay attacks by women in 1999 alone. *See* KEN MOORE, ANTI-LESBIAN, GAY, TRANSGENDER AND BISEXUAL VIOLENCE IN 1999 20 (2000); *see also* COMSTOCK, *supra* note 7, at 59-67 (showing perpetrators of attacks not exclusively male).

Because no study empirically shows that hyper-aggressive males would have continued to perpetrate antigay violence if law enforcement clearly opposed antigay animus, claims that masculinity is "the cause" of antigay violence remain wildly speculative. *See* Candace Kruttschnitt, *Gender and Interpersonal Violence in* 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 324-51 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994) (noting that many men perceive an ability to control and avoid violence to be "masculine"); Christine Alder, *Violence, Gender, and Social Change*, 44 INT'L SOC. SCI. J. 267-76 (1992) (surveying literature to caution against reductions of causes of crime to masculinity); Howard J. Ehrlich, *The Ecology of Antigay Violence*, *in* Herek & Berrill, *supra* note 5, at 105 (noting that both severe underreporting of antigay violence and anonymity of attackers precludes sweeping attributions of antigay violence to youth and masculinity).

Despite these findings, some theorists continue to argue that homophobia is the result of a masculinity crisis, focusing solely on the large numbers of young men who appear to perpetrate antigay violence. *See* JoAnn Wypijewski, *A Boy's Life*, HARPER'S MAG., Sept. 1999, at 61, 73 ("Gay men are killed horribly everywhere in this country, more than thirty just since [Matthew] Shepard . . . the only constant is that they are dead, and that most of their killers are straight and most of them are men."); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual Men": Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 754 (1995) ("[A]n unwanted sexual advance is a basis for justifiable indignation. The reason it is far more likely that a man would kill under such circumstances than a woman, is that women rarely kill when provoked, but men frequently do."); JAMES MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 119-53 (1993).

one that is *hysterical*, an irrational hostility to the experience or contemplation of homosexual desire, and one that is *narcissistic*, an insistence that heterosexuals have a right to assume a position of power over sexual minorities.[163] And yet, as this Part will show, antigay murderers and antigay policymakers alike typically cannot genuinely subscribe to *any* of the antigay hysteria they espouse, since none of them seriously tout discrimination and violence as a means of regulating or discouraging gay sexuality.

Accordingly, since antigay rhetoric almost certainly lacks any practical, coherent force, the action underlying it can only have one meaning—that murderers and policymakers believe that the force they exert against lesbians and gay men flows from a recreational, narcissistic "right." But to sustain itself, such an assumption requires legal support. Since both supporters and opponents of antigay laws claim that such laws impede the social acceptability of homosexuality, it should logically follow that intolerance of homosexuality might be difficult to sustain in the absence of legal prohibitions on it.

Indeed, legal protection for gay intimacy should counteract cultural antigay animus sufficiently to allow antigay hysterics, if they exist, to experience gay desire without fear of the stigma attached to it. In the same way, legal protection for gay intimacy should make antigay narcissists feel less inclined to punish lesbians and gay men. In the absence of such protection, parallels between antigay governmental rhetoric and murderers' confessions emerge and take on a disturbing significance: unless government officials wish to admit they draw upon murderous reasoning to justify antigay policy, the antigay rhetoric espoused by antigay murderers, instead, is quite likely learned from government.

### *B. Discerning Government Influence on Hate Crime Through Individual Cases*

#### 1. Rhetorical Explanations for the Murder of Allen Schindler

In October 1992, Navy Airman Terry Helvey stomped gay Navy Radioman Allen Schindler to death so severely that his remains were

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163. The most complex summary of modern forms of "homophobia" can be found in ELIZABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES 137-159 (1996), and terms referring to the "hysterical" and "narcissist" strains of antihomosexual animus are borrowed from Professor Young-Bruehl's work. Additional detailed support for the nonobsessive nature of modern "homophobia" can be found in SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988). The murders and policies detailed in §§ II.B & II.C of this Article, respectively, show that obsessional and hysterical excuses for antigay violence are not corroborated by the actions of the perpetrators.

described by the medical examiner as pulp, like those belonging to victim of a plane crash or a severe trampling by a horse.[164] "If you took a tomato and slushed it all up without damaging its skin," the examiner claimed, "that's what it would look like." The destruction of Schindler's body suggested that the murder was the work of a man consumed by psychotic rage. And yet, Helvey has always maintained that he did not lose emotional control of his anger or hostility on the night of the murder. According to his own testimony, the blows he inflicted on Schindler were not provoked by fear or revulsion toward him, but were deliberately inflicted because he simply wanted to torment Schindler, an impulse he allowed, through drunkenness, to go too far.

To understand the murder of Allen Schindler fully, it is important to note that Schindler never appears to have announced his homosexuality to Helvey, or for that matter, to most people he knew. For most of Schindler's life, most people presumed that Schindler was heterosexual.[165] As a young boy, Schindler was accused of kissing girls in school, and as he grew older, Schindler dated women and told his girlfriend that he loved her and wanted to marry her.[166] While on leave, he openly bragged to his family members about women that he claimed to have dated, and he often flirted with his sisters' children's female teachers. Schindler's family knew he had some gay friends, and claimed that Schindler was merely confused whenever questions about his sexuality arose.[167] In fact, when Schindler told his mother, brother, and sister that he was gay in May of 1991, even they did not believe him. When "pressed for details" about his sexuality, Schindler only told his family he was "not doing anything" and that they did not understand what "type" of homosexual he was.[168]

In 1988, Schindler entered the United States Navy as a way to see the world and finance his college education.[169] His first tour of duty was so successful that he extended his enlistment and encouraged his best friend and his brother to enlist.[170] Schindler had no adverse performance ratings prior to 1991 and had only been called before his ship's captain

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164. James Sterngold, *Motivation in Killing Gay Sailor is Left Unclear in Penalty Hearing*, N.Y. TIMES, May 26, 1993 at A16 [hereinafter Sterngold, *Motivation in Killing Unclear*].

165. Cheryl Lavin, *Strange Case of a Dead Sailor: Was Allen Schindler Killed Because He Was Gay?*, CHI. TRIB., Dec. 21, 1992 at 1 [hereinafter Lavin, *Strange Case*].

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

once for disciplinary reasons.[171] Until at least 1991, Schindler had told no one that he was gay, although he appears to have accepted that identity hesitantly with his family and friends.[172] Schindler officially declared his gay identity when he asked the Navy for a discharge, an announcement that only just preceded his murder by Airman Apprentice Terry Helvey in October 1992.[173]

As 1991 drew to a close, Schindler was transferred to the *U.S.S. Beulah Wood*, where he was persistently harassed for being perceived as gay.[174] According to his shipmates, much of the crew of the *Beulah Wood* branded him a "faggot," attacking both his person and his property.[175] On one occasion, a shipmate even punched Schindler in the face while he was asleep.[176] Schindler's friends told reporters the *Beulah Wood* was "an extremely tough" ship.[177]

Schindler received disciplinary penalties three times in the nine months between his transfer to the *Beulah Wood* and his death.[178] According to his letters to his friends, Schindler's "misconduct" arose from what he perceived to be necessary responses to his tormentors.[179] On his last leave, Schindler told his mother he did not want to return to his ship, and shortly after he returned to the *Beulah Wood*, Schindler told his superiors he was gay and asked to be discharged.[180]

As a shipmate of Schindler, Terry Helvey claimed he had disliked Schindler long before he suspected Schindler was gay, supposedly because Schindler bossed him around while the two were assigned to cleanup duty together.[181] According to Helvey, once rumors surfaced that Schindler was gay and about to be discharged, his dislike of Schindler grew more intense.[182] Helvey has confessed that, on the night he killed Schindler, he and a crewmate, Albert Vins, spotted Schindler while they were out "drinking and fighting."[183] This was a ritual he called "doin' the Navy thing," something that "happened so many times, [he couldn't]

171. *Id.*
172. *Id.*
173. James Sterngold, *Killer Gets Life as Navy Says He Hunted Down Gay Sailor*, N.Y. TIMES, May 28, 1981 at A18 [hereinafter Sterngold, *Killer Gets Life*].
174. Lavin, *Strange Case*, *supra* note 165.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. Lavin, *Conversation with a Killer*, *supra* note 144.
182. *Id.*
183. *Id.*

count them."[184] According to Vins, Helvey suggested that the two men stalk Schindler, and Vins, apparently also intoxicated, went along with Helvey.[185]

Helvey and Vins followed Schindler into a restroom and cornered him.[186] According to Helvey, Schindler raised a fist to defend himself.[187] Both Helvey and Vins agreed that Helvey kneed Schindler in the groin, then held Schindler and began punching him repeatedly. Next, Helvey used his heel to stomp Schindler in the face and chest, leaving footprints permanently pressed into Schindler's skin.[188] According to Vins, Helvey then kicked Schindler like a trapped soccer ball, working his way down Schindler's body with his foot, crushing it.[189] Schindler's face was "disfigured beyond recognition," so much so that he was only identifiable by tattoos on his arm.[190] According to the medical examiner, the blows delivered by Helvey shattered Schindler's bones, destroyed most of the organs in his body, and even lacerated his penis.[191] Helvey has since claimed he only punched Schindler a few times and that medical examiners must have disfigured Schindler's body.[192] Nevertheless, he has admitted, "[He] was having fun and this dude ended up dying."[193]

Helvey's understanding of fun was apparently quite warped. He had a reputation for fighting as a child and, because of his behavioral problems, Helvey had spent a substantial amount of time in a boys' home.[194] One social worker documented that Helvey had a history of settling his perceived problems with physical violence and fights.[195] Helvey himself has claimed that he had only ever used his brain as a "strategic shell" and that he was popular in boot camp primarily because he had beaten up another soldier.[196] After his arrest, Helvey purportedly told one witness he had always wondered what it was like to kill a man, and that he had no regrets about killing Schindler and would do it

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. Sterngold, *Killer Gets Life*, *supra* note 173, at A18.
191. Lavin, *Conversation with a Killer*, *supra* note 144;, *see also* Jesse Green, *What the Navy Taught Allen Schindler's Mother*, N.Y. TIMES, Sept. 12, 1993 at 58; Sterngold, *Motivation in Killing Left Unclear*, *supra* note 164.
192. Lavin, *Conversation with a Killer*, *supra* note 144, at A1.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*

again.[197] One of Helvey's defense witnesses at his court martial claimed Helvey also used steroids, which purportedly made him more aggressive and, once intoxicated, potentially unable to control his violent outbursts.[198] But Helvey's past, if believed, may have prefigured his antagonism toward gay men. Helvey claimed his father severely beat him, calling him "a little faggot" and forcing him to eat his own feces.[199]

At his court martial, Helvey claimed a severe hatred of "homosexuals," insisting he found "homosexuals . . . disgusting, sick and scary."[200] He stated further that, on the night he killed Schindler, he was "afraid of faggots" and "scared."[201] Helvey also initially claimed that Schindler made a pass at him, but he later admitted that he invented the claim.[202] Helvey twice attributed his hatred of homosexuals to the military.[203] At his court martial, Helvey read a statement alleging that the murder could have been averted had "homosexuals" not been allowed in the military.[204] And he later told the *Chicago Tribune* that antigay sentiment was "bred into [enlistees] as soon as [they] got to boot camp. It was banged into [their] head[s], 'The Navy and gays are not compatible.' It's like a big joke: 'Throw 'em off the ship.'"[205]

From his jail cell, Helvey has claimed he no longer fears gay men.[206] Of course, when reporters speculated that Helvey and Schindler had been intimate, Helvey described that speculation as the worst possible thing that could happen to him.[207] At the mere thought of the suggestion, Helvey claimed, "I thought I was going to die."[208] But now, specifically referring to a gay cellmate, Helvey has stated the man is a "good guy," someone Helvey "could probably go out and drink a beer with. . . ."[209] Though he describes himself as someone who will "manipulate and lie in a second" to help himself, after the killing and court martial, Helvey has claimed "a human life has meaning to [him] now."[210]

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197. James Sterngold, *Motivation in Killing Unclear*, *supra* note 164.
198. Lavin, *Conversation with a Killer*, *supra* note 144, at A1.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

2. Rhetorical Explanations for the Murder of Billy Jack Gaither

Steven Mullins' murder of Billy Jack Gaither received substantial attention from the national media for its violence. It was an extraordinarily predatory bludgeoning, stabbing, and burning of a human being. As with the murder of Allen Schindler, the excesses of Mullins' murder tactics suggest that he was empowered by an unstoppable rage. And, like Terry Helvey, Steven Mullins gave testimony at trial and statements to the media that told a different story. Mullins spent a great deal of time with Gaither before the murder. Knowing that Gaither was gay for some time throughout their relationship, Mullins was apparently able to resist any compulsion to murder him. Moreover, Mullins was apparently sufficiently in control of his faculties at all times to plan an elaborate execution of Gaither. Mullins has, in fact, claimed he deliberately killed Gaither because he believed murdering Gaither was acceptable punishment for Gaither's very specific expressions of his sexuality.

Billy Jack Gaither was a thirty-nine-year-old textile worker who lived in Sylacauga, Alabama, where he helped care for his ailing father and sang in his church choir.[211] Though Gaither was known to his siblings and many local townspeople as a gay man, Gaither's parents claim not to have known that Gaither was gay.[212] Locals insist that while Gaither would not hide his gay identity, he was also not the type of individual to force his sexuality on anyone, much less to make a pass at anyone who appeared to be dangerous.[213] Gaither occasionally traveled to local gay bars and claimed once to have had an affair with a married man, but was apparently dating no one at the time of his death.[214] After his murder by Steven Mullins and Charles Butler, Gaither was consistently described in the press as a gentle man who threatened no one.[215]

Steven Mullins, by all accounts, had a rough life.[216] He served time in state prison for burglary and forgery and claims to have seen his father for the second time only when the two found themselves in jail

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211. David Firestone, *Murder Reveals Double Life of Being Gay in the South*, N.Y. TIMES, Mar. 6, 1999 at A1, A10.

212. *Id.* at A10.

213. David Story, *The Sad Death of Billy Jack*, THE ADVOCATE, May 11, 1999, at 29-30.

214. *Id.*

215. *See, e.g.*, *20/20: Blinded by Hate: Interview with Killers of Billy Jack Gaither* (ABC Television broadcast, Dec. 6, 1999) [hereinafter *20/20: Blinded by Hate*]; *see also* Pedersen, *supra* note 15.

216. Telephone Interview with Rod Giddens, Esq., (Apr. 22, 1999) (notes on file with author).

together.[217] People who knew Mullins claim that he was known for threatening to beat others up.[218] Mullins was also known to have a problem with substance abuse and had trouble finding and keeping work.[219] Mullins has since described himself as a former neo-Nazi skinhead, someone who believed that anyone "other than the white race, [was] just evil, didn't belong on the earth."[220] When asked by the press if he "hated gays" when he was an active skinhead, Mullins has said he did, and "guesses" he was still a skinhead at the time he killed Gaither.[221] He has also claimed, however, "I've often felt that [the man who killed Gaither] was like another person. You know, somebody else inside me. That was that."[222]

Beyond his own confusion about his propensity for murder, Mullins' own sexuality has been placed in doubt by people who claim to have known him. At Charles Butler's trial for the murder of Billy Jack Gaither, several witnesses testified that they had seen Mullins kissing and dancing with another man, Jimmy Dean, at a party.[223] Dean specifically testified that he had serviced Mullins with oral sex.[224] Mullins denied under oath that he had ever had any homosexual sexual encounters.[225] On national television, Mullins repeatedly implied that he was heterosexual, or at least expected to be perceived as such. Specifically claiming he could "respect" gay people for being gay as long as they "[could] respect [him] as being straight."[226]

When pressed on his views on homosexuality, Mullins literally cried to the press. "It's not right . . . being gay . . . You can read the Bible and it tells you it's not right."[227] In a curious comparison of his own guilt to his beliefs about Gaither's guilt, Mullins was more specific: "He's in hell . . . Because he's a homosexual, and it tells you in the New Testament that that's wrong. And if I had a Bible, I could show it to you where it says that people who do that will go to hell—adulterers, liars, homosexuals, murderers, unless they repent, and I have repented."[228]

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217. *Id.*
218. *20/20: Blinded by Hate*, *supra* note 215.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Frontline: Assault on Gay America*, http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/mullet.html (Feb. 16, 2000) [hereinafter *Frontline: Testimony of Mullins Sexuality*].
224. *Id.*
225. *Id.*
226. *20/20: Blinded by Hate*, *supra* note 215.
227. *Id.*
228. *Id.*

Whatever Mullins' feelings toward sex and murder might have been, by his own account he felt no general threat from Billy Jack Gaither or a need to punish him generally for his sexuality. At his trial, Mullins testified that he had known Gaither for over a year and had asked Gaither for rides to the grocery store or to bars.[229] But Mullins claimed that, approximately two weeks before the murder, Gaither made a pass at him over the telephone.[230] After his conviction, Mullins told the press the pass had angered him. He stated, "I was shocked, but yet I tried to brush it off like it really didn't happen. I thought we had a pretty respectful relationship up until then . . . . And he broke that respect line there. It started eating at me and bothering me a lot."[231]

Since his conviction, Mullins has admitted to the press that his murder of Billy Jack Gaither was a hate crime,[232] an admission that radically diverges from his sworn testimony. At both his trial and his accomplice's trial, Mullins testified that he was only "looking to get some money" because he was unemployed and decided to take Gaither out to the woods to rob him because Gaither "was queer."[233] But both before and after his trial, Mullins has expressly claimed that Butler knew the two men plotted to kill Gaither, a claim Butler has denied.[234] From jail, Mullins told the press that he woke up the morning of February 19 "out of a dead sleep" and decided, "I was going to do whatever I had to do to kill Billy Jack . . . . I was going to cut him or stab him and then burn him. To me it didn't seem any different than waking up and saying, 'I'm going to the grocery store this afternoon.'"[235] When asked why he considered killing an appropriate act, Mullins stated, "I really don't know. It just seemed like the thing to do. . . . I didn't feel like he needed to live any longer."[236]

Though Mullins told police he called Gaither to go bar-hopping,[237] in sworn testimony Mullins has claimed that he propositioned Gaither at some point that night, proposing a three-way sexual encounter between himself, his victim, and Charles Butler.[238] That night, Mullins assembled

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229. Val Walton, *Mullins Testifies in Butler Defense*, BIRMINGHAM NEWS, Aug. 5, 1999 at 1A, 9A.

230. *20/20: Blinded by Hate*, *supra* note 215.

231. *Id.*

232. *Id.*

233. Walton, *Mullins Testifies in Butler Defense*, *supra* note 229, at 9A.

234. *20/20: Blinded by Hate*, *supra* note 215.

235. *Id.*

236. *Id.*

237. *See Frontline: Assault on Gay America* http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/statement.html (Feb. 16, 2000) [hereinafter *Frontline: Mullins' Statement*].

238. Walton, *Mullins Testifies in Butler Defense*, *supra* note 229, at 9A.

several murder weapons and gathered a pile of tires and kerosene to prepare for the disposal of Gaither's body.[239] Mullins told ABC News that when Gaither met him that evening, Mullins knew he was going to kill Gaither, and that Gaither should not have trusted him. Gaither drove around as Mullins drank a six-pack of beer, and the two finally headed to a bar to pick up Butler, where they waited for Butler to finish his pool game.[240] The three men then headed into the woods in Gaither's car, purportedly to drink more beer and have their sexual encounter.[241]

Describing the actual killing, Mullins' repeated versions of what happened are internally inconsistent and diverge from Butler's account. Post-conviction, Mullins told the press his attack on Gaither was immediate: "Billy Jack parked the car and all three of us got out. I had some loose pants on, and I popped my pocket knife open and left it in my right pocket. And I grabbed Billy Jack by the back of the head and by his back and shoved him to the ground. And as I was doing that, I had my pocket knife in my hand and I cut his throat."[242] At his trial, though, Butler claimed that when the three men arrived at the woods, Gaither began talking about "gay activities." Though Butler has since admitted to having visited gay bars, he claims that Gaither's "queer" talk prompted Butler to attack Gaither, kicking him several times.[243] For his part, Mullins claimed that he thought he saw Gaither glance at Butler as Butler moved away to urinate, and that that Gaither's purported leer enraged him, compelling him to throw Gaither to the ground and slash his throat.[244]

According to Mullins, Gaither pleaded for his life: "He asked me to just, you know, let him go, that he wouldn't say anything . . . . I told him it was too late."[245] When asked if he told Gaither why he slit his throat, Mullins admitted, "I told him 'cause he was a faggot."[246] According to his sworn testimony, Mullins then stabbed Gaither twice in the chest.[247] Mullins forced Gaither into the trunk of Gaither's car as Gaither stood up, with blood apparently streaming from his throat.[248] Though Butler has since claimed that he "really wasn't thinking . . . like a little chicken

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239. *20/20: Blinded by Hate*, *supra* note 215; *Frontline: Mullins' Statement*, *supra* note 237.

240. *Frontline: Mullins' Statement*, *supra* note 237.

241. *20/20: Blinded by Hate*, *supra* note 215.

242. *Id.*

243. Val Walton, *Butler Just as Guilty in Slaying Jurors Told*, BIRMINGHAM NEWS, Aug. 4, 1999, at 11A

244. Walton, *Mullins Testifies in Butler Defense*, *supra* note 229, at 9A.

245. *20/20: Blinded by Hate*, *supra* note 215.

246. *Id.*

247. Walton, *Mullins Testifies in Butler Defense*, *supra* note 229, at 9A.

248. *20/20: Blinded by Hate*, *supra* note 215.

with their head cut off running around" he remembered that Gaither was "bloody, real white."[249] Mullins has similarly claimed that he thought Gaither was dead—or would be by the time they arrived at Peckerwood creek to dispose of his body.[250]

Butler further testified that at Peckerwood Creek, he helped Mullins drag Gaither from the trunk of his car because he was scared that Mullins would kill him.[251] But as the killers attempted to move Gaither, Gaither fought back and pushed Mullins down a steep incline into Peckerwood Creek.[252] Mullins climbed out of the creek and saw Gaither running for his car.[253] Mullins brandished the keys and taunted Gaither, reminding him that he had no means of escape, then called Butler to help him.[254] Apparently thinking that Gaither had escaped, Butler then ran back to help Mullins.[255]

As Butler returned to the murder scene, he saw that Mullins had caught up to Gaither and was beating him repeatedly with an axe handle.[256] Mullins has denied none of this, swearing both to police and in court that he kept up the beating until he "gave out of energy and couldn't do it anymore."[257] County prosecutors claim that Gaither died from these beatings, which caused more than a dozen skull fractures and a battering of Gaither's face and jaw.[258] While no one seems to have challenged that assumption, Mullins told police the fire Butler started began to grow as he beat Gaither, then Mullins stopped and immediately dragged Gaither's body to the flames.[259] The two men then set Gaither's body on the fire, then burned and abandoned Gaither's car at a nearby dump.[260]

Butler confessed the killing to his father who spread the word to coworkers who, in turn, told local law enforcement authorities.[261] Mullins claimed he "felt really guilty about what happened," that "[he] got [his] Bible out . . . and [he] prayed and asked God for forgiveness." And that God answered those prayers telling him "[He] was forgiven."[262]

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249. *Id.*
250. *Id.*
251. Walton, *Butler Just as Guilty in Slaying*, *supra* note 243, at 11A.
252. *Id.*
253. *Id.*
254. *Id.*
255. *20/20: Blinded by Hate*, *supra* note 215.
256. *Id.*
257. Walton, *Mullins Testifies in Butler Defense*, *supra* note 229, at 9A.
258. *20/20: Blinded by Hate*, *supra* note 215.
259. *Frontline: Mullins' Statement*, *supra* note 237.
260. *Id.*
261. *20/20: Blinded by Hate*, *supra* note 215.
262. *Id.*

According to local authorities, Mullins not only confessed to the killing but claimed that God told him to do so.[263] Mullins has since claimed he regrets the crime and that it "just never should have happened," but that "[He doesn't] have the guilt on [him] anymore" because "God forgives and forgets."[264]

3. Patterns of Illogic

Despite their shock value, the confessions of Terry Helvey and Steven Mullins provide rich insight into the killers' perspectives. Both men clearly believed they had authority to take their victims' lives. Neither apparently considered the fact that Schindler and Gaither might be citizens whose deaths would matter under the law. Helvey has claimed he faulted the military for failing to enforce its ban against homosexuals. Mullins apparently believed that he was the law unto himself—that he could commit crimes of theft and murder against a man who "was queer" and decide that man should no longer live. Though Mullins made no direct attributions to Alabama officials in justifying his conduct, as this Part will later show, his rhetoric directly mimicked that of the Alabama legislature and the Attorney General in expressing a distinct hostility toward *being* gay. In both cases, it is certain the killers were aware that their victims were outcasts and that the outcasts were accustomed to punishment, indignity, and abuse—a perspective encouraged by the law.

It is also, perhaps, remarkable that both Helvey and Mullins blamed their victims for overpowering sexual advances, even though neither claim has held up under questioning. Helvey admitted that the pass he accused Schindler of making was fabricated, and Mullins' descriptions of Gaither's purportedly shocking sexual advances, one telephonic and the other an ambiguous glance toward a third person, defy any understanding of flirtation provocative enough to provoke murder. Indeed, given that Mullins has admitted that he propositioned Gaither to stage a false "three-way" sexual encounter, it is at least equally likely that Butler's and Mullins' coordinated claim that Gaither "talked gay" to Butler and "leered" at Butler was also fabricated. In fact, as explained by the killers, Gaither's gay advances conveniently justified the actions that followed that night—Butler attacking Gaither, putting Gaither off guard, moving away from Gaither, and leaving Gaither alone with Mullins for the killing.

263. *Id.*
264. *Id.*

Even if Helvey and Mullins had genuinely imagined sexual passes from their victims, their claims that they were victims of sexual advances would still be suspect since so many people, including Supreme Court justices, have been known to misread human conduct as sexual invitations or violent threats.[265] If either killer, in fact, had ever flirted by smiling, saying "hello" or "accidentally" bumping into someone, one can only imagine what Schindler or Gaither said that either killer interpreted as a prelude to a kiss. But to make matters worse, both killers perceived gay passes under the influence of alcohol, as in countless cases involving the murders of gay men.[266] Given that both killers claim to have lost control of the violence they inflicted on their victims, the idea that either man was somehow capable of accurate perceptions of a sexual pass should seem at least questionable.

Notwithstanding the sexual overtones of their initial defenses, the animus exhibited by Helvey and Mullins confirms that both men constructed provocative gay identities for their victims to justify their violence. Neither Schindler nor Gaither apparently ever behaved in a

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265. *See, e.g.*, Carroll v. State, 627 So. 2d 874, 877 (Ala. 1993) (noting that defendant interpreted the statement "fuck you" to be a "homosexual threat" to mean "I am going to fuck you," which, according to the examining psychologist, caused the defendant "to react in an extremely drastic manner"); People v. Coronado, 33 Cal. Rptr. 2d 835, 836-37 (Cal. Ct. App. 1994) (noting defendant assaulted men because he "mistakenly interpreted the situations as threats or homosexual advances," leading a psychiatrist to claim defendant was "unnaturally afraid of assault, especially homosexual assault"); Housel v. State, 355 S.E.2d 651, 652-3 (Ga. Ct. App. 1987) (noting that defendant claimed he "freaked" when victim purportedly made a "gesture" that defendant interpreted as a homosexual advance; defendant stabbed his victim several times in his car, pushed the victim into a ravine and stabbed the victim again when the victim tried to climb out of the ravine). The United States Supreme Court itself has without basis, falsely described an alleged sexual advance as a sexual assault warranting violence. In 1968, Stillman Wilbur bludgeoned Claude Hebert to death in Hebert's hotel room using "both his fists and a blunt instrument to inflict bodily injuries of such severity that Hebert died within a few minutes." Maine v. Wilbur, 278 A.2d 139, 140 (Me. 1971). The "visible wounds on the body of the victim . . . and the blood stains and spatters in the room" led the medical examiner and the investigating officers to conclude that Wilbur applied "prolonged and inordinate force" to Hebert, killing him in a manner that was particularly "bloody and atrocious." *Id.* at 141. Wilbur was arrested, tried and convicted for the felonious homicide of Hebert, and Wilbur did not deny killing his victim. *See id.* Wilbur only told police that Hebert had made an "indecent overture" toward him and that he killed Hebert in a frenzy. *Id.* Wilbur also offered no other evidence of the overture. *See id.* In reviewing the claim, Justice Powell, writing for the Supreme Court, eerily equated Hebert's alleged "homosexual advance" with a "homosexual assault," though there was no evidence supporting such a characterization. *See* Mullaney v. Wilbur, 421 U.S. 684, 685 (1975).

266. *See, e.g.*, Clark v. Alabama, 451 So. 2d 368, 370 (Ala. Crim. App. 1984) (noting that the defendant allegedly fought off sexual advances after a night of drinking and accompanying his victim to his hotel room); Walden v. Georgia, 307 S.E.2d 474, 475 (Ga. 1983) (finding that defendant scuffled with his victim in a bar); Schick v. Indiana, 570 N.E.2d 918, 921-22 (Ind. Ct. App. 1991) (finding that the accused claimed to have been the victim of a gay pass shortly after a night of heavy drinking); Massachusetts v. Doucette, 462 N.E.2d 1084, 1089 (Mass. 1984) (noting that the defendant admitted to following his victim to a hotel room while drunk).

way that threatened the killers, and neither victim could have overpowered their killers at the times of their deaths since both were outnumbered by their killers and their killers' accomplices. Moreover, both Helvey and Mullins spent time with their victims without, apparently, witnessing any revolting stereotypes sufficient to inspire a killing. Helvey has claimed it was only upon learning that Schindler was gay that his dislike of Schindler intensified into hatred and gave him an acceptable target for his beatings. Mullins, who may have dabbled in homosexual experimentation, did not kill Gaither for his purported "sin." Rather, Mullins was apparently revolted by the thought that someone might have perceived he was gay, particularly since he spent time with Gaither. In sum, by their own admissions, what enraged both killers most of all was the thought that *someone else* might perceive *them* as gay.

Sifting through these confessions, it becomes clear that both Helvey and Schindler attacked their victims to display their power over homosexuality. Despite claiming to fear and loathe gay sexuality, neither Helvey nor Mullins made any effort to avoid it. Instead, like so many other murderers of lesbians and gay men,[267] both men sought out proximity to their gay victims to inflict harm on them. Terry Helvey certainly had no fear of being seen in public with his gay victim as long as he could be seen stalking, bludgeoning, and destroying him in front of a witness. With Charles Butler along for the ride to witness the murder, Mullins could ensure that his hostility to gayness would be confirmed and repeated. Certainly, Mullins did not have to proposition Gaither, bar hop with him, and lure him to a remote location to put a stop to his alleged flirtations. For both killers, their notoriety as antigay men has allowed them to shroud themselves in graphic antigay imagery, counteracting their worst fears of being perceived as gay.

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267. Numerous studies and press accounts show that gay bashers generally take elaborate steps to stay in contact with gay people, particularly in gay bars, so that they can pursue their victims. *See*, COMSTOCK, *supra* note 7, at 72, 73 (1991) (offering examples of one young attacker who faked identification to gain access to a gay bar; another who purposefully drove to a gay neighborhood to commit his crime; another who cruised gay men in a park prior to beating them; and yet another who said "we went out to get faggots because we hate them"). Hate crimes, in fact, often overlap with "pickup crimes," where predators themselves apparently make or trade sexual advances to make contact with a victim for the purpose of committing a crime. *See* John Gallagher, *Flirting with Disaster*, ADVOCATE, Oct. 28, 1997, at 39. To murder Matthew Shepard, for example, Aaron McKinney and Russell Henderson apparently pretended to be gay to get close to him so that they could lure him to accompany them, then rob and murder him. *See* Michael Janofsky, *A Year After a Gay Man's Killing, Laramie Braces for a Second Trial*, N.Y. TIMES, Nov. 5, 1999, at A1. Brazenly one of the killers then tried to claim that he killed Shepard in a "panic" because, while drunk and drugged, he thought Shepard grabbed his genitals and licked him. *See* Michael Janofsky, *A Defense to Avoid Execution*, N.Y. TIMES, Oct. 26, 1999, at A18.

The gruesomeness of the murders of Schindler and Gaither particularly illustrate that the objective of the killers was never self-protection from any threat, but obliteration of the personification of gayness. Both murderers achieved their goals by turning their murders into attention-grabbing spectacles with "extraordinary acts of sadism."[268] In this respect, the killings of Schindler and Gaither are far from unique. They are, in fact, much like the murder of Rebecca Wight, a woman who was shot in the head and the back while her lover was shot in the arm, the face, the head, and twice in the neck in Pennsylvania,[269] or like the murder of Michael Murray, who was beaten into unconsciousness, stabbed twenty-nine times with a screwdriver, then drowned by his killers in New York,[270] or the murder of Stephen Goedereis, who was kicked in the head twenty times until his face was shattered beyond recognition in Florida.[271] According to Mark Potok of the Southern Poverty Law Center, "In ordinary crimes, people are beaten or shot. That doesn't seem to be enough for these killers of homosexuals. They have to break every bone in their face or stab them 30 times."[272] Apparently, for one murdered gay person after another, the observation that their murderers kill by "torture, cutting, mutilation, and beating . . . to rub out the human being" has now become axiom.[273]

A framework of justification rhetoric thus emerges from the violence of the murders of Schindler, Gaither, and others like them. First, the perpetrators of antigay violence construct threatening gay acts and identities to justify purportedly uncontrollable violence, even though, under scrutiny, the "threat" in each case appears uncorroborated at best and wholly imaginary at worst. Second, the perpetrators pursue their

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268. Chris Bull, *The State of Hate*, ADVOCATE, Apr. 13, 1999, at 24 (quoting Jack Levin, director of the Brudnick Center on Violence at Northeastern University).

269. The story of the murder of Rebecca Wight and the attempted murder of Claudia Brenner can be found in Pennsylvania v. Carr, 580 A.2d 1362, 1363 (Pa. Super. 1990). The attack on Wight and Brenner is also detailed in CLAUDIA BRENNER, EIGHT BULLETS: ONE WOMAN'S STORY OF SURVIVING ANTIGAY VIOLENCE (1995).

270. *See* N.Y. v. Keller, 667 N.Y.S.2d 814, 815-816 (N.Y. App. Div. 1998) (describing the brutal riverside murder of Michael Murray in the City of Binghamton, Broome County, "the motive being defendant's belief that Murray was homosexual").

271. Two teenagers accused Stephen Goedereis of calling one of them beautiful, then stalked Goedereis, beating him into unconsciousness and crushing his head, kicking it 20 times. *See* Kellie Patrick, *Two Sentenced in Gay Man's Killing: Hate Crime Law Applied to Teens*, FT. LAUDERDALE SUN SENTINEL, Sept. 4, 1999, at 1B; Associated Press, *Teen Convicted of Killing Man Who made A Pass*, BUFF. NEWS, June 15, 1999, at 8A (describing the infliction of wounds); *Two Teens Convicted in Gay Man's Death*, L.A. TIMES, June 15, 1999, at A11 (describing the condition of Goedereis' body).

272. *See* Chris Bull, *supra* note 268 (quoting Potok).

273. *See* VIOLENCE PROJECT: NATIONAL GAY AND LESBIAN TASK FORCE, ANTIGAY VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1988, at 9 (1988).

victims for excessive punishment, in part to justify their invented threats by matching them with extraordinary and destructive action. Whatever inspires the violence from the outset—a need for cash, a desire for murderous fun, or merely a need to affirm one's superiority—the framework serves to justify the violence in the moment, and apparently to sustain it against all charges of unprovoked violence long thereafter.

### *C. Rhetorical Links Between the Confessions of Antigay Murder and Antigay Policy: The Rhetoric of Violence in Military Policy*

For decades, United States military policy on homosexuality has been based on a remarkably violent and homophobic farce. In the year 2000, the United States Department of Defense (DoD) finally conceded that it can order all service members to work with others perceived to be lesbian or gay, and that it can expect harassment and violence not to occur within military ranks.[274] But as late as the 1990s, a staggering array of military leaders directly invoked antigay violence as justification for "traditional" bans on lesbians and gay men from military service, claiming that heterosexuals have never been expected to serve with openly homosexual service members because military units would collapse under thirsts for antigay violence.[275] If the DoD's current view of its ability to stop such violence is correct, the military "tradition" of accommodating violent homophobia should now widely be understood to have been a vicious ruse.

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274. In July 2000, the DoD announced that it would order implementation of antiharassment training throughout the services and require service members to refrain from harassing perceived lesbians and gay men. *See* note 315 *infra*. President Clinton amended the Manual for Courts-Martial by Executive Order in October 1999 to allow a service member convicted of crimes of violence to receive enhanced penalties for infliction of violence based on the sexual orientation of the victim. *See* Exec. Order 13,140 64 Fed. Reg. 55,115 (1999).

275. Congressional and military experts split over this claim, further corroborating the schizophrenic nature of military decisionmaking. The House Armed Services Committee, along with Retired General Norman Schwartzkopf and others, insisted that predominantly heterosexual units would experience breakdowns in trust and order if made to work with homosexual service members. *See* H. REP. No. 103-200 at 287-89 (1993); S. REP. No. 103-112 at 274-76, 279-81 (1993). The Senate Armed Services Committee, along with Chairman of the Joint Chiefs of Staff Colin Powell, insisted throughout its report that its primary concern was exposing heterosexual service members to open homosexuality, since heterosexuals could be ordered to work with lesbians and gay men and since antigay violence was punishable. *See* S. REP., *supra* at 277-81. The Committee further stated that no means for containing sexual tension existed. *Id.* at 281. And yet, the Committee somehow reasoned that discovered "homosexuals" could only remain in the military by proving they are not homosexual, a mandate suggesting that something more than "public homosexuality" was the Senate's concern. *See id.* at 294 (suspected service member must prove he or she is not a homosexual). As explained, *infra* note 336, the federal government and federal courts agree that current policy requires discovered homosexuals to prove they are not homosexual.

During periods in which the federal government has both banned lesbians and gay men from service and allowed closeted lesbians and gay men to serve, the DoD has, in fact, been aware of brutal acts of antigay violence committed by service members. In this sense, the DoD's current opposition to antigay violence is not merely a concession of error. It is, rather, a *confession* that the DoD could have controlled, or attempted to control, decades of antigay violence committed by service members. The facts allow no other conclusion:

- In the early 1990s, numerous service members worldwide were caught murdering and battering gay civilians.[276] Though crime after crime eventually became public, the DoD developed no policy for controlling such violence. When military officials responded to the violence, the response was typically nonchalant. For example, when twelve Marines severely beat gay men outside a bar in Washington, DC, in 1990, Marine Colonel Peter Pace told reporters, "A gay bashing would mean that someone was looking specifically for a gay person to attack, and my understanding is that the Marines were drunk, words were exchanged, and they did something very stupid. I have no reason to believe it was anything more."[277] Colonel Pace could not explain why his Marines were shouting antigay slurs outside a gay bar, or why Marines had been suspected of throwing tear gas into the bar a decade earlier.[278] His soldiers were only fined $400 each for disorderly conduct.[279] Two months later, more Marines from Pace's base attacked patrons at the bar and were only fined $800 each.[280]

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276. *See* THE HUMAN RIGHTS CAMPAIGN, A DECADE OF VIOLENCE: HATE CRIMES BASED ON SEXUAL ORIENTATION, 2 (1999) (describing service member attacks in Alabama and California); *10 Years for Marine Who Killed Japanese*, CHI. TRIB., Mar. 24, 1994, at 16 (describing a Japanese court conviction of Marine PFC Christopher Glidden for murdering a man with concrete block in response to purported gay sexual advance); Thom Mrozek, *Navy Corpsman Sentence to Life in Park Slaying of Homosexual*, L.A. TIMES, Nov. 14, 1992, at B10 (describing sailor's murder of a gay man); *Marines Sentenced in Attack on Gay*, L.A. TIMES, May 9, 1992, at B5 (describing sentencing of two Marines who pleaded guilty to misdemeanor hate crime and felony assault for beating and robbing a gay man outside a bar); *Sailors Sentenced in Beating of Gay*, SAN DIEGO UNION, Dec. 19, 1991, at B11 (describing sentencing of two sailors who admitted to hate crime attack on a gay man in a bar).

277. *See* Stephen Buckley, *Fight on Hill Involving Gay Men, Local Marines Heightens Tensions*, WASH. POST, June 21, 1990, at B6. The Marines shouted epithets such as "Kill the fags!" at the gay customers prior to the attack. *See* Debbie Howlett, *Gay Patrols Taking Steps to Fight Hate Attacks*, USA TODAY, Oct. 10, 1990, at 3A.

278. *See* Jennifer Ordonez, *Police Criticized for Response to Tear Gas Attack at D.C. Bar*, WASH. POST, July 17, 1997, at A16.

279. *See 2 Marines Disciplined in Fight with Gay Patrons of D.C. Bar*, WASH. POST, July 5, 1997, at C7.

280. *See* Howlett, *supra* note 277.

- By 1993, Retired General Norman Schwartzkopf shockingly told Congress, without reproach, that "in every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual . . . violence sometimes followed. . . ."[281] Marine Colonel Frederick Peck testified that he would not want his gay son to serve in the Marines because his life "would be hell" and "in jeopardy from his own troops."[282] According to Peck, "[f]ratricide is something that exists out there, and there are people who would put my son's life at risk in our own Armed Forces," and "straight males would probably murder gays."[283] One naval officer even testified that a sailor perceived to be gay was thrown overboard at sea and, when asked what was done to stop it or control it, the officer responded, "Of course, we conducted an investigation. . . . . But the fact is, the man is gone."[284]
- A 1993 study commissioned by the DoD concluded that "the occurrence of anti-homosexual violence in the military . . . is at least partly a reflection of military leadership" and that combating antigay violence required "a clear message from leadership of zero tolerance for such violence."[285] Moreover, the study noted, "Any policy that includes penalties for revealing one's homosexual status may further discourage reporting" of violence.[286] In short, the report concluded that antigay violence "clearly occurs in the military under current policy" and no evidence supported "any firm predictions about the likelihood of increased anti-homosexual violence" if openly gay and lesbian people were allowed to serve.[287]
- Despite receiving warnings through Congressional testimony of risks of antigay violence, both Congress and military leadership in 1993 expressly rejected a proposed military training policy that would have promoted an understanding of homosexuality on the grounds that such training would offend antigay military

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281. *See Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Servs.*, 103d Cong., 2d Sess., 596 (May 11, 1993) at 602.

282. *Id.* at 615.

283. *Id.* at 615.

284. *See Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Servs.*, 103d Cong., 2d Sess., 171 (1993).

285. *See* NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT [hereinafter NDRI REPORT] 273, 279-81 (1993).

286. *Id.* at 281.

287. *Id.* at 273.

members. As Congress formulated current separation policy, the House of Representatives Armed Services Committee opposed guidelines that would create "a sanctuary in the military where homosexuals could serve discreetly."[288] Though military leadership has historically had the power to require service members to subordinate to command their personal interests, including religious beliefs,[289] political beliefs, and desires for violence,[290] the Military Working Group convened by the DoD in 1993 insisted that all education on the military's policy "should not include sensitivity training" on homosexuality allegedly because such training would offend heterosexual service members' personal values.[291]

- In 1994, the DoD began to implement its "Don't Ask, Don't Tell" guidelines, and antigay violence spiked *inside* the military. From 1994 forward, the Servicemembers Legal Defense Network warned that antigay harassment was occurring in the ranks, reporting as many as 400 instances of death threats, verbal assaults, and physical assaults in 1998 and 968 in 1999. Many service members came out as gay, fearing for their safety, particularly when faced with threats such as, "You'd better not be gay because in the Navy we kill our fags" and "There's nothing wrong with killing a few fags."[292]
- After racist soldiers from Fort Bragg murdered African-American civilians in December 1995,[293] the Army adopted regulations to ferret out all military extremism that advocated "racial, gender, or ethnic hatred or intolerance" before it manifested in violence.[294]

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288. H. REP., *supra* note 275, at 289.

289. *See* Goldman v. Weinberger, 475 U.S. 503, 507, 509-10 (1986) (holding that military needs for uniformity can require male Jewish service members to forego wearing yarmulkes while on duty); Brown v. Gilnes, 444 U.S. 348, 356-61 (1980) (holding that military can expect service members to forego political expression, including circulating leaflets); Greer v. Spock, 424 U.S. 828, 840 (1974) (upholding regulation prohibiting unapproved distribution of publications on an Air Force base).

290. *See* United States v. Solorio, 483 U.S. 435, 439-42 (1987) (restoring authority of military to punish military service members for crimes unrelated to military service, and effectively returning to "an unbroken line of decisions from 1866 to 1960" recognizing such jurisdiction).

291. OFFICE OF THE SECRETARY OF DEFENSE, SUMMARY REPORT OF THE MILITARY WORKING GROUP 5 (1993).

292. *See* Service Members Legal Defense Network, 1998 Annual Report 5 (1999); Elizabeth Becker, *Harassment in the Military is Said to Rise*, N.Y. TIMES, Mar. 10, 2000, at A15.

293. *See* Serge F. Kovaleski, *Soldiers in White Supremacist Uniforms*, WASH. POST, Dec. 11, 1995, at A1. William Brannigan & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple*, WASH. POST, Dec. 9, 1995, at A1.

294. For a thorough discussion of Army regulations of extremism, *see* Maj. Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1 (1999).

Those regulations included *no* bans on antigay hate, even though in March 1997 the Under Secretary of Defense conceded that antigay harassment was occurring in the services.[295]

- By April 1998, the Under Secretary of Defense expressed concerns that threats of violence against service members perceived to be gay were not being reported because threatened service members feared such reports would trigger investigations of their sexuality.[296] Disturbingly, the Under Secretary admitted that "effective dissemination" of DoD directives for investigating antigay harassment "could not be documented."[297]
- In July 1999, Army Private Calvin Glover bludgeoned Private Barry Winchell to death, the culmination of four months of persistent antigay harassment by Winchell's platoon.[298] Indeed, months earlier, when gossip about Winchell's sexuality began to spread, his platoon leaders did nothing to stop the harassment that ensued.[299] Winchell's Platoon Sergeant, Michael Kleigfen, testified at official hearings on the murder that he declined to stop the harassment because he believed "[e]verybody was having fun."[300] Kleigfen did, however, begin to inquire of his soldiers about who might be gay,[301] conduct the DoD has categorically declared to be a violation of current military policy.[302] Once word spread that the platoon leaders suspected Winchell of being gay,

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295. *See* EDWIN DORN, OFFICE OF THE UNDER SECRETARY OF DEFENSE, GUIDELINES FOR INVESTIGATING THREATS AGAINST SERVICE MEMBERS BASED ON ALLEGED HOMOSEXUALITY (1997). The Under Secretary issued directives only recommending investigations of harassment. *See id.* The directives failed to include any statement broadcasting DoD's purported opposition to antigay violence. *See id.*

296. OFFICE OF THE UNDER SECRETARY OF DEFENSE, REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY 7 (1998).

297. *Id.*

298. While Winchell's family claims Winchell never identified as gay, his platoon mates have testified that the platoon perceived him to be gay and harassed him accordingly. *See* Francis X. Clines, *For Gay Soldier, a Daily Barrage of Threats and Slurs*, N.Y. TIMES, Dec. 12, 1999, at 33; Francis X. Clines, *Killer's Trial Shows Gay Soldier's Anguish*, N.Y. TIMES, Dec. 9, 1999, at A18. Winchell's lover, a preoperative transsexual, also claims Winchell accepted a gay identity simply because he was a man in love with a person who was still biologically male. Steve Friess, *Insult and Injury: Medial Coverage of Friend of Murdered Gay Soldier, Barry Winchell*, THE ADVOCATE, Feb. 1, 2000 at 22.

299. Mark Thompson, *Why Do They Have to Push Me Like That?*, TIME, Dec. 13, 1999 at 56.

300. *Id.* at 57.

301. *Id.*

302. *See* DEPARTMENT OF THE ARMY INSPECTOR GENERAL: FORT CAMPBELL TASK FORCE, DAIG SPECIAL ASSESSMENT/INVESTIGATION OF ALLEGATIONS OF VIOLATIONS OF THE DOD HOMOSEXUAL CONDUCT POLICY AT FORT CAMPBELL [hereinafter DAIG REPORT], July 2000, at 1. The report can be found at http://www.army.mil/ig/8report.htm

the platoon's harassment of Winchell intensified and continued for months.[303] On July 4, 1999, during an outdoor Independence Day celebration, Calvin Glover repeatedly taunted Winchell, eventually punching a beer out of Winchell's hands.[304] Winchell struck Glover with the palm of his hand, grabbed Glover around the waist, and threw him to the ground.[305] According to several accounts, Glover reportedly told Winchell "I will kill you," then told other soldiers "I won't let a faggot kick my ass."[306] Hours later, Glover spotted "that faggot" sleeping on a cot outside with the platoon mascot and bludgeoned Winchell's head and face while Winchell slept.[307] Glover smashed Winchell's head so brutally it shattered "like an eggshell," forcing Winchell's brains from his ears, and leaving his face swollen beyond recognition.[308] In a matter of days, Winchell died.[309]

In the days following the preliminary hearings on the Winchell murder, the DoD finally agreed to issue anti-harassment guidelines, guidelines that it had delayed issuing for more than two years, guidelines that might have prevented Winchell's death.[310] Disturbingly, according to Pentagon officials, the DoD issued the guidelines not as a result of the violence *per se*, but primarily in response to the public uproar over it.[311]

- In March 2000, the Inspector General (IG) for the Department of Defense released his report on antigay harassment and violence in the military, finding that eighty percent of service members surveyed in military units worldwide witnessed offensive and derogatory antigay speech in the previous year, and thirty-seven percent witnessed antigay harassment.[312] In July 2000, the IG for

303. Thompson, *supra* note 299, at 57.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. These guidelines were still not issued until February 2000, when they appeared under the moniker of revised military policy, a policy now apparently known as "Don't Ask, Don't Tell, Don't Harass." *See* Elizabeth Becker, *Pentagon Orders Training to Prevent Harassment of Gays*, N.Y. TIMES, Feb. 2, 2000, at A15. Prior to the unveiling of the new policy, the Pentagon had never required universal training for all service members and had never ordered full compliance with antiharassment training in all branches of the Armed Forces. *Id.*
311. Philip Shenon, *Pentagon Moving to End Abuses of "Don't Ask, Don't Tell" Policy*, N.Y. TIMES, Aug. 13, 1999, at A1.
312. OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY (REPORT NO. D-2000-101), Mar. 16, 2000, at 4. The Inspector General also found that eighty-five percent (85%)

the Department of the Army (DAIG) concluded Fort Campbell was merely in need of training to stop antigay recreational bashing, claiming that heterosexual service members simply might not perceive such conduct as serious, even though, on reflection might others reasonably perceive it to be harassment.[313] Indeed, while the DAIG reported only summarily that no climate of homophobia permeated Fort Campbell, facts continued to emerge indicating that, while many soldiers at Fort Campbell regularly visited a gay night club prior to Winchell's death, others engaged in ritualistic and uncontrolled antigay taunts.[314] Based on these reports, the DoD decided that from July 2000 forward, military commanders would be expected to prevent antigay harassment and violence throughout the services, and that service members could be ordered to work alongside service members perceived to be gay.[315]

- As the above timeline shows, the military's shift from ambivalence to antigay violence, on the one hand, to superficial opposition to it, on the other, has been phenomenally schizophrenic, not just in its evolution but in its persistent assessment of its own rationale, much in the way gay bashers assess their own psychoses. Like Terry Helvey and Steven Mullins—admitted antigay murderers who do not actually consider themselves killers—current military leadership continues to be at least of two minds—one the nonviolent, nonhomophobic, rational decisionmaker, struggling to deal with charges of homophobia, and the other, murderous and reckless, forced to admit that it has killers within its own ranks. And like Helvey and Mullins, military leadership continues to insist that it is tolerant of gays and lesbians, provided that gays and lesbians remain at a

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of surveyed service members perceived tolerance of antigay speech by military command and five percent (5%) perceived tolerance of antigay harassment. *See id.*

313. *See* DAIG REPORT, *supra* note 302, at 1-12. On the amount of harassment Winchell endured at Fort Campbell, the DAIG REPORT has curiously minimized the fact that the testimony given at Glover's preliminary hearings is inconsistent with the contents of the Report. The sworn testimony of service members at those hearings, including that of Winchell's platoon sergeant, was that the harassment was substantial. *See, e.g.*, Francis X. Clines, *Killer's Trial Shows Gay Soldier's Anguish*, N.Y. TIMES, Dec. 9, 1999 at A18; Francis X. Clines, *For Gay Soldier, a Daily Barrage of Threats and Slurs*, N.Y. TIMES, Dec. 12, 1999 at 33. The DAIG REPORT is based on platoon members perceptions of whether the harassment was in jest or not. It declares overall harassment to have been minimal, comparing the number of those who witnessed it to the number of those who claimed not to see it.

314. *See* Thomas Hackett, *The Execution of Pvt. Barry Winchell*, ROLLING STONE, Mar. 2, 2000, at 86.

315. *See* Elaine Sciolino, *Pentagon Orders Punishment for Any Harassment of Gays*, N.Y. TIMES, July 22, 2000, at A8.

distance, submitting to others for definitions of acceptable exercises of liberty. Under the circumstances, it should come as no surprise that, on close analysis, the justification for current military policy rhetorically parallels a defense of a gay bashing.

*Homosexuals Are Disgusting, Sick, and Scary*

The military policy known as "Don't Ask, Don't Tell" superficially pleads ignorance and respect for the privacy of gay persons and for gay persons themselves. Beyond that, it *exhibits* neither, separating lesbians and gay men from service for a propensity to engage in "homosexual conduct" and privately engaging in gay sex.[316] Like all gay bashing, at the core of current military policy is a purportedly categorical objection to the sexual activity that gay people desire, something supposedly different from heterosexist norms.[317] In the military context, that objection has been persistently stubborn, a deeply rooted tradition of regulating homosexuality that has arisen from panicked efforts to purge the military of the image of deviance.[318] Though these sex prohibitions have facially targeted all noncoital sex,[319] at all times the military has primarily committed to ferreting out "deviate" homosexual sex, using sting operations and psychiatry to separate only people with gay desire from service.[320]

Of course, the military's current policy of purportedly allowing gay and lesbian men to serve is fundamentally at odds with its longstanding anxiety about sexual deviance. As one of the military's leading experts on separating gay people from service has conceded, the very policy of "Don't Ask, Don't Tell" should logically render all claims about the *per*

316. For defenses of current policy conceding the policy does not exhibit "good faith" respect for privacy of gay and lesbian service members, see Capt. John A. Carr, *The Difference Between Can and Should:* Able v. United States *and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1 (1999); Arthur A. Murphy, *Defending or Amending "Don't Ask, Don't Tell"*, 102 DICK. L. REV. 539, 546-48 (1998).

317. *See* NDRI REPORT, *supra* note 285, at 3-11.

318. For direct regulation of deviate sex in the Articles of War, see 41 stat. 787, art. 93 (1920). As the Senate Armed Services Committee noted, regulation of habits and "good order and discipline" were often the primary means of punishing homosexuality until the Code for Military Justice included consensual noncoital sex under the rubric of sodomy. *See* S. REP., *supra* note 275, at 265. *See also* § VII of Army Regulation 615-200.

319. *See* c. 1041, 70A Stat. 74 (1956). The statutory prohibition on all "unnatural" sex, both homosexual and heterosexual, continues today. *See* 10 U.S.C. § 925. art. 125 (1999).

320. For a thorough indictment of the labeling effect of branding persons with homosexual desire "deviants" in the military context, see COLIN J. WILLIAMS & MARTIN S. WEINBERG, HOMOSEXUALS IN THE MILITARY: A STUDY OF LESS THAN HONORABLE DISCHARGE (1971). *See also* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO, 128-74 (1990)

*se* incompatibility of homosexuality and the military "nonsense."[321] And yet, even though gay sex has never been shown to pose any threat to military readiness or cohesion, the DoD now maintains that gay people can serve in the military as long as they do not have such sex.[322]

The military's extensive focus on gay sexual *acts* has depended on the pretense that "deviant" sex is not practiced by "good" service members, or, for that matter, even heterosexual ones.[323] Of course, countless heterosexual service members have always engaged in fornication, oral sex, commercial sex, and adultery, acts which are condemned by popular morality.[324] Yet, because the military only punishes adulterous conduct when it is "open" and creates personnel conflicts,[325] the military can maintain a false public claim that individual

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321. *See* Maj. (Ret.) Melissa Wells-Petry, *Sneaking a Wink at Homosexuals? Three Case Studies on Policies Concerning Homosexuality in the United States Armed Forces*, 64 U. MO. K.C. L. REV. 3, 50 (1995) ("that homosexuals presently are allowed by law to serve . . . then Congress uttered nonsense" when it claimed that military cohesion would be effected by allowing the DoD to exercise discretion in asking potential service members about homosexuality prior to accession).

322. *See* NDRI REPORT, *supra* note 285, at 9-10. United States military leadership has historically punished gay sex to ease its anxiety about conforming to heterosexist pressures and dogma. As early as World War I, when troop mobilization provided opportunities for men to leave home and explore having sex with men, opportunistic homosexuality in the ranks flourished, horrifying both military and civilian sexual moralists who saw the mostly-male military as a breeding ground for homosexuality. For extensive coverage, see CHAUNCEY, *supra* note 149, at 142-48; *see also* LAWRENCE MURPHY, PERVERTS BY OFFICIAL ORDER: THE CAMPAIGN AGAINST HOMOSEXUALS BY THE UNITED STATES NAVY (1988). The crackdowns continued through World War II. *See* BÉRUBÉ, *supra* note 320, at 23-27.

323. Radically divergent points of view confirm that moral distinctions about homosexuality undergird military sexual policies. *Compare* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998) (tracing the roots of objections to male sexual misconduct in the military), *and* LAWRENCE MURPHY, *supra* note 316, at 549-51 (describing moral objections to homosexuality as critical to military objections to homosexuality given the lack of evidence of harm caused by or connected with homosexuality, particularly homosexual sex among women).

324. The military simply does not prosecute all fornication. *See* United States v. King, 34 M.J. 95, 96-97 (C.M.A. 1992). In the case of adultery, military policy currently provides for prosecution only when it can be shown to affect "good order and discipline" and brings "discredit upon the armed forces." *See* United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) ("We are not prepared to state a per se rule that sexual intercourse between a married soldier and person not his or her spouse constitutes the offense of adultery under Article 134, UCMJ.")

On the question of oral sex, it is unlikely the military could *ever* be said to root such sex out of the military. The NDRI study presented to the Department of Defense found a high incidence of oral sex in both the heterosexual and homosexual population, stating that "it seems reasonable to assume, based on general population estimates, that a majority of married and unmarried military personnel engage in oral sexual activity, at least occasionally." *See* NDRI REPORT, *supra* note 285, at 58.

325. *See* Frank Bruni, *Adultery Alone Often Fails to Prompt a Military Prosecution*, N.Y. TIMES, Dec. 13, 1998, at 29 (describing how only flagrant adultery triggers prosecutions); Captain James M. Winner, U.S.A.F., *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1077 (1998) (noting 900 cases

heterosexuals are "moral" in the customary sense unless they flagrantly demonstrate otherwise. In contrast, since sexual minorities can be scapegoated without impugning the sexual majority, the military has been able to sweepingly criminalize the private and public sex lives of any such minorities, all of whom are punishable as symbols of the military's purported commitment to sexual morality.

Over time, military leadership's willingness to use absurd antigay stereotypes to justify proscriptions on gay sex and people who desire it has evidenced at least some psychosis. For instance, the military once justified separation of lesbians and gay men from service on the grounds that homosexuals were unstable and susceptible to blackmail, though to date, the military has been unable to corroborate any of these claims.[326] Even broad smears of more recent vintage have put the military's ability to reason about gay sex in a poor light. The military's conflation of gay identity with susceptibility to the Human Immunodeficiency Virus (HIV), for example, has crumbled since the military has had to admit that HIV has often been transmitted in the ranks heterosexually.[327] Branding homosexuals as sexual predators has also proven ineffective, since

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of adultery prosecuted in all four services over a five-year period); Steven Lee Myers, *Pentagon to Tighten Army's Fraternizing Ban*, N.Y. TIMES, July 28, 1998, at A8 (describing extremely uneven regulation of sexual contact between service members in all four branches of the Armed Services); Peter Cary, *Navy Justice*, U.S. NEWS & WORLD REP., Nov. 9, 1992, at 46, 46 (describing campaigns against "homosexuals" as comprising half of the Naval Investigative Service caseload compared to investigations of heterosexual sexual conduct investigated "under certain circumstances").

326. *See* Theodore E. Sarbin & Kenneth E. Karols, *Nonconforming Sexual Orientation in the Military and Society*, PERSONNEL SECURITY RES. & EDUC. CTR. REP., No. 89-002, at 29 (1988) (summarizing DoD-commissioned survey of thirty years of policy and research showing no security risk based on sexual orientation discovered since release of UNITED STATES NAVY, REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS (1957)); *see also* NDRI REPORT, *supra* note 285, at 2 ("[o]nly one policy option" was found to be consistent with its research and logic: that "sexual orientation, by itself" is "not germane to determining who may serve in the military"); GENERAL ACCOUNTING OFFICE, REPORT TO JOHN CONYERS, TED WEISS, & GERRY E. STUDDS, U.S. HOUSE OF REPRESENTATIVES ON THE EXCLUSION OF HOMOSEXUALS FROM THE ARMED FORCES 3 (1993) (noting that "the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have recently acknowledged that homosexual orientation is no longer a major concern").

327. *See* United States v. Dumford, 30 M.J. 137 (C.M.A. 1990) (upholding conviction of a HIV-positive member of the United States Air Force court-martialed for engaging in unsafe heterosexual sex); United States v. Sargeant, 29 M.J. 812 (A.C.M.R. 1989) (upholding conviction of a HIV-positive Army Sergeant convicted of engaging in unsafe heterosexual sex); United States v. Woods, 27 M.J. 749 (N.M.C.M.R. 1988) (upholding conviction of a HIV-positive Navy Hospitalman court-martialed for engaging in unsafe heterosexual sex). The military has correctly admitted that unsafe sex, not sexual orientation, determines transmission of sexually transmitted disease and has applied that policy to service members regardless of sexual orientation. *See* John A. Anderson et al., *AIDS Issues in The Military*, 32 A.F. L. REV. 353 (explaining need for the policy to prevent heterosexual transmission).

heterosexual males have become infamous nationwide for sexual harassment of women in the military[328] and sexual hazing of men outside of it.[329] Under these circumstances, military leadership has had understandable difficulty distinguishing stereotypes of homosexuality from much heterosexual behavior.

Not surprisingly, punishing and stigmatizing gay and lesbian identity has only rendered that identity virtually meaningless in the military context. Service members who identify as gay have largely concealed their identity in the military over time to remain in service.[330] Still others who might have as identified as gay in a climate that did not punish homosexuality have acquiesced to conventional wisdom that a homosexual orientation is so "wrong" that even they should not accept that they have one.[331] Consequently, military leadership has been forced to admit that the tradition has been "ineffective . . . in deterring homosexuals from entering the military."[332] Accordingly, the military tradition has only proven its opposite: gay and lesbian service members have always served honorably in the military, capable of suppressing

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328. Government officials and military scholars have frequently concluded that heterosexual sexual harassment has been encouraged by misogynist military leadership and that the remedy to such harassment is increased gender equality throughout the ranks. The official government response to the Tailhook 1991 scandal, for example, was that the most egregious and disturbing sexual harassment was perpetrated by officers, and that the chaos that was unleashed at the Tailhook Convention was a breakdown of leadership. *See* DEP'T. DEF., INSPECTOR GEN., THE TAILHOOK REP. 84-96 (1993).

Scholars have increasingly linked increased participation by women in the military as essential to combating gender bias in the military ranks. *See* Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39,63-66, 87 (1999) (describing how disengagement by women from the military reduces opportunities for women to influence sexual harassment and other forms of gender-biased policy); ROSEMARIE SKAINE, POWER AND GENDER 313-15 (1996) (surveying problems of harassment as problems both of command and "systemic" gender inequality in the military); JEAN ZIMMERMAN, TAILSPIN 279-83 (1995) (summarizing the importance of gender equality to challenge stereotypes of women in the military).

329. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 76-78 (1998) (citing briefs describing workers who identified as heterosexual and disavowed interest in gay sex but also harassed male heterosexual worker by threatening to rape him, taunting him as a homosexual, and physically assaulting him, including thrusting a bar of soap in his rectum); Quick v. Donaldson Co., 90 F.3d 1372, 1374-75 (8th Cir. 1996) (describing a group of heterosexual male employees accused of "bagging," or grabbing, another heterosexual employee's genitals); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996) (describing heterosexual workers accused of harassing perceived gay worker by exposing themselves to him, binding and forcing him to his knees while forcing him to simulate oral sex, placing a broomstick to his anus, and fondling him).

330. The two classic works on this subject are BÉRUBÉ, *supra* note 320, and RANDY SHILTS, CONDUCT UNBECOMING (1993). Bérubé in particular has detailed how service members from the beginning of World War I both denied their sexuality to get into service, *see, e.g.*, BÉRUBÉ, *supra* note 320, at 4-6, 23-25, and simply began discovering that they were gay once away from home. *See id.* at 243-49.

331. *Id.*

332. OFF. SECRETARY DEF., SUMMARY REPORT OF THE MILITARY WORKING GROUP 7 (1993).

their identity, precluding a claim that any mission has been compromised by a service member's homosexuality.[333]

*That's What Was Bred into You as Soon as You Got to Camp: It Was Banged into Your Head, "The Navy and Gays Are Not Compatible:' It's Like a Big Joke: 'Throw 'Em off the Ship*

Just as gay bashers typically have fabricated threats posed by their victims to compensate for the lack of actual justification for their violence, the military's inability to identify harms caused by lesbians and gay men has required Congress and the DoD to resort to imaginary threats posed by homosexual service members to justify current military policy. This is especially true now that the DoD has conceded it can require service members to work with others perceived to be gay and has effectively wiped out claims that unit cohesion is threatened by the presence of known gay service members.[334] And so, consistent with their objection to homosexuality in general, Congress and the DoD have been reduced to maintaining one claim and one claim only to justify punishment of lesbians and gay men: allowing lesbians and gay men to openly serve disturbs homophobic service members, who would purportedly imagine that gays and lesbians desire them and, thus, would feel so uncomfortable showering and sleeping with "known homosexuals" that units could not function effectively.

Of course, if Congress or the DoD ever seriously anticipated sexual tension from homophobes imagining homosexual attraction, military leadership would have had no choice but to promulgate regulations prohibiting glances or touches between persons of the same gender in order to squelch all hints of homosexual desire sparked by homophobic imagination. Not surprisingly, though, no regulations of unwanted touches and glances have ever existed in the Armed Forces between members of the same sex, because no uncontrollable sexual tension exists. Just as in locker rooms and community showers nationwide,

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333. *See* BÉRUBÉ, *supra* note 320.

334. As noted above, both the Senate Armed Services Committee and the Chairman of the Joint Chiefs of Staff conceded that heterosexual service members could be ordered to work with gay and lesbian service members. *See* S. REP., *supra* note 275, at 279-81. Interestingly, the Pentagon is currently looking to economic packages and image reform as a means of reversing recent declines in personnel, declines which cannot be attributed to the service of lesbians and gay men. *See* Elizabeth Becker, *Armed Forces to Try a Hollywood Pitch for Luring Recruits*, N.Y. TIMES, Jan. 29, 2000, at A16 (quoting Secretary of Defense William S. Cohen as claiming "Tom Cruise in 'Top Gun' did more for recruiting than any strategy we've ever come up with"); Michael Kilian, *Military's Recruitment Slump Solved by 4.8% Pay Increase; Pilot Drain, However, Keeps Air Force Short*, N.Y. TIMES, Oct. 6, 1999, at 12; Barbara B. Buchholz, *May the Armed Forces Be with You; Uncle Sam Still Wants You—and He's Got the Incentives to Prove It*, CHI. TRIB., Oct. 3, 1999, at C1.

lesbians and gay men in the military have proven capable of refraining from conduct that might cause sexual discomfort.[335]

Still, with "Don't Ask, Don't Tell" broadcasting that gay and lesbian service members serve in the ranks, even the dimmest homophobes should already be aware that gay and lesbian service members shower and bunk with them under a meaningless cover of "heterosexuality."[336] To make matters even more absurd, because the First Amendment arguably protects certain forms of expressive and associational activity, Congress and the DoD currently make no attempt to prevent service members from marching in gay pride parades or going to gay bars on gay dates,[337] conduct which should indicate as much a propensity to engage in gay sex as holding hands or stating categorically "I am gay,"[338] even though holding hands and making such definitive statements are credible evidence leading to discharge.[339]

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335. As historian Allan Bérubé noted, gay and lesbian people have proven quite capable of fitting in on heterosexual terms, albeit because of antigay measures. *See* BÉRUBÉ, *supra* note 320, at 52-66. Accordingly, there is no reason to assume that gay and lesbian service members could not conform to a "no-look, no-touch" policy any less than they could conform to a more oppressive one. For a study of the phenomenon applied to the military context, see Gregory M. Herek, *Why Tell if You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197-219 (Gregory M. Herek et al., eds. 1996) [hereinafter OUT IN FORCE].

336. In the Department of Defense's 1993 study on service members, participants in virtually every group of service members surveyed assumed that homosexual service members were serving with them. *See* NDRI REPORT, *supra* note 285, at 230. Even without regard to discharges confirming the presence of lesbians and gay men in the military, military policy on its face suggests that neither Congress nor any of its military advisors have ever believed that service members are significantly bothered by sleeping and showering with persons with a professed interest in gay sex. Both current and former military policy have allowed "heterosexual" service members to remain in the ranks if they are found to have engaged in gay sex through "indiscretions"; the same is arguably true of homosexual service members who can somehow rebut a presumption that they have a propensity for homosexual sex. *See* 10 U.S.C. § 654(b)(1) and (2) (1999); DoD Directive 1332.14(H)(1)(c) (1982). Even if insignificant numbers of heterosexuals and "asexual-homosexuals" have taken advantage of the military's "escape clause," that clause could never have existed in military policy if the sexual tension claim were real; it would unacceptably have risked broadcasting that some persons with an interest in gay sexual desire might be allowed to stay in the ranks. Both defenders and opponents of current separation policy have claimed that the exception is rarely, if ever, used. *See, e.g.*, Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 277-80 (1996) at 257-61; Wells-Petry, *supra* note 321. The United States, as well as courts reviewing the matter to date, have officially rejected this view. *See, e.g.*, Able v. United States, 88 F.3d 1280, 1298-99 (7th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 930 (4th Cir. 1995); Richenberg v. Perry, 909 F. Supp. 1303, 1313 (D. Neb. 1995).

337. *See* DoDD 1332.14 (encl. 3, att. 4) at C(4), p. 4-2.

338. Generally, the First Amendment protects the right to march in a parade. *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group, 515 U.S. 557 (1995) and the right to associate for cultural purposes; Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317, 1326-27 (5th Cir. 1984); Gay Students Org. of the Univ. N.H. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974); One Eleven Wines & Liquors, Inc. v. Div. Alcohol Beverage Control, 235 A.2d 12 (N.J. 1967) (citing NAACP v. Alabama, 357 U.S. 449 (1958)). Because the Court has held that "'our citizens in

Even if openly gay and lesbian service members generate discomfort by their identity, it is difficult to believe that homophobic service members cannot be taught to overcome fear of imagined same-sex attraction, just as they are taught to overcome fear of combat,[340] and just as they are taught the "sexual modesty" the DoD so desperately seeks to protect.[341] Moreover, if sexual panic causes heterosexuals to assume that "known homosexuals" will make sexual advances against them, it is inconceivable that such paranoia can be assuaged by cloaking homosexuals in the military, enabling them to "lurk" undetected there.

The "sexual tension" justification for military policy, thus, disturbingly resembles gay panic on two levels. On the surface, military leadership claims it requires punishment of lesbians and gay men, not because of any actions on the part of the punished service members, but because homophobic service members uncontrollably imagine their own sexual attractiveness. Of course, military leadership should fear sexual tension creeping into the ranks under current policy since the DoD now conveys to all service members that lesbians and gay men may be working alongside them. At the bottom, then, since units are not falling apart on account of rampant sexual panic, the military's claim of sexual tension in the ranks must be either: (1) deliberately and falsely maintained because military leadership needs the rationale to justify the injuries it inflicts on lesbians and gay men, or (2) one utterly imagined in the minds of military leaders themselves.

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uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" Chappell v. Wallace, 462 U.S. 296, 304 (1983) (citations omitted), it is understandable that the military has avoided discharging personnel for going to gay bars or marching in a gay pride parade in civilian clothes. DoD Dir. 1332.14. Enlisted Administrative Separations. Guidelines for Fact-Finding Inquiries into Homosexual Conduct. Enclosure 4-1. Dec. 21, 1993; DoD Dir. 1332.30. Separation of Regular Commissioned Officers. Enclosure 8-3. Guidelines for Fact-Finding Inquiries into Homosexual Conduct. The idea that marching in a gay parade or going on a gay date is no measure of gay identity is, of course, preposterous.

339. *See* Dod Dir. 1332.14. Enclosure 3, attachment 4 at C(4), p.4-2.

340. Experience and tradition of equating cross-gender nudity with sexuality, as well as acceptance of same gender nudity in communal showers and sleeping quarters, indicates that sexual anxiety is taught not inborn. *See* Lois Shawver, *Sexual Modesty, the Etiquette of Disregard, and the Question of Gays and Lesbians in the Military in* OUT IN FORCE, *supra* note 335, at 226-44. Of course, heterosexual anxiety toward sleeping and showering with persons known to be lesbian or gay would increase if that anxiety were to be encouraged by authority through validating homophobic insecurity rather than teaching homophobes to overcome their fears. For a stinging summary of this argument, see Mazur, *supra* note 336, at 277-80.

341. Indeed, as the Army Inspector General found in investigating Fort Campbell where Winchell was murdered, antigay service members merely needed training to be able to refrain from antigay conduct; the Army Inspector General found no uncontrollable homophobia in the ranks. *See* DAIG REPORT, *supra* note 302, at 6.

*"I Was Having Fun and This Dude Ended Up Dying"*

As noted above, with the Pentagon now declaring its opposition to harassment of suspected lesbian and gay service members, military leaders have effectively conceded that murder and assault of gay and lesbian service members could have been ordered away years ago, even if the order took no form other than "leave the fags alone."[342] As with antigay murder, then, the true motive for military policy can only be punishment of lesbians and gay men as a show of heterosexist power. No other explanation exists for military officials in Congressional hearings openly accepting the beating, drowning, and killing of lesbians and gay men as something ordinary.

Indeed, particularly in light of the policy's purported focus on *open* homosexuality, the only possible explanation for the military's punishment of private gay sexuality is to punish lesbians and gay men simply because the military *can* do so, not because it *needs* to do so. Despite a rise in enlistment shortages due to the increasing attractiveness of private sector employment in the last two decades,[343] the military has even been willing to exacerbate shortages, discharging nearly 24,000 service members for homosexuality and, of course, deterring countless others from entering service entirely.[344] Such a degree of impracticality is striking, given that in the last 100 years, the military has relegated African-American and female service members to subordinate positions but rarely expunged them from military service.[345]

Here, the parallels in the sentiments behind military policy and the murders committed by Mullins and Helvey are unmistakable. For Mullins and Helvey, the idea that their heterosexual identity would be

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342. According to one gay service member at Fort Campbell who disclosed his homosexuality in the wake of Winchell's murder, Fort Campbell officials implemented sensitivity training in September 1999 in a 20-30 second session, stating only "This is a meeting about fags. Don't bother them. They won't bother you. If you know someone's gay or a fag, just let it be. Go your own way, and let them go their own ways. And that's all that has to be said. So leave the fags alone." *See 60 Minutes: Don't Ask, Don't Tell* (CBS television broadcast, Dec. 12, 1999).

343. Stephen Lee Myers, *Military Reserves Are Falling Short of Finding Recruits*, N.Y. TIMES, Aug. 28, 2000, at A1.

344. Between 1980 and 1991, the military discharged 16,919 service members for homosexuality and no other reason. *See* NDRI REPORT, *supra* note 285, at 8. Between 1992 and 1998, the military discharged an additional 5701 service members for homosexuality alone. *See* WILLIAM ESKRIDGE & NAN HUNTER, GENDER, SEXUALITY AND THE LAW: 1999 SUPPLEMENT 77 (1999). In fiscal year 1999, the military discharged an additional 1034 service members for homosexuality alone. *See* Roberto Suro, *Military Starts Sensitivity Training*, WASH. POST, Feb. 2, 2000, at A8.

345. For a summary, see Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991); *see also* NDRI REPORT, *supra* note 285, at 106-90.

tainted with gay sexuality was unacceptable. For the military, once gay identity becomes open, known gay and lesbian service members must be "discharged"—removed completely—to perfect the appearance of an exclusive heterosexual military universe.[346] In light of the military's ability to overcome cohesion threats from integration of African-Americans or women into service, the only justification for tolerating cohesion threats posed by heterosexual dislike of lesbians and gay men is the assumption that gay and lesbian service members are especially deserving of differential treatment, that gay and lesbian identity is not fit for the image of the United States and its military at all.[347]

In fact, this is also the best explanation for the military's persistent claim that service members are not committing grotesque acts of violence and harassment against lesbians and gay service members. If no persons with gay or lesbian identity serve in the military, such nonexistent lesbian and gay service members simply could not be threatened or harmed. Of course, under military policy, "gay" and "lesbian" service members do not exist, because persons with that identity are either forced to deny that identity, discharged, harassed, or murdered out of the military's ranks.

As a "hierarchical culture" with "broad control of many aspects of soldiers' lives and behavior,"[348] the United States military must consider itself responsible for the violence its service members inflict. Though military leadership may not wish to admit it, the responsibility for antigay violence in the ranks obviously rests with those who have scapegoated lesbians and gay men as threats to military stability. Barry Winchell complied with military policy, allowed himself to be perceived as heterosexual, and was killed for failing to live up to that perception. Allen Schindler asked to be discharged as a gay man, and he was killed, too. Unquestionably, then the violence that took the lives of Winchell

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346. For a thorough critique of the impact that "passing" has on gay and lesbian military personnel, see Kenji Yoshino, *Assimiliationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"* 108 YALE L.J. 485, 544-50 (1998) ("The ontic theory that forced invisibility can have eradicating effects" relies on "the premise that if gays are not permitted to identify themselves, they are effectively erased—a military in which gays are permanently invisible is a military in which the fantasy that no gays exist can be sustained.").

347. In fact, when the United States Supreme Court has repeatedly lowered judicial scrutiny of discrimination in military decisionmaking, both the Court and the military have presumed that the military is *capable* of controlling cohesion problems. *See* Chappell v. Wallace, 462 U.S. 296, 300-04 (1983) (barring suits by personnel against superior officers for damages for discriminatory treatment on the grounds that assignments are assumed appropriate means of coordinating military personnel); Rostker v. Goldberg, 453 U.S. 57, 70-74 (1981) (deferring to congressional judgment in discriminatory treatment not purportedly based on gender stereotypes).

348. *See* NDRI REPORT, *supra* note 285, at 279.

and Schindler and others like them was violence military leadership expected to occur and allowed to occur.

### *D. The Rhetoric of Violence in Alabama Policy on Homosexuality*

Government records in Alabama show that many Alabamians perceived to be homosexual have been beaten and murdered because of their sexuality,[349] and occasionally set on fire.[350] As with murders in the U.S. military, these attacks have occurred with sufficient frequency to

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349. In part because Alabama does not prosecute hate crimes as such, the State maintains no records totaling the numbers of lesbians and gay men murdered, leaving records scattered through reported cases. Illustrative of the problem is the case of Daniel Lee Siebert, whose murder of a gay man was only reported because West Publishing printed the Alabama Court of Criminal Appeals' opinion affirming his death sentence for strangling a deaf woman. *See Siebert v. Alabama*, 562 So.2d 586, 588 (Ala. Crim. App. 1985). Siebert had previously stabbed a gay man twenty-nine times, claiming that the stabbings were necessary to thwart off the victim's "homosexual advances." *Id.* at 597-98. But Siebert was convicted only of manslaughter for the killing and was eventually released from prison. *See id.* at 597. The state introduced the conviction in the sentencing phase of the murder of a woman to support its contention that Siebert had a history of violence. *See id.* at 597-99 (noting that "number of the stab wounds" showed "the violent nature" of the murder of the unnamed "homosexual"). For a similar use of antigay hate crime by the state, see *Hays v. Alabama*, 518 So.2d 749, 752, 761 (Ala. Crim. App. 1985) (discussing prosecutor's use of the beating of "a homosexual" to show "pattern and scheme" in prosecution of the lynching murder of Michael Donald by Ku Klux Klan members who went looking for "a black man to hang").

Nevertheless, records of murders of gay men do surface, most often in purported "gay pass" cases where defendants make uncorroborated claims that the murders were necessary to prevent sexual advances by men perceived to be gay. *See Ex parte Scarbrough*, 621 So. 2d 1006 (Ala. 1993) (affirming felony murder conviction of man who purportedly made a gay pass at defendant); Cowart v. State, 579 So. 2d 1, 5-6 (Ala. Crim. App. 1990) (describing murder of a gay man by thief who plotted to "roll" and rob a "fag"); Jones v. Alabama, 565 So. 2d 1157 (Ala. Crim. App. 1989) (allowing defendant to claim justification for multiple shootings of a purported gay attacker resistant to multiple bullet wounds); Borden v. Alabama, 522 So. 2d 333, 333 (Ala. Crim. App. 1988) (describing defendant's claim that he killed his victim in self-defense against a "homosexual act," "stabbing him numerous times with a pair of scissors or similar instrument"); Allen Dale Clark v. Alabama, 451 So. 2d 368, 370 (Ala. Crim. App. 1984) (noting defendant's claim that, while drunk and before robbery and murder of the victim, he fled from the victim "who was allegedly a homosexual [who] made sexual advances" towards him).

350. In 1991, Kenneth James Jackson beat Tony Henderson to death, then burned his body along with Henderson's home. *See Ex parte Jackson*, 674 So. 2d 1365, 1366-68 (Ala. 1990). Jackson claimed that Henderson made sexual advances toward him the day before the murder and that he "reacted violently toward Henderson as a result." *Id.* at 1368. In 1989, David Leitner murdered Father Francis Craven after accusing Craven of making sexual advances toward his adopted son, a former male prostitute. *See* Leitner v. Alabama, 672 So. 2d 1371, 1372-73 (Ala. Crim. App. 1995). Leitner beat the priest with a metal pipe, bound and gagged him, and set his body on fire. *See id.* at 1373. Both murderers were accused of being gay themselves, but both denied it and accused their victims of being gay predators. *See Jackson*, 674 So. 2d at 1366-68 (noting defendant denied having a "homosexual" or "bisexual" orientation); *Leitner II*, 672 So. 2d at 1377 (noting that the accused blamed the priest for instigating the murder by sending gifts to his son); *see also* Leitner v. Alabama, 631 So. 2d 273, 279 (Ala. Crim. App. 1993) (reversing defendant's first conviction for trial court's failure to admit evidence of priest's confessions of sadomasochistic fantasies of being tortured and molested as a "faggot").

raise questions about the role Alabama government has played in tolerating a culture of violent prejudice. Indeed, the few narratives that historians have sought to preserve suggest that gay and lesbian Alabamians' experiences with the law have not been atypical, at least from the perspective of other antigay regimes.[351] And if comparison of litigation throughout the United States demonstrates anything, Billy Jack Gaither seems to have been murdered in a state with as much governmental hostility to gay and lesbian intimacy as anywhere.[352]

### *I Really Wasn't Thinking . . . Like a Little Chicken with Their Head Cut Off Running Around . . . It Just Seemed Like the Thing to Do . . . . I Didn't Feel Like He Needed to Live Any Longer*

Perhaps it is not ironic that Alabama officials, like their murderous antigay counterparts, have explicitly justified their favor for punishing gay and lesbian intimacy with their own difficulties thinking and writing about sex. Indeed, for a significant period of time, Alabamian opposition to gay and lesbian sexuality seems to have been so staunch that judges actually claimed to be precluded by decency from so much as *discussing* homosexuality.[353] General governmental incompetence in Alabama only

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351. There are few historical works on gay and lesbian experience in Alabama in the twentieth century. Professor John Howard of York University has provided the most thorough documentation of early experiences of gay and lesbian life in the South. *See* JOHN HOWARD, MEN LIKE THAT 47, 52-53 (1999); John Howard, *Place and Movement in Gay American History: A Case from the Post-World War II South*, *in* CREATING A PLACE FOR OURSELVES: LESBIAN, GAY, AND BISEXUAL COMMUNITY HISTORIES 211-25 (Brett Beemyn ed., 1997). Quasi-fictional works based on gay life in Alabama include HOWARD CRUSE, STUCK RUBBER BABY (1995) (a graphic novel, historical account of gay life in Birmingham in the 1960s) and TONI MCNARON, I DWELL IN POSSIBILITY: A MEMOIR (1992) (a memoir of Birmingham after World War II from a lesbian vantage point).

352. In the federal employment context, *compare Anonymous v. Macy*, 398 F.2d 317, 318 (5th Cir. 1968) *cert. denied sub nom.*, *Murray v. Macy*, 393 U.S. 1041 (1969) (upholding discharge of Alabama postal worker for private "homosexual acts") *and Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (barring discharge of federal employee for private "homosexual" solicitations).

In the context of military service, *compare Bon Hoffburg v. Alexander*, 615 F. 2d 633, 635-36 (5th Cir. 1980) (upholding Alabama enlistee's discharge by the Army on the grounds that she was lesbian because she was a female married to transsexual whose pre-operative status was also female) and *Meinhold v. United States Dep't Def*., 34 F.3d 1469, 1479 (9th Cir. 1994) (holding sailor's statement "I am in fact gay" insufficient statement of homosexual orientation under then-in-force Congressional authorization for separation).

In the context of constitutional challenges to sexual proscriptions, *compare Alabama v. Woodruff*, 460 So. 2d 325 (Ala. Crim. App. 1984) (denying standing to challenge overbreadth attacks on sodomy law by construing sexual acts as nonprivate) and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (denying privacy challenge to sodomy law applied in the privacy of the defendant's home).

353. *See supra* note 146.

augmented the appearance that Alabama officials recklessly inflicted harm. Even as late as the 1960s, the Alabama Sex Crimes Commission confessed it could not complete a meaningful assessment of the number of sex offenders it charged and convicted because state record-keeping was so poor.[354]

Despite Alabama officials' apparent inability to document what they did to gay and lesbian Alabamians, the state kicked off a rigorous sex crimes campaign in 1961 that included a strong antigay component. The legislature revised Alabama's criminal sexual psychopath laws to allow for the civil commitment or imprisonment of any individuals charged merely with the crime of "sex deviation."[355] If, at any time, the Superintendent of the Alabama State Hospital determined that "treatment" could occur in prison, the committed "sex deviate" could be transferred to prison *without* criminal conviction or trial.[356] Imprisonment without trial appears to have been the likely fate of at least some gay and lesbian persons under this system. As the Superintendent for the Alabama State Mental Hospital suggested to the Alabama Sex Crimes Commission in 1963:

> In the case of the confirmed sexual deviate, we find treatment to be of little benefit although they [sic] are given the usual psychological treatment – discussion of their problem, group psychotherapy, medication, and the usual treatment accorded any mentally sick person. . . . I think the confirmed sexual deviate, particularly the homosexual, responds poorly to treatment and could be treated as well in the penal institution as in the hospital.[357]

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354. *See* ALABAMA SEX CRIMES COMMISSION, SEX OFFENDER LAWS: A REPORT TO THE LEGISLATIVE COUNCIL OF THE STATE OF ALABAMA 3 (1963) ("It is difficult to obtain meaningful figures as to the number of offenses reported . . . . [T]here is no systematic recording of arrests and convictions.").

355. The Criminal Sexual Psychopathic Persons Act was first adopted in 1951 and amended in 1961 to allow for commitment without trial. *See* ALA. CODE § 434-41 Title 15 (1940). As in other areas of antigay law, this does not appear to be unique. *See* Davy v. Sullivan, 354 F. Supp. 1320, 1323 n.3 (M.D. Ala. 1973) (comparing Alabama's scheme to that of several other states).

356. ALA. CODE § 434-41 (1940).

357. ALABAMA SEX CRIMES COMMISSION, SEX OFFENDER LAWS: A REPORT TO THE LEGISLATIVE COUNCIL OF THE STATE OF ALABAMA 5 (1963). It is unclear what form of "treatment" was taking place in Alabama at the time. Nationally, lobotomies were performed on gay and lesbian patients as late as the 1950s. *See* JONATHAN NED KATZ, GAY AMERICAN HISTORY 191-205 (1976). Additionally, electrical and chemical shock treatments, aversion therapy, and induced vomiting, were popular "treatments" for homosexuality. *See id.* Assuming Alabama followed national trends, it is possible that by the 1960s Alabama did not practice invasive medical treatments on its gay and lesbian patients. Moreover, given Alabama's complete lack of funding for health services in its mental institutions, it is possible Alabama did not provide any treatment at all. In this sense, at least, it makes sense that Alabama's mental institutions would be indistinguishable from prisons.

To understand just how horrific Alabama's prescribed therapy was for its homosexual population, it is important to note that, while Alabama's prisons were described by the United States Supreme Court as utterly inhumane,[358] Alabama's mental health facilities were in such deplorable conditions that critics described them as "vomit inducing" "concentration camps" where "undesirables" were dumped and housed with the violently insane, receiving little to no protection or care from the state.[359] A central photograph in the media blitz surrounding litigation over the conditions in the State's institutions symbolized the reality: a mental health facility in Alabama was a place where a child could be strapped to her urine-soaked bed, unattended, while flies crawled in and out of her mouth.[360] By most accounts, that symbol was an understatement of the daily torture and neglect that permeated Alabama's mental health facilities.[361] Nevertheless, in typical Alabama fashion, the State formally attempted to defend its commitment procedures for its "psychopaths" as "humanitarian."[362]

Given the State's record-keeping in its criminal justice system, it is difficult to know how many people, gay or otherwise, were among the thousands of Alabamians inappropriately warehoused through this system.[363] In striking down Alabama's criminal sexual psychopath law, a federal court could only conclude that the number of persons committed under the state's sex crime law was significant but "indeterminable."[364] Because the system was so underfunded and dilapidated, Alabama was unable to prove that it provided *any* treatment to any of its "patients" at all, and the court was only able to hold that Alabama's "humanitarian" commitment procedures were punitive.[365]

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358. *See* Dothard v. Rowlinson, 433 U.S. 321, 334 (1977) (describing Alabama prisons as uniquely violent among American prisons and "a peculiarly inhospitable one for human beings"); Pugh v. Locke, 406 F. Supp. 318, 322-23, 325 (M.D. Ala. 1976) (describing the prisons as "horrendously overcrowded," "filthy," and overwhelmed by "rampant violence and jungle atmosphere"), *judgment aff'd and remanded sub nom.*, Newman v. Ala., 559 F.2d 283 (5th Cir. 1977), *cert. granted in part and rev'd in part sub nom.*, Alabama v. Pugh, 438 U.S. 781 (1978).

359. *See* BASS, *supra* note 85, at 289-96 (describing "vomit inducing" conditions); Videotape: We Dare Defend Our Rights (Alabama Center for Law and Civic Education 1992) (on file with the Cumberland School of Law) (providing photographs of the "concentration camp" conditions of Alabama's mental health facilities). *See also* Wyatt v. Stickney, 334 F. Supp. 1341, 1343-1344 (M.D. Ala. 1971) (summarizing the "dehumanizing" conditions that made meaningful treatment impossible).

360. *See* BASS, *supra* note 85, at 283.

361. *Id.*

362. Wyatt v. Stickney, 334 F. Supp. at 1328.

363. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378, 397 (M.D. Ala. 1971) (finding only that "several thousand Alabama citizens" were "suffering . . . confinement in the state's mental institutions").

364. Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973).

365. *See id.* at 1328.

Regardless of how many punishments and incarcerations actually manifested under Alabama's sex crimes law, the primary purpose of Alabama law appears to have been to cast threats to "deviants" in violent overtones. Regarding lesbians and gay men, in particular, the Sex Crimes Commission announced its 1967 "reform" proposals in these terms:

> In some parts of this nation and some other countries, there seems to be an attitude of permissiveness toward certain types of sex deviations such as homosexual acts by mutual consent. While the Commission does not feel the laws should be inhumanly cruel against those persons having abnormal tendencies, the Commission does definitely feel that these people have forfeited certain of their standings and the laws should be as such to impose severe penalties for such acts.
>
> In plain words, the Commission feels that it is in the interest of the citizens of our state that Alabama be known as a place where it is tough for persons having abnormal tendencies. We feel that this will put these people on notice, will discourage such people from coming to our state, and will prevent an increase in such type behavior for future generations.[366]

Certainly, as the evidence of homophobic murders and harassment under the Alabama criminal justice system suggests, persons with gay identity in Alabama could be presumed to live in fear of incurring injury in of the state and its "tough on homosexuals" culture.

Indeed, though Alabama officials have moderated much of their antigay rhetoric in the last few decades, the hostility to simply being lesbian or gay in Alabama is still very real. In 1997, the mayor of the state's capital publicly announced that Montgomery's "queers" would not be attacked if they "didn't all hang out together."[367] State officials have also publicly reminded Alabamians that gay people do not have the same protections under the law as nongay people,[368] particularly where

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366. *See* EARL C. MORGAN, COMMISSION TO STUDY SEX OFFENSES: INTERIM REPORT TO THE ALABAMA LEGISLATURE, [hereinafter ALA. SEX CRIMES COMM'N II] June 12, 1967, at 5. The Commission's Report received press coverage of its "tough on homosexuals" policy. *See Panel Asks 5 Laws Against Sex Crimes*, BIRMINGHAM NEWS, June 13, 1967, at 22.

367. *See* Kim Chandler, *Mayor Defends Antigay Remark*, MONTGOMERY ADVERTISER, Dec. 23, 1997, at A1.

368. *See* Robin DeMonia, *First Step Taken to Repeal Interracial Marriage Ban*, BIRMINGHAM NEWS, Mar. 12, 1999, at 1B (describing Congressman Blaine Galliher's claim that equal protection in marriage law would be troublesome because "[s]omebody's going to have to get out there and tell Bubba this is not a problem" for the state's ban on gay marriage); John D. Alcorn, *Personal Beliefs vs. Public Policy: Alabama's Leaders and Lawmakers Often Blur the Distinction Between Their Professional Responsibilities and Their Personal Beliefs*, MONTGOMERY ADVERTISER, Oct. 28, 1996, at 1A (describing Democratic and Republican candidates' determination to declare categorical opposition to "homosexual rights"); Jay Reeves, *Pastor: Gay Unions to Continue*, MONTGOMERY ADVERTISER, Aug. 31, 1996, at 3F (describing Governor Fob James campaign against same-sex marriages as violations of "God's law").

lesbians and gay men have been exempted from protections of anti-violence laws developed for the state's other citizens.[369] From this perspective, even if all of Alabama's homophobic murderers were prosecuted under the media scrutiny that accompanied that of Billy Jack Gaither's murderers, the state's support of a "tough life" for Alabama's "homosexuals" still appears to include at least ambivalence for antigay violence.[370] And, it is this ambivalence that casts a continual threat to gay persons in the state.

### *"It's Not Right . . . Being Gay"*

With little disguise, the state of Alabama has primarily designed antigay policy to cultivate social hostility against homosexuality. In 1975, the Alabama legislature broadly conceded that its laws regulating sexual conduct between consenting adults could not really target sexual activity. Revising the state's criminal code, the legislature dropped fornication from the statute and declared its anti-adultery laws "dead letter,"[371] with the following confession escaping from the legislature's criminal code committee:

> The number of liaisons which are illegal under Alabama law is, undoubtedly, very high. . . . On the other hand, arrests and prosecutions are rare. The conclusion is clear that existing criminal law has been notoriously unsuccessful in stamping out adultery, and it is unlikely that anyone will ever launch a program of enforcement on a scale sufficient to make criminal penalties a significant risk in philandery . . . Criminal sanctions are practically inadequate and, therefore, inappropriate to regulate nondeviant sexual behavior between consenting unmarried adults.[372]

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369. *See* Associated Press, *Defense Feels "Confident" as Trial in Slaying of Gay Man Begins*, CHATTANOOGA TIMES/FREE PRESS, Aug. 2, 1999, at B5 (describing death of legislation in Alabama which would have amended hate crime law and increased penalties for targeting sexual orientation, bringing penalties in line with those for targeting other identity characteristics); Associated Press, *Legislature Draws Praise from National Gay and Lesbian Task Force*, July 25, 1999 (describing surprise reaction of legislation sponsor at the potential for bill targeting violence occurring in any "family, household, dating, or engagement" to include violence in gay and lesbian dating relationships).

370. Murders of gay men, if prosecuted, have often been seen as "manslaughter" when the "gay pass" defense does not come under media scrutiny. For cases not reported in popular press, see cases cited at note 349 *supra*. For example, Steven Mullins and Charles Butler were not charged with capital murder until national press coverage placed Alabama in the spotlight. *Compare* Alvin Benn, *Small Town Rejects Image of Crime*, MONTGOMERY ADVERTISER, Mar. 11, 1999, at 1A (describing media impact on town's image) *with* Jay Reeves, *Suspects in Gay Man's Death Face Capital Murder Charges*, MONTGOMERY ADVERTISER, Mar. 27, 1999, at 3D (describing upgrade in charges after the media blitz).

371. ALA. CODE § 13A-13-2 (Commentary 1994).

372. *Id.*

And yet, the Alabama legislature expressly revised the Alabama code "to make *all* homosexual conduct criminal" even though such laws should be as unenforceable as any Alabama laws against consensual intimacy.[373] And so, if gay and lesbian Alabamians, as "consenting unmarried adults," will not really have their *sex lives* affected by Alabama's effectively unenforceable sex crime law,[374] the legislature must have had only one purpose for modifying its sex crime law: to maintain criminal status for gay and lesbian Alabamians solely for public stigmatization.

As a matter of law, the legalization of a wide range of nonmarital heterosexual sex in Alabama should have foreclosed any debate that state law was designed to protect traditional marital intimacy or morality.[375] With little cultural change attending the repeal of laws against consensual heterosexual sex, the state proved that such laws were not bulwarks against moral chaos. Consequently, the moral abyss left exposed beneath Alabama's laws against consensual sex has left little doubt that the state's attention to homosexual identity has only been *pretext* for the control of public stigma—just like a gay bashing, an excuse for infliction of punishment.

If statements of government officials are any measure of how Alabamians react to gay and lesbian identity, the extent and frequency of the random punishment one can expect to be inflicted on gay and lesbian people in Alabama is startling:

- In 1991, Auburn University denied student organization status to campus gays and lesbians primarily on the grounds that "sodomy" was a crime in Alabama, even though the University could attribute no gay and lesbian sex to the proposed student club.[376]

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373. ALA. CODE § 13A-6-65 (Commentary 1998) (emphasis added). The Commentary to the Alabama Code has been officially recognized by the Alabama Supreme Court as the legislative intent for the statute. *See Ex parte J.M.F.*, 730 So. 2d 1190, 1196 n.5 (Ala. 1998) (citing Commentary to § 13A-6-65 for the claim that the legislature "specifically altered" the Criminal Code "to make all homosexual conduct criminal").

374. It is noteworthy, for example, that only one man was arrested under the statute in 1997 and 1998. Telephone conversation with Carol Roberts, Alabama Criminal Justice Information Center (July 19, 1998) (notes on file with author).

375. A growing number of states have rejected the "morality" bases for laws against same-gender sex. *See, e.g.*, Powell v. Georgia, 510 S.E.2d 18, 24-26 (Ga. 1998); Kentucky v. Wasson, 842 S.W.2d 487, 496-97, 501 (Ky. 1992); Gryczan v. Montana, 942 P.2d 112, 125 (Mont. 1997); New York v. Onofre, 51 N.Y.2d 476, 489-90, *cert denied*, 451 U.S. 987 (1981); Pennsylvania v. Bonadio, 415 A.2d 47, 49-50 (Pa. 1980); Campbell v. Sundquist, 926 S.W.2d 250, 264-65 (Tenn. Ct. App. 1996). As the Kentucky Supreme Court noted: "The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexuals for differential treatment." *Wasson*, 842 S.W.2d at 501.

376. Gay Lesbian Bisexual Alliance (GLBA) v. Sessions, 917 F. Supp. 1548, 1550 (M.D. Ala. 1996), *aff'd sub nom.* GLBA v. Pryor, 110 F.3d 1543 (11th Cir. 1997). It should be noted that the Gay Lesbian and Bisexual Alliance (GLBA) of Alabama, the plaintiff in litigation with

Subsequently, the state legislature attacked all gay and lesbian groups at state universities, passing resolutions stating that "a homosexual life style" was not legal in Alabama and that it somehow threatened to "debase" and "immoralize" traditional Alabama families.[377] The legislature categorically denied funding to all gay and lesbian student groups, claiming that the State's unenforced sex crimes laws prohibited gay and lesbian "lifestyles."[378] Defending the measure in court, the Alabama Attorney General argued that merely *being* gay was the equivalent of an inchoate crime.[379] The Attorney General further claimed that discussions of gay and lesbian identity by gays and lesbians themselves would be "vulgar and lewd," and that state-sponsored discussion of gay sexuality should be limited to students without gay identity.[380]

- In 1992, the Alabama legislature began requiring public schools to teach "from a public health perspective" that "homosexuality" is not "acceptable to the general public" and that "homosexual conduct" is a crime.[381] However, no explanation was required as to what "homosexual conduct" or other aspect of "homosexuality" was *not* a public health threat.[382] The law remains in force, even though the state's own public health records show no health threat posed by women having sex with women, or men having safe sex

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Alabama, was founded to "educat[e] all members of the university community on the fears and dangers of homophobia and to provide a support system for the University of South Alabama's homosexual students." 110 F.3d at 1546 (11th Cir. 1997). The District Court also noted that the GLBA "never lobbied for nor advocated repeal of Alabama's sodomy laws, nor is violating these laws one of its purposes or goals." 917 F. Supp. at 1551 n.19.

377. Striking down the law that resulted from this misconduct, the District Court noted that the attacks of one representative stemmed from particularly overt animus:

> Members of the Auburn SGA lobbied for the bill, and one state representative [Hooper] went so far as to use an effeminate voice, imitating the "stereotypical image" of a gay man, when he joked with his colleagues to vote no. A representative's press release stated: "who in their right mind would put [homosexuals] in any position within our educational system where they might become role models of the young[;] . . . can anything destroy the possibility of happiness for a young person more than turning him or her away from traditional marriage and family life, to the dismal sewers of sodomy and lesbianism."

GLBA v. Sessions, 917 F. Supp. at 1550.

378. *See* ALA. CODE § 16-1-28 (1975) (prohibiting use of public monies or facilities for promotion of lifestyles prohibited by sodomy and sexual misconduct laws).

379. *See* 917 F. Supp. at 1556 (quoting the Attorney General as arguing "a person whose sexual orientation is admittedly 'gay' or 'lesbian' and thus is 'homosexual,'" is not "immune from the enforcement of an inchoate statute which is corollary to the criminal sodomy statutes").

380. 917 F. Supp. at 1554, 1557.

381. ALA. CODE § 16-40A-2 (1975 and Supp. 1999)

382. *Id.*

with other men. In fact, according to state records, the number of African-American Alabamians with HIV/AIDS exceeds the number of reported HIV/AIDS cases for the population of men having sex with men, and heterosexuals themselves represent twenty percent of the state's HIV/AIDS population in Alabama.[383]

- In 1996, the state's "Ten Commandments" Judge Roy Moore attacked a lesbian parent during divorce proceedings, claiming that she *lived* contrary "to the laws of nature."[384] Outside the courtroom, the former media spokesman of the judge led an antigay rally, declaring that "the people of Etowah County are going to stand against the homosexual lifestyle and against things that are against the laws of God."[385] Though the Alabama Supreme Court removed Moore from the case,[386] a year later the Court upheld a restriction imposed by Judge Moore on a lesbian parent's rights to visit her child[387] on the grounds that: the parent's "lesbian relationship" was immoral in the eyes of Alabamians and illegal in the state.[388] Apparently it made little difference to the Court that the woman's ex-husband had (1) threatened to kill her and the children; (2) been arrested for drinking and driving with the children in the car; and (3) developed a history of physical violence toward his family, including locking his infant son in an automatic clothes dryer.[389] Two years later, Alabama voters elected Moore to position of Alabama Supreme Court Chief Justice, after Moore ran on a platform of restoring "morality" to Alabama law.[390]
- In 1998, the Alabama Supreme Court unanimously affirmed a custody award against another lesbian mother despite the mother's pledge at trial *not* to have sex in violation of Alabama law while she retained custody of her child.[391] The grounds, not surprisingly, echoed those proffered by Judge Moore: the lesbian "lifestyle" was illegal and determined by "most" Alabamians to be

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383. *See* Alabama Department of Public Health, *Alabama HIV/AIDS Cases Reported 1982 Through April 30, 1999*, ALA. HIV/AIDS UPDATE, Summer 1999, at 5.

384. Associated Press, *Antigay Rally Held Outside Courtroom*, MONTGOMERY ADVERTISER, July 31, 1996, at 2B.

385. *Id.*

386. *See* Associated Press, *Moore Backers Protest Ruling Barring from Case*, MONTGOMERY ADVERTISER, June 4, 1997, at 5B.

387. *See Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala.1998).

388. *Id.*

389. *See id.*

390. *See* Thomas Spencer et. al., *Moore Wins, Credits God*, BIRMINGHAM NEWS, Nov. 8, 2000, at 1A, 13A.

391. *See Ex parte J.M.F.*, 730 So. 2d at 1192 (Ala. 1998).

immoral.[392] The Court held the mother presumptively forfeited custody because she displayed a committed lesbian relationship to her child by: (1) exchanging rings with her partner; (2) "kiss[ing] and show[ing] romantic affection" for her partner "in the child's presence;" (3) explaining to the daughter that she and her partner "love each other the way that the child's father and stepmother love each other;" (4) letting her partner accompany the child to school and church; and (5) exposing the child to her "homosexual" friends.[393] Claiming to draw upon assumptions about purportedly uniform "gay parenting," the Court concluded that the potential for harm from the mother's parenting of her child was "enormous."[394]

- In late 1998, antigay judicial absurdity reached new lows when yet another Alabama court declared a man "bisexual" on the grounds that he had an "attachment to the more feminine-type articles [of furniture]" and spent time with male friends when he was not in church or at home.[395] The judge not only denied the father custody of his children but refused to reverse his finding that the father was bisexual.[396] The Alabama Court of Civil Appeals has since described the judge's reasoning as "based entirely on conjecture and speculation."[397]

Given these sweeping attacks on lesbian and gay identity by government officials, there is no reason to believe that Alabama's thug population would act with any less "conjecture and speculation" in selecting gay targets for their violence. Since Alabama indeed does have its share of violent and irrational thugs,[398] many of whom are probably

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392. *Id.*

393. *Id.*

394. *See* 730 So. 2d at 1195 n.4 (citing Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894 (1997)). Wardle himself has subsequently claimed that he based his argument for a presumption against lesbian and gay parenting on (1) what he perceived to be a lack of information about lesbian and gay parents an (2) conclusions regarding risks that he drew from his perceptions about "some" gay and lesbian people. *See* Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629, 635-37 (1998). Wardle's thesis has been roundly criticized as uncorroborated and the byproduct of gross stereotyping. *See* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, U. ILL. L. REV. 253 (1998). Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions* 7 TEMP. POL. & CIV. RTS. L. REV. 255, 276-79 (1998).

395. D.L. v. R.B.L., 741 So. 2d 417, 419 (Ala. Civ. App. 1999).

396. *See id.*

397. *Id.*

398. In Alabama, radically disproportionate numbers of murders (61%), rapes (58%) and assaults (50%) were committed by individuals age 29 and younger. *See* ALABAMA CRIMINAL JUSTICE INFORMATION CENTER: TOTAL CRIME INDEX at http://agencies.state.al.us/acjis/pages/cia99/99aMain.htm. Individuals under the age of 25

"woefully ignorant about the world,"[399] it is fair to say that those thugs might be vulnerable to an antigay misinformation campaign. With the state's official antagonism for "all homosexual conduct," presumably including homosexual "eating" and "breathing," the Alabama legislature and Supreme Court have been able to brand the "homosexual lifestyle" exclusively criminal,[400] a categorization that reinforces the idea that homosexual persons do not exist except as the sum of criminalized sexual acts. In this manner, the state has taken extraordinary risks, stirring up hatred and propagandizing that the state's most ignorant and violent thugs are surrounded by predatory gay "criminals."

Indeed, when national antigay campaigns have described lesbians and gay men as "human garbage," people who would "just as soon kill you as look at you,"[401] prominent Alabama officials have joined in the bashing, portraying lesbians and gay men as criminal recruiters of heterosexual children.[402] And yet, Alabama's law reformers have claimed to be bemused by the "feverish and excited clamor for enactment of stricter sex offense laws and greater penalties" that accompanies press coverage of violence by accused homosexuals.[403]

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account committed similarly disproportionate numbers of murders (46%), rapes (41%), and assaults (35%). *Id.* These numbers are consistent with national figures, which show that a disproportionate amount of murder (51%), rape (44%), and aggravated assaults (40%) is perpetrated by men and boys under the age of 25. *See* UCR 1999 at 228.

399. *See* ROGERS, *supra* note 86, at 609-10:

> Information surveys confirmed what low standardized scores had already suggested: many Alabamians were woefully ignorant about the world in which they lived. Only eighteen percent (18%) knew the name of the state's lieutenant governor in 1989 and only twenty-three percent (23%) could name at least one U.S. congressman from Alabama. A 1990 survey of 1033 high school students in twelve schools revealed that sixty-six percent (66%) could not explain capitalism, only forty-nine percent (9%) knew that Karl Marx wrote the Communist Manifesto, eighty-six percent (86%) did not know when the Civil War occurred, and fifty-five percent (5%) could not correctly identify the Holocaust. Only twenty-four percent (24%) knew that Martin Luther led the sixteenth-century Protestant Reformation. Many students identified the leading Protestant reformer as the pope or as Jim Bakker of the PTL Club.

400. *See Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala.1998) (declaring gay or lesbian life "is illegal under the laws of this state, and immoral in the eyes of most of its citizens").

401. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 346-49 (1997) (quoting the Rev. Jerry Falwell's public statements during Anita Bryant's "Save the Children" campaign against gay rights in Dade County, Florida).

402. *See* CRAWFORD, *supra* note 18, at 52 (quoting George Wallace's letter supporting Anita Bryan's "Save the Children" campaign: "Do you realize what [the homosexuals] want? They want to recruit our children under the protection of the laws of our land!"); James Robey, *Report of Subcommittee on Contributing Causes: Governor's Commission to Study Sex Offenses in* ALA. SEX CRIMES COMM'N II, *supra* note 366, at 14 (describing official position of the Sex Crimes Commission as concluding that "Pornography . . . Alcohol and Narcotics are used extensively by homosexuals to arouse the sex desires of their prospects, usually juveniles").

403. *See* ALA. SEX CRIMES COMM'N II, *supra* note 366, at 7. Specifically on this point, the Commission cited the 1962 homosexual molestation and murder of a small Birmingham boy,

Given the fact that antigay murderers elsewhere have frequently emphasized state hostility to gay people to justify their own violence,[404] and given that gay intimacy has been propagandized as menacing by the state, it is not surprising that Alabama's citizens might react violently toward gay people. As David White of Alabama's Gay and Lesbian Alliance explained to the *New York Times*, "[e]ven in Birmingham, I would never in a public place grab my partner's hand and walk down the street. It would literally be a death wish in the state of Alabama. You would almost be inciting violence to do something like that."[405]

And so, with violent self-defense having become a virtual art form in the state, confrontation with gay identity[406]—something to be locked away, like murder and rape—should be expected to be deadly. According to the latest scientific survey of antigay violence in Alabama's largest city, thirty-nine percent of the gay and lesbian population have reported enduring acts of antigay vandalism, threats, or assault.[407] And in public schools, where government is expected to teach students "the boundaries of socially appropriate behavior" and the "'habits and manners of civility' essential to a democratic society,[408] Alabama continues to teach that "homosexuality" is "not acceptable."[409] It is no wonder, then, that forty-nine percent of lesbian and gay Birmingham residents report having been the target of threats, slurs, and violence in schools.[410]

The culmination of all antigay policies and prejudices in Alabama has, then, been well symbolized by Steven Mullins' murder of Billy Jack

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noting that demands for new legislation surged in the aftermath, sponsored by legislators from the murder victim's legislative district. *Id.*

404. Murderers of gay men have expressly invoked perceptions of legal hostility to gay sexuality for the belief that police would approve of antigay violence. *See* Ann Janette Rosga, *Policing the State*, 1 GEO. J. GENDER & L. 145, 158-60 (1999) (interviewing murderers who confessed that they believed "Police ain't gonna do nothin'"; that "the homosexuals make themselves easy targets because the police will bust 'em"; and because "I knew how the police felt about homosexuals"); Justin Gillis & Patrice Gaines, *Pattern of Hate Emerges on a Fence in Laramie: Gay Victim's Killers Say They Saw an Easy Crime Target*, WASH. POST, Oct. 18, 1988, at A1.

405. David Firestone, *Murder Reveals Double Life of Being Gay in Rural South*, N.Y. TIMES, Mar. 6, 1999, at A1, A10.

406. *See* JOHN SHELTON REED, THE ENDURING SOUTH: SUBCULTURAL PERSISTENCE IN MASS SOCIETY 46 (1986) (surveying data to show southern tendency to use force "to settle differences").

407. Gay and Lesbian Alliance of Alabama, *Antigay Violence, Harassment, and Discrimination in Birmingham*, June 30, 1999 (detailing findings of Charles Collins, a public health researcher at the UAB School of Public Health) (results on file with author) [hereinafter *GLAA Findings*].

408. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

409. *See* note 381, *supra*, and accompanying text.

410. *GLAA Findings*, *supra* note 407, at 1.

Gaither.[411] Mullins' attorney, Rod Giddens, has insisted that Mullins' would not have indulged in murder had he not had some sense of the correctness of his actions. According to Giddens, "there's a tension around here" toward matters of homosexuality, "you can feel it."[412] Since Giddens took the Mullins case, at least one local businessman expressly told Giddens that if Gaither "had made a pass at him, he'd have killed him, too."[413] In light of these statements, it would seem that no amount of scapegoating of Mullins could get Alabama culture off the hook for stoking rage against homosexuality. As Giddens says, "[A]round here, you take any aggravated person in an aggravated state—mix in social problems and maybe even a little beer and pot—now that's a cocktail for a disaster."[414]

## III. "LOVE CRIMES"[415]

> *[T]he first step in their growing up is to learn how to spurn love. They have to deny it by law, boy. Then begins the season of hate and SHAMEFACEDNESS. Confusion leaps like fire in the bowels and false faces bloom like jimsonweed. They put on a mask, boy, and life's turned plum upside down.*
>
> Ralph Ellison, Juneteenth[416]

> *Democracy is a bloody business, demanding blood sacrifice. Every advance American democracy has made toward fulfilling the social contract, toward justice and equality and true liberty, every step forward has required offerings of pain and death. The American people demand this, we need to see the burnt bodies of the four little black girls, or their sad small coffins; we need to see the battered, disfigured face of the beaten housewife; we need to see the gay man literally crucified on a fence. We see the carnage and think, Oh, I guess things are still tough out there, for those people. We daydream a little: What does that feel like, to burn? To have your face smashed by your husband's fist? To be raped? To be dragged behind a truck till your body falls to pieces? To freeze, tied to a fence on the Wyoming prairie, for eighteen hours, with the back of your head staved in?*
>
> Tony Kushner, Matthew's Passion[417]

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411. Telephone conversation with Rod Giddens, Esq. (Apr. 21, 1999) (notes on file with author).

412. *Id.*

413. *Id.*

414. *Id.*

415. The phrase "love crimes" is often used as a mockery of the term "hate crimes." *See* Margaret Carlson, *Laws of the Last Resort*, TIME, Oct. 28, 1998, at 40.

416. RALPH ELLISON, JUNETEENTH 162 (1999).

417. Tony Kushner, *Matthew's Passion*, NATION, Nov. 9, 1998, at 4.

For those who understand that discrimination in the United States has turned sexual minorities into an underground class subject to ridicule and violence, it should come as little surprise that the dissection of gay life in American discourse resonates with a violence collapses distinctions between love and hate. Supreme Court Justice Byron White once defined "personal integrity and autonomy" as the "privilege of choosing those with whom intimate relationships are to be established," the violation of which was "rape"—the "ultimate violation of self."[418] And yet, White and his colleagues on the Court upheld the power of states to punish "homosexuality" with criminal law,[419] in White's own terms, a raping of lesbian and gay Americans for exercising the freedom to choose "those with whom intimate relationships are to be established." If the law can categorically subject gay people to the "ultimate violation" of self, surely it is correct that the principal "hurt" of such discrimination is that it teaches permission to punish, permission "that encourage[s] not only police harassment but all manner of privately inflicted harm from insults to trashing to violence."[420]

The need for examination of discrimination's violent impact on gay life is pressing, especially since the power of law to transform the love lives of lesbians and gay men into a basis for injury is still quite pronounced. Gay and lesbian people in the United States, for example, do lovingly wed. But as recently as this past decade, all levels of American government have expended invaluable time and resources so that antigay forces can resist *recognizing* such gay and lesbian couples as "family" or "married."[421] Indeed, even in Vermont, which has now committed to equal treatment of all couplings regardless of the gender of the parties, the electorate has engaged in countless hours of debate simply over what to officially call gay and lesbian couples.[422] And so, while the rhetoric of marriage confers privileged status on heterosexual couples under the law, the denial of that status exposes gay and lesbian

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418. Coker v. Georgia, 433 U.S. 584, 597 n. 11 (1977) (quoting United States Department of Justice)

419. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.30, at 358 (1992).

420. *See* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 203-04 (1989).

421. To note one example, Californians recently voted to decline legal recognition of same-sex marriages because Californians are "not ready for a marriage between a man and a man," regardless of whether a same-sex couple is ready for such a marriage. *See* Jenifer Warren, *Campaign 2000: Proposition 22: Ban on Gay Marriages Wins in All Regions but Bay Area*, L.A. TIMES, Mar. 8, 2000, at A23 (quoting initiative sponsor Peter Knight).

422. *See* Carey Goldberg, *Forced into Action on Gay Marriage, Vermont Finds Itself Deeply Split*, Feb. 3, 2000, at A16; Jeffrey Good, *Vermonters Resist Gay Marriage Rancor*, BOSTON GLOBE, Jan. 9, 2000, at B6.

couples to harassment by government and private parties alike, imposing severe legal consequences on gay and lesbian relationships particularly at the time of unexpected "misunderstandings, separation, and death."[423]

Alabamians, at least, once thoroughly understood the importance of discrimination in sex and marriage law to fostering intolerance and prejudice. In 1872, Alabama became the first state in the United States to strike down anti-miscegenation laws when its Supreme Court reasoned that if the state could discriminate in regulating sex and marriage, its power to discriminate would be limitless.[424] Five years later, Alabama also became the first state to reinstate the ban on interracial marriage when its politically reconstituted Supreme Court insisted that regulation of minority sexuality was critical to maintaining broader racial stratifications in the state.[425] According to the Court:

> It is through the marriage relation that the *homes* of a people are created . . . where the elders of the household seek repose and cheer . . . and where, in an affectionate intercourse and conversation with them, the young become imbued with the principles, and animated by the spirit and ideas, which in a great degree give shape to their characters and determine the manner of their future lives. These homes, in which the virtues are most cultivated and happiness most abounds, are the true *officinae gentium* — the nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred? . . . [T]he law should absolutely frustrate and prevent the growth of any desire or idea of such an alliance, and all the secret arts, practices and persuasions of servants or others upon the weak-minded or forward, to bring it about—by making marriage between the two races, legally impossible, and severely punishing those who perform, and those who, with intent to be married, go through the ceremonies thereof. Manifestly, it

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423. *See, e.g.*, Van Dyck v. Van Dyck, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring) (noting that because law discriminates against gay and lesbian marriages, gay and lesbian citizens cannot, among other things:

> a) file joint income tax returns; b) create a marital life estate trust; c) claim estate tax returns; d) claim family partnership tax income; e) recover damages based on injury to a partner; f) receive survivor's benefits; g) enter hospitals, jails and other places restricted to 'immediate family'; h) live in neighborhoods zoned 'family only'; i) obtain 'family' health insurance, dental insurance, bereavement leave and other employment benefits; j) collect unemployment benefits if they quit their job to move with their partner to a new location because he or she has obtained a new job; k) get residency status for a noncitizen partner to avoid deportation; l) automatically make medical decisions in the event a partner is injured or incapacitated; m) and automatically inherit a partner's property in the event he or she dies without a will.)

(footnotes omitted).

424. *See* Burns v. State, 48 Ala. 195, 197 (1872).

425. *See* Green v. State, 58 Ala. 190, 194-95 (1877).

> is for the peace and happiness of the black race, as well as of the white, that such laws should exist.[426]

Such a perverse understanding of "peace" provides great insight into a world where attacks on love are acceptable precursors to the maintenance of hate. Racially-stratified marriage regimes in the United States not only punished individuals who loved a person of a "different" race in private, intimate spaces, but prevented persons of diverse racial backgrounds from knowing each other as family members. In the same way, sexually preferential legal regimes not only discourage gay and lesbian people from exploring same-gender affections, but, in so doing, prevent American families from knowing gay and lesbian couples as anything other than strangers to ordinary human existence.[427]

The paranoia that once coursed through defenses of punishment of interracial marriage is enlightening in the context of government-induced hate, particularly given the concession that it was the fear of the breakdown of traditional morality that animated it. According to the Alabama Supreme Court, "the more humble and helpless families are, the more they need this sort of protection."[428] Thus, in states like Alabama, where heterosexual fornication, adultery, and divorce are now legal, it is no wonder that some heterosexuals might still feel a need to lash out at interracial marriage and same-sex intimacy to bolster sexual and moral traditions they perceive as weakened. Indeed, in Alabama, where the divorce rate is among the highest in the nation,[429] and ninety percent of the state's population is married before the age of twenty-five,[430] discomfited Alabamians may well be in need of something to scapegoat as an enemy to traditional marriage.

As suggested throughout this Article, Alabama is not unique in this regard or any other. Indeed, America's most recent national campaign of hostility toward gay people is the overtly defensive Defense of Marriage

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426. *Id.*

427. *See, e.g.*, *An American Family*, *supra* note 15, (describing Marine Col. Peck's views that he learned to accept his homosexual son and his son's relationship as a family matter, though arguing that military policy that would introduce homosexuals to homophobes would lead to violence); Barton Gellman, *Gay Aviator's Plea Rejected; Navy Board Unmoved by Lieutenant's Emotional Defense*, WASH. POST, July 25, 1992, at A1 (detailing how Lieutenant Tracy Thorne's father opposed homosexuality but learned to accept his son as he watched him defend himself before the Navy Board of Inquiry). *But see* Warren, *supra* note 421, at A23 (noting how sponsor of California's anti-same-sex marriage initiative is estranged from his gay son).

428. *Green*, 58 Ala. at 195.

429. *See* Greg Garrison, *Survey: Baptists Lead in Divorces*, BIRMINGHAM NEWS, Dec. 30, 1999, at 2A (noting that Alabama, "which has more than one million Southern Baptists and a majority of evangelicals ranks fourth nationally in divorce rates"); Marion Manuel, *Untying the Knot: Divorce Now a Southern Ritual*, ATLANTA J. & CONST., Nov. 12, 1999, at 1A.

430. *See* U.S. DEP'T COM., 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: ALABAMA (1990 CP-1-2), at 94 (1992).

Act (DOMA)[431]—a law that provides heterosexual marriage no defenses against divorce and adultery, but instead, serves as little more than a legal platform for panicked heterosexuals to stigmatize lesbians and gay men as the cause of agony.[432] In supporting the legislation, Congressman Bob Barr, the thrice-married, twice-divorced adulterer,[433] branded same-sex marriage a "direct assault by homosexual extremists" on the institution of marriage[434] leaving "the very foundations of our society . . . in danger of being burned" by the "flames of hedonism, the flames of narcissism, the flames of self-centered morality."[435] Likewise, the adulterous Henry

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431. Defense of Marriage Act, Publ. L. No. 104-199 (1996), *codified as* 28 U.S.C. § 1783C (1996) and 1 U.S.C. § 7 (1996).

432. In sponsoring DOMA, the Senate's elder statesman, Robert Byrd, seemed to know that his antigay rhetoric was prone to scrutiny as gay bashing. Byrd had to catch himself, protesting, "I am not here to blast anyone. I am not here today to lash out at anybody. I am not here today to attack anybody." 192 S. REC. S10111 (Sept. 10, 1996) (statement of Senator Byrd). But he attacked gay and lesbian intimacy anyway, invoking the force of law to help him inflict his injuries. According to Byrd:

> It is incomprehensible to me that federal legislation would be needed to provide a definition of [marriage and spouse] two terms that for thousands of years have been perfectly clear and unquestioned . . . . Mr. President, I am rapidly approaching my 79th birthday, and I hold in my hands a Bible, the Bible that was in my home when I was a child. This is the Bible that was read to me by my foster father. It is a Bible, the cover of which having been torn and worn, has been replaced . . . . 'So God created man in his own image, in the image of God created he him; male and female created he them. . . . . Be fruitful, and multiply, and replenish the earth. . . . . For this cause shall a man leave his father and mother, and cleave to his wife; And they twain shall be one flesh: so then they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.' Woe betide that society, Mr. President, that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning. . . . . This reflects a demand for political correctness that has gone berserk. We live in an era in which tolerance has progressed beyond a mere call for acceptance and crossed over to become a demand for the rest of us to give up beliefs that we revere and hold most dear in order to prove our collective purity. At some point, a line must be drawn by rational men and women who are willing to say, 'Enough!'

142 S. REC. S10108-S10111 (Sept. 10, 1996) (statement of Senator Byrd) (emphasis added). Anyone who witnessed Byrd's defense of the "collective purity of heterosexuality" could testify, age, Bible, and Senate floor aside, Byrd all too easily recalled the image of a 25-year-old Alabama man, ax handle in hand.

For similarly phobic arguments, see 142 S. REC. S10101 (1996) (statement of Senator Lott) (claiming DOMA was "a response to an attack upon the institution of marriage"); 142 S. REC. S10103 (1996) (statement of Senator Nickles) (claiming DOMA needed prevented attacks on the "backbone" of the American family); 142 S. REC. S10106 (1996) (statement of Phil Gramm) (describing DOMA as a defense against a strike at "prosperity," "freedom," and "happiness").

433. Robert Scheer, *Flynt Hustlers Tale of GOP Hypocrisy*, L.A. TIMES, Jan. 19, 1999, at 7 (describing Bob Barr's marital history).

434. 142 CONG. REC. H7275 (July 11, 1996) (Statement of Rep. Barr).

435. 142 CONG. REC. H7482 (July 12, 1996) (Statement of Rep. Barr).

Hyde[436] proclaimed that "two men loving each other . . . demeans, it lowers the concept of marriage."[437]

Of course, the history of interference with sex and marriage in American law has always been one in which the law has had little regard for the impact it has had on human love. Indeed, for all its sweep, American law has only danced around the idea of love, recognizing rights to marriage, procreation, and family life, all of which lay claim to love but none of which require it.[438] Even when the Supreme Court wrote about the freedom to marry in *Loving v. Virginia*, it could not bring itself to mention the word "love," instead couching its understanding of intimacy in rhetorical, euphemistic flourishes of liberty, privacy, and, worst of all, the freedom to "choose."[439] Perhaps foolishly believing that we were equal under the law, gay and lesbian people have attempted to claim a right to that same freedom to choose, and have been denied that choice throughout American history. Perhaps the law has assumed that if those of us who are gay can "choose to love," we can also choose not to love, and that, if we make the wrong "choice," we should suffer for it.

I can only speak personally to this point: when I have loved someone, I have not chosen it—the longing to be near him, to hear his voice, to breathe his air, to know the warmth of his embrace, to hold his hand. And like so many sexual minorities, when I have not expressed these feelings, that, too, has also not been by choice. Those feelings have repeatedly and systematically been forced down inside of me to a place where "hate crime" is no longer a mystery. There, something tells me that if Steven Eric Mullins believed that Billy Jack Gaither had made a

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436. *See* Frank Rich, *More Joy of Sex*, N.Y. TIMES, Sept. 26, 1998, at A15.

437. *See* 142 CONG. REC. H7480 at H7501 (July 12, 1996) (statement of Henry Hyde).

438. The Supreme Court's opinions protecting heterosexual procreation, marriage, and family life do not expressly recognize the concept of love, and most do not mention the word. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95-96 (1987) (describing marriage rights as important to emotions, religion, spirituality, and government benefits, without reference to love); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing marriage as noble "way of life" and an "intimate" "bilateral loyalty"); Maynard v. Hill, 125 U.S. 190, 204-05 (1888) (relating marriage to morals, civilization, and "the legitimacy of many children, the peace of many families, and the settlement of many estates").

439. The Court's discussion of marriage in *Loving* is confined to two paragraphs in which the Court describes marriage as something "personal" and "vital" to happiness, but makes no mention of the word "love." 388 U.S. at 12. In fact, the Court's only mention of the word "heart" comes in the context of the "principle of equality at the heart of the Fourteenth Amendment." *Id.* At oral argument, counsel for the Lovings explained to the Court:

> [N]o matter how we articulate this, no matter which theory of the due process clause, or which emphasis we attach to it, no one can articulate better than Richard Loving, when he said to me: 'Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia.'

*See* MAY IT PLEASE THE COURT 285 (Peter Irons & Stephanie Guitton eds., 1993).

life-threatening pass at him, there was nothing Billy Jack could have done to prevent what happened next. Billy Jack Gaither was dead the minute an Alabamian came face to face with a culturally demonized gay identity, opened his mind to the thought someone might also perceive him as gay, and screamed.

Given the limited regard the law has for love, the tolerance it has for hate should be utterly unsurprising. In cultures where arranged marriages were norms and marital choices were exercises of economic power, the connections between cultural repression and violence may have seemed so basic to a way of life as not to be questioned. But given the growing acceptance of the centrality of romantic love and marriage to human development, discriminatory legal attacks on gay love continue to be particularly cruel cuts. If a culture can, with force of law, strike directly at the hearts of gay and lesbian people, it should come as no shock that the culture's most violent members may feel no qualms about striking at gay and lesbian people more profoundly.

With all due respect to Oscar Wilde, the "mystery of Love" is not "greater than the mystery of Death."[440] Throughout the United States, harassment, punishment, and other forms of intrusions into the love lives of gay and lesbian people are well-rehearsed as a matter of culture and policy. From this perspective, the murder of lesbians and gay men should be imminently understandable to any American who knows that gay and lesbian people must still, in the twenty-first century, suppress expressions of love for social, economic, and physical survival. For those Americans who spend life along the culture's most violent and primitive margins, brute force must feel like an effective way to participate in the culture's promotion of death of its gay citizenry. Indeed, in a country still rife with antigay injury democratically preserved and enforced by law, the death of a gay person at the hands of a nongay American should really be no mystery at all.

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440. *See* OSCAR WILDE, SALOME 66 (Lord Alfred Douglas trans., Faber & Faber ed., 1989). In light of the murderous context for the quote, it is certainly possible that Wilde himself did not really agree that "the mystery of Love is greater than the mystery of Death."