# Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law

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In this article we examine how the concept of hate crime has been transformed in judicial discourse from a broad ambiguous category, which generated substantial controversy and opposition, to a focused determinate legal construct, which has been largely accepted as a legitimate legal practice. We track changes in judicial rhetoric across 38 appellate court opinions that consider the constitutionality of hate crime cases (1984–1999), and we propose a theoretical framework for analyzing the "settling" of legal meaning. A qualitative interpretive analysis demonstrates that the meaning of hate crime that emerges across the series of cases is much richer and nuanced than the collection of words contained in the statutes, and that the domain of hate crime has expanded across the series of cases to include a broader range of behaviors and mental precursors. Quantitative analysis shows that, over time, judges have developed a more economical and formulaic rhetoric for responding to petitioners' constitutional challenges to hate crime statutes and have converged around sets of arguments for negotiating challenges. We discuss the implications of these findings for traditional jurisprudential analyses, sociolegal research on judicial decisionmaking, and research on the social construction of deviance.

## The Problem of Settling

At any given moment, legal rules and categories exist on a continuum from controversial to settled (Friedman 1967:793–4). For example, there is widespread agreement about the behaviors and intentional states involved in larceny or fraud, but significantly less consensus about what should be included under sexual harassment (Schultz 1998) and computer "hacking" (Chan-

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dler 1996). The controversy surrounding these latter categories has resulted in intense negotiations among politicians, legal officials and experts, collective actors, and others about their meaning: What kinds of behaviors and intentions can be grouped under these categories? What should be excluded? What is the relationship between these behaviors and those already legally proscribed? What makes the misbehavior involved severe enough to be labeled illegal? Such questions expose the effort to attach a precise meaning to broad legal concepts and delimit their domain and usage. The centrality of such "meaning-making" activities in constituting a legal category, coupled with temporal variability in the "settledness" of legal categories, underscores a core social process operative in law: "determinacy" is a social achievement rather than an inherent quality of legal rules and concepts (Mitchell 1990; Ewick 1992; Weissbourd & Mertz 1985).

Although the "settling" of legal meaning occurs in multiple sites inside and outside of the formal legal system (Mertz 1994), courts are correctly understood by legal analysts and social science researchers to play a special role in determining the meaning of law (Wahlbeck 1998). Despite the acknowledged centrality of courts and judicial opinions in the "fleshing out" of legal rules, there has been little research and theory on the social process by which legal concepts are formed, elaborated, and delimited. To begin to fill this gap, we offer a set of theoretical and analytic tools for investigating the settling of legal meaning. Empirically, we focus on the statutory concept of hate crime. Such statutes enhance punishments for crimes committed because of a victim's race, religion, sexual orientation, or other protected characteristic. We selected hate crime law because of its newness and because the consensus within the legal community about its meaning and legitimacy has varied visibly over time. Such variation is key to building a broader understanding of the settling phenomenon.

As a largely unexplored issue, the topic of settling prompts both interpretive and explanatory questions. Because settling is fundamentally a meaning-making activity, an interpretive analysis aimed at understanding how the meaning of hate crime has evolved in judicial discourse is necessary. At the same time, we can use the case of hate crime to search for general factors that facilitate or impede settling. Thus, an orientation to how settling can be conceptualized, measured, and explained is also necessary. Although interpretive and explanatory modes of inquiry are typically separated within sociolegal and social science research, we unite them in order to understand both the "career" of the legal concept of hate crime and to build a preliminary model of settling that will be useful in guiding future research.

More specifically, we explore the settling of hate crime by examining appellate judicial opinions from 1984 to 1999 that con-

sider the constitutionality of hate crime laws. The data are well suited to our questions because the emergent meaning of hate crime is reflected across the series of judicial opinions. We now turn to our theoretical framework for examining the settling process, and indicate its relationship to work on judicial politics, institutionalism, and societal reaction theories of deviance.

## Judicial Politics, Meaning-Making, and Institutionalization

What is commonly referred to as the "legal model" of judicial decisionmaking (Segal & Spaeth 1993) contains assumptions about the origin and circulation of legal meanings within the judicial system. The legal model suggests that the meaning of a legal rule is constrained by (a) the *plain meaning* of the language contained within a statute, (b) the *original intent* of the drafters of the statute, (c) the judge's sense of the proper balance of *societal interests* embodied in the statute, (d) *precedent,* and (e) the *Constitution* (Spaeth 1995). Ideally, these factors combine to produce a singular unambiguous interpretation of what a rule covers and whether it represents a legitimate rule relative to precedent and the Constitution.

A substantial body of research has shown that the legal model fails to consider the influence of judges' political values and ideological commitments on judicial decisions (See Segal & Spaeth 1993; 1996; Spaeth 1995; Segal et al. 1995; Segal & Cover 1989).[1] Such work, however, has been primarily concerned with explaining the objective outcomes of cases (e.g., judges' votes) and is less focused on the social processes through which judges make sense of a legal rule, frame their decisions, select or create justifications, and embed their interpretations of specific statutes within broader systems of meaning.[2]

In addition to the flaws identified by judicial politics researchers, the legal model also does not adequately represent how judges attach meaning to legal concepts. However, rather than juxtaposing legal and social causation, we begin by conceptualizing judicial behavior as ordinary social action, a product of

[1] Recently, some scholars have questioned whether the legal model represents an empirically testable explanatory model or is instead a largely mythical image of judging (Brisbin 1996). If it is an explanatory model of decisionmaking, then it can be discounted with contrary evidence. If it is an idealized image that no one really believes is practiced (Caldeira 1994), empirical contradiction only serves to defeat a straw man (See *AJPS* special volume).

[2] This shift from focusing on case disposition to substantive rules as outcomes of judicial behavior is advocated by Knight & Epstein, who argue "that analyses of courts ought to center on the law that is established by judicial decisions. By law we refer to the substantive rules of behavior that are created by courts through their holdings and justificatory arguments. If legal rules become the primary focus for analyzing the effect of precedent on judicial decisionmaking, then the possibilities for such effects expand beyond the determination of judicial preferences. And such effects cannot be adequately tested through a narrow focus on the disposition of cases" (1996:1021).

a judge's socially constructed interests and ideological values, and the limitations, perceived or actual, on the exercise of those interests (See Sewell 1992; Giddens 1984; Swidler 1985). "Past constructions of law" (Brisbin 1996), "interpretive canons" (Rosenberg 1994), expectations of the judge's "role" (Knight & Epstein 1996), and policy commitments (Segal & Spaeth 1993) all form part of a cultural "tool kit" (Swidler 1985) from which judges construct interpretations and opinions. In other words, it makes sense to think about law as structuring judicial outputs, but not in the deterministic way the legal model presumes.[3]

How meaning is given to legal concepts is a process of social construction—of both the past doctrinal foundations and the particular rule at hand. This understanding owes much to the "moderate" constructionist view of legal meaning-making, as described by Mertz (1994), which expresses skepticism toward the "fixed and natural character of categories." It suggests that such categories are fluid, encompassing different content across time and space, and raises for empirical investigation the question of how legal categories become constructed, i.e., how they become fixed (Ewick 1992), taken for granted (Berger & Luckmann 1966), and naturalized (Douglas 1986).

Research on the social construction of legal categories can be traced to the labeling/societal reaction perspective within the sociology of deviance that emerged in the 1950s and 1960s. Two lines of inquiry originate from this work (Pfohl 1994). The first line of research, which is macrosociological and historical in nature, examines the role of "moral entrepreneurs" and other extralegal collective actors in the construction and promotion of definitions of deviant behavior through legislative reform (Becker 1963; Gusfield 1963; 1981; Spector & Kitsuse 1977; Pfohl 1977). The second line of research is microsociological and interactional in nature and focuses on the application of deviant labels to particular social actors and actions (Kitsuse 1962; Becker 1963; Scheff & Culver 1964; Bittner 1969; Emerson 1969; Wiseman 1970), as well as the consequences of being labeled deviant (Lemert 1951; Sykes & Matza 1957).

[3] In other words, we take the view that judges are *bricoleurs* who assemble decisions and opinions from multiple sources, including both preexisting "legal" factors and what is traditionally referred to as "extralegal" factors (e.g., policy philosophies or popular constructions of criminal deviants). The key to this perspective is that even the way legal factors affect decisions is through a social process (See Knight & Epstein 1996). The "plain meaning" of a statute, the societal interests at stake, and what precedents and constitutional provisions are relevant to consider are all mediated by an interpretive process that involves a certain amount of improvisation and flexibility. However, the striking thing is that flexibility tends to diminish over time, as judges converge around particular interpretations and conform to community expectations about how to address particular matters. Put another way, our view is that parsing explanations of judicial behavior into what amounts to "legal" versus "social" factors (i.e., attitudinal, ideological) is rooted in a false understanding of legal factors as somehow non-social.

David Sudnow's (1965) work on "normal crimes" (see also, Cicourel 1967; Daniels 1970; McCleary 1977) represents one of the earliest and most influential efforts in the constructionist tradition to specifically examine courts. Observing the plea bargaining process within a criminal court, Sudnow found that prosecutors and public defenders connect offender behavior with what he terms a "normal crime" construct. The normal crime construct is a rich folk theory about the ordinary circumstances in which crime occurs, and it goes far beyond the narrow specifications of the statutory definition of the crime. Prosecutors and public defenders then use the normal crime concept, rather than the statutory definition, to derive the charge used in the plea bargain. Thus, Sudnow shows how both "criminal" actions and statutes are assigned meaning through the interactions of criminal justice officials.[4]

However, Sudnow's use of "normal crime" as a theoretical concept is rather static; the meaning of a normal crime appears to officials as an a priori given. We maintain that the meaning of a criminal statute is temporally variable, and such variability is particularly pronounced in categories that are new or vigorously contested. Actors must reach a consensus over time in order for a construct to become more settled. Sudnow provides useful insights into how, once established, a normal crime concept is put into use. But we also need to understand how normal crime constructs are formed in the first place and become more stable over time.

To describe theoretically the settling of legal meaning we employ Berger and Luckmann's (1966) notion of institutionalization. According to Berger and Luckmann, institutionalization is a process by which forms of social action and social organization within a sphere of social life become widely seen as the "correct" or most appropriate response to a particular problem.[5] Institutionalization results in patterns of social action that are not necessarily the product of (individual or collective) rationality or efficiency, but instead result from actors' desires for familiarity, stability, and certainty (DiMaggio and Powell 1991; Jepperson

[4] Boyd et al. (1996) employ Sudnow's framework to understand the routine practices law enforcement officers use to categorize hate crimes. They also address the implications of those practices for the production of official statistics about hate crime.

[5] The terms institution, institutional, and institutionalization are used widely in sociological discourse. The present usage most closely reflects recent work in the new institutionalism of organizational theory and its precursors (DiMaggio & Powell 1991; Jepperson 1991; Tolbert & Zucker 1996). Our use must be delineated from the way "institution" is used within the positive theory of institutions in political science. A theory of political decisionmaking, the positive theory of institutions holds that rational actors collectively bargain to create institutions that minimize transaction costs and encourage cooperation. Institutions in this view exist and take shape in such a way as to guarantee stability in political decision-making outcomes. Although our application of the "institution" concept also focuses on decisionmaking, we make no assumptions about the rationality of actors or the optimality of the institutions that emerge.

1991; Zucker 1991; Tolbert & Zucker 1996).[6] Thus, institutionalized behaviors appear to actors as commonsensical, obvious, "natural" responses (Douglas 1986). Actors perceive institutionalized behaviors as exteriorized rules to which they must conform, and thus social actors lose sight of the fact that such practices are actually human inventions (Berger & Luckmann 1966; Schutz 1967). We wish to highlight the implications of institutionalization for rhetoric and discourse. As behavior becomes institutionalized it becomes more *taken for granted*, requires less explicit justification, and instead relies increasingly on tacit agreement.[7]

To summarize, although there is a substantial body of work about judicial decisionmaking and court behavior, sociolegal scholars have devoted little theoretical attention to the settling of legal meaning, a core social process in law. Furthermore, the "legal model" does not provide an adequate explanation of settling. Because settling is analogous to the basic social process of institutionalization described by Berger and Luckmann, we are encouraged to view it in such terms. This framework allows us to examine the central components of settling, and the specific settling of the meaning of hate crime. Before turning to our analysis of settling, we briefly trace the history of the hate crime construct.

## The Development of Hate Crime Law

The concept of "hate crime" is relatively new, emerging in the past 20 years. However, legal responses to hate-motivated behavior in America date back to reconstruction-era civil rights statutes and early-20th-century state statutes aimed at the activities of white supremacist organizations, most notably the Ku Klux Klan. Such groups were targeted for vandalism to churches, temples, and synagogues, and the wearing of masks and hoods (Bensinger 1992; Jacobs 1993:113). Later, in the 1960s and 1970s, the U.S. Department of Justice prosecuted some hate-motivated criminal offenses under federal civil rights statutes (Morsch 1991).[8]

The contemporary wave of hate crime legislation began in California in 1978, and by 1995 two-thirds of U.S. states had enacted hate crime laws (Grattet et al. 1998:295). In contrast to older laws, modern hate crime statutes include a "bias-motivation" standard (Berk et al. 1992; Jenness & Grattet 1996) and

[6] In sociolegal studies, institutional analysis has been employed to understand organizational responses to the normative and cognitive dimensions of law (Edelman 1990; 1992; Edelman & Suchman 1997; Sutton et al. 1995; Heimer 1999).

[7] Implicit in this conceptualization is the notion that institutionalization results from repetition. Only forms of social action that are repeated, habitual, and routine can be institutionalized (Berger & Luckmann 1966:54).

[8] See 18 U.S.C. Sections 241, 242, and 245, which cover conspiracies against a person's constitutional rights, deprivations of their rights under the color of law, and interference with a person's involvement in federally protected activities.

reference an array of status categories such as race, religion, ancestry, national origin, gender, ethnicity, sexual orientation, age, and physical and mental disability. Offenses committed because of such real or imagined status affiliations are eligible for a penalty enhancement or are reclassified as a more serious crime. Among the latest developments, the 1994 Federal Hate Crime Sentencing Enhancement Act directs the United States Sentencing Commission to increase sentences for eight predicate crimes (murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and vandalism) by at least three offense levels, if such crimes are found to have been bias-motivated and occurred on federal properties (Anti-Defamation League 1997; Altschiller 1999).

In the early 1990s, hate crime laws ignited a vigorous constitutional debate.[9] As Figure 1 illustrates, the vast majority of appellate cases that have considered the constitutionality of hate crime laws occurred between 1991 and 1995. The following commentary published in a *U.C.L.A. Law Review* article by Susan Gellman, the leading critic of the laws, exemplifies the controversy surrounding hate crime laws during this period:

> The debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, when either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on both sides at once (1991:334).

In *State* v. *Mitchell*, the Wisconsin Supreme Court echoed Gellman's sentiments:

> This case presents an issue which has spawned a growing debate in this country: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crime statutes and some vigorously in opposition. Individuals and organizations traditionally allied behind the same agenda have separated on the issue of the legitimacy of hate crime statutes (1992:160).[10]

At the heart of such contestation are several First Amendment and Fourteenth Amendment constitutional questions. Three First Amendment challenges have been raised: punish-

[9] The controversy surrounding hate crime laws surfaced shortly after campus speech codes were successfully challenged in the late 1980s (Lawrence 1999; Jacobs & Potter 1998; Walker 1994). Although the two issues share a common history, courts have largely rejected hate speech codes but have upheld hate crime laws.

[10] For simplicity, throughout this article we only cite page numbers for legal cases from the official reporter. Complete citation information, including references to all reporters, is included in Hate Crime Cases Cited and Other Cases Cited.

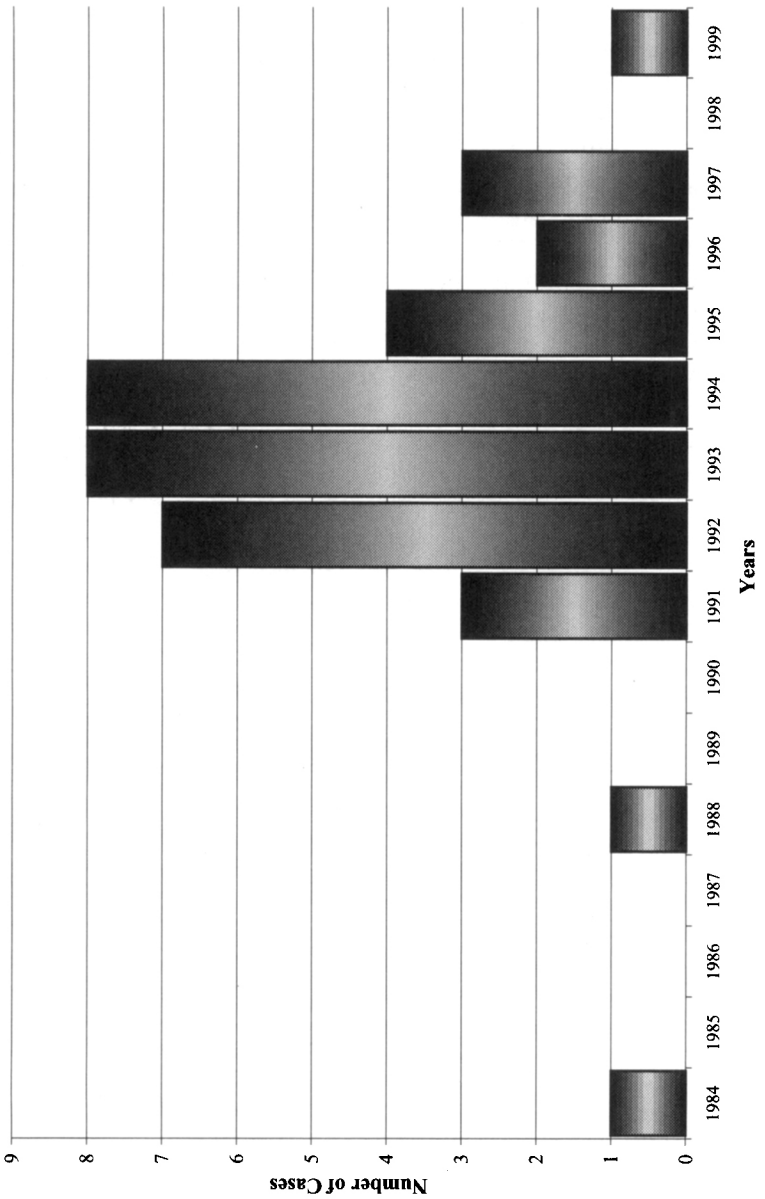


**Figure 1.** Number of appellate cases challenging hate crime statutes.

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ment of speech, overbreadth, and content discrimination. Punishment of speech challenges suggest that hate crime laws punish speech rather than action. Because the underlying offense, such as assault, is already punishable, the penalty enhancement must be directed at the actor's bias motive. Bias-motivation, in turn, is inextricably tied to beliefs and opinions (cf. *State* v. *Mitchell* 1992). Overbreadth challenges have a similar focus, contending that the sweeping language of hate crime statutes encompasses legitimate forms of expression and may have a "chilling effect" on constitutionally protected speech (cf. *State* v. *Mitchell* 1991). Content discrimination challenges argue that hate crime laws regulate speech based on the subject being addressed. Even though entire forms of expression such as "fighting words" are proscribable, statutes cannot further regulate particular fighting words (cf. *R.A.V.* v. *St. Paul* 1992). For example, a statute cannot punish fighting words related to racial animus more than fighting words related to hatred of the adversary's family.

In addition, two Fourteenth Amendment questions have been raised: equal protection and vagueness. Equal protection claims suggest that hate crime laws give preferential treatment to those with certain status characteristics (cf. *State* v. *Beebe* 1984).[11] Vagueness claims suggest that hate crime laws violate due process because they are so nebulous that the average person cannot predict what behavior will violate the statute (cf. *In re M.S.* 1995).[12]

Clearly, hate crime laws generated a significant constitutional debate. The central constitutional issues regarding speech, due process, and equal protection presented perplexing questions upon which reasonable people could, and did, disagree. Yet such questions have now been largely resolved. In recent years, a consensus has emerged among jurists that hate crime laws are indeed constitutional. But how has the meaning of hate crime become institutionalized? That is, how has the meaning of hate crime been transformed from controversial to "settled?"

## Research Strategy

To investigate the interpretive and explanatory questions previously set out, we examine all appellate judicial opinions from 1984 to 1999 ($N = 38$) that consider the constitutionality of state

[11] Equal protection claims have been raised in so few cases that we do not attempt to draw any conclusions about the patterns. Consequently, we do not discuss equal protection claims in our analyses.

[12] Recently, another Fourteenth Amendment challenge has emerged regarding whether hate crime statutes lower the standards of evidentiary proof from "beyond a reasonable doubt," as is appropriate for criminal law, to "a preponderance of the evidence," the threshold in civil proceedings (*State v. Apprendi* 1997). Although the New Jersey court rejected this claim, it remains to be seen whether this new line of attack will be repeated in future cases.

hate crime laws.[13] Cases were identified through the Lexis-Nexis on-line database.[14] For each case, we coded the petitioner's constitutional *claims,* or challenges, and the judge's *arguments* in response to such claims.[15] Most opinions address claims and arguments in an explicit and sequential manner: summary of petitioner's claim, arguments for accepting or rejecting claim, summary of next claim, arguments for accepting or rejecting next claim, and so on. The formulaic nature of judicial opinions enhanced our ability to code claims and arguments.

The emergent judicial conception of hate crime becomes clear across the series of opinions. Through an interpretive analysis of changing patterns of claims and arguments, we can observe the meaning attached to hate crime and the nature of the meaning-making process. Through an explanatory analysis of more formal and quantifiable characteristics of the opinions, we can begin to measure settling and search for factors that predict it. Thus, the data are well suited to the dual nature of our inquiry.

As discussed previously, petitioners have advanced five distinct constitutional claims: hate crime statutes (1) punish speech, (2) are overbroad, (3) involve content discrimination, (4) violate due process because of vagueness, and (5) violate equal protection through preferential treatment for certain groups. Judicial arguments provide justifications for accepting or rejecting such claims. Some examples are useful to illustrate how we tracked claims and arguments across cases. In response to overbreadth challenges (claim: overbreadth), jurists argue, for instance, that the probability that hate crime laws will have a "chilling effect"

[13] Constitutional challenges to hate crime statutes have been made on both "facial validity" and "as applied" grounds. "Facial validity" challenges address the general constitutionality of a statute, while "as applied" challenges addresses the application of a statute to particular case circumstances. Because our analysis is concerned with the overarching meaning attached to a law, we only examine "facial validity" cases.

[14] Siegelman and Donahue (1990) point out that some cases are not published; therefore, published cases may not be representative of all cases. However, the selection bias they describe is not a liability here. First, Siegelman and Donahue are primarily concerned with research that uses a sample of published cases to gauge the frequency of specific kinds of behavior and the legal response to that behavior. Because we are not using published cases to estimate behavior, such as the frequency of hate crime, the critique is inapplicable. Second, only published cases are relevant for examining settling. Published cases become part of the shared dialogue on the meaning of hate crime and influence the meaning attached to hate crime in subsequent cases. Unpublished cases are invisible to other courts (and to us), and consequently have no impact on the meaning-making process. Third, it is plausible that opinions concerning the facial validity of recently implemented statutes, such as hate crime, would be published at a higher rate than opinions concerning older laws.

[15] We acknowledge the possibility that some petitioners' claims may be inaccurately represented in the opinions. Indeed, judges may ignore particular claims or convert them into a form that is more tractable from their point of view. Our investigation of petitioners' briefs for the higher-profile cases suggests that although it is not widespread, it does happen. However, knowing the "true" claims petitioners make would not be particularly valuable since such claims are not part of the official interpretations of the laws and, therefore, would be peripheral to the meaning-making process.

on constitutionally protected speech is remote (argument: chance of self-censorship low). In response to vagueness challenges (claim: vagueness), jurists often note that hate crime statutes have a plain meaning, which can be interpreted by ordinary people (argument: plain meaning). Frequently, judges bring multiple arguments to bear on a particular claim. For example, in response to the claim that hate crime laws punish speech (claim: punishment of speech), judges may argue that the state has a compelling interest in curbing hate crimes that outweighs any incidental regulation of speech (argument: compelling interest), or that hate crime laws punish the action of selecting a particular victim (argument: hate crime laws only punish action). The Appendix displays the claims and arguments that were coded for each case.[16]

To assess the reliability of our coding scheme, a research assistant coded petitioners' claims and judges' arguments for a random sample of ten cases. The coder was given a brief description and example of each claim and argument. The results suggest a reasonable degree of reliability, given the often complex nature of legal arguments and the resulting intricacies of the coding scheme. Specifically, the coder correctly identified 96% of the petitioners' claims and 74% of the judges' arguments, for an overall reliability of 85%.

In the next section, we turn to our interpretive questions about how the concept of hate crime evolved across the appellate cases. In the subsequent section, we consider our explanatory questions about how to conceptualize, measure, and model settling. At that point, we will further elaborate the components of our research strategy that are specific to the quantitative analyses.

## Settling and the Judicial Interpretation of Hate Crime

Few legal statutes start out as algorithms for government intervention that are then executed mechanistically by enforcers. Many, if not most, begin as broad templates for action. Frequently, interested parties question the constitutionality and range of application of a statute. As courts weigh in on questions of legitimacy and scope, the meaning of a statute evolves and spreads beyond the collection of words contained within the text of the statute. The results of our interpretive analysis suggest that meaning is ultimately attached to a statute through two processes: construct elaboration and domain expansion (Jenness 1995; Grattet et al. 1998).

*Construct elaboration* refers to the refinement and clarification of a legal construct. Through construct elaboration, courts delin-

[16] An additional appendix that defines each claim and argument and provides an example of each is available from the authors upon request.

eate the circumstances in which a construct can be invoked, ruling certain behaviors and mental states in or out of the construct's domain. Construct elaboration articulates and establishes a foundation for the rule or concept. As a result of construct elaboration, a concept becomes richer, more developed, and more embedded. Because of these characteristics, elaboration is best seen as a feature of a relatively early phase of the settling process in which rhetorical energy is being expended to justify and legitimate a concept or rule.[17]

*Domain expansion* refers to an increase in the range of behaviors subsumed within a legal construct. In domain expansion, legal constructs are invoked and applied in new realms, extrapolated to encompass situations not imagined at earlier points in time. Importantly, domain expansion can only occur after the core elements of a concept are established. Once the core elements are entrenched, judges become more willing to accept a broader range of behavior within the construct's domain. Domain expansion is contingent upon, and reflects, the increasing institutionalization of a concept. Thus, domain expansion must be seen as occurring in the later phases of the settling process.[18] We now present evidence from our interpretive analysis regarding the role of construct elaboration and domain expansion in the settling of hate crime.

### Elaboration of the Hate Crime Construct

The hate crime statutes considered in the appellate cases were sharpened and delimited and, as a result, the definition of hate crime has become richer and more developed.[19] Although

[17] The fact that statutes take on more complex meanings across a series of appellate cases should come as no surprise; courts are supposed to elaborate and explicate the meaning of statutes. Challenges are designed to exploit areas of ambiguity in a statute and undermine the general validity of a statute. Courts either accept the petitioner's or respondent's interpretation, or construct one of their own. In the process, judges sharpen the definitions of the terms used in the statute and, by drawing analogies, relate the statute to more established jurisprudential principles. This happens regardless of whether the statute is rejected or upheld.

[18] Once a concept is completely settled, its meaning reaches a condition of stasis, referencing much the same behaviors and mental processes across time. Judges, prosecutors, public defenders, and the general public all share a similar understanding of the purpose and domain of the rule. Such rules also generate little discussion—legal actors do not require elaborate justifications to persuade each other that the rule is legitimate. The meaning of such an institutionalized construct is clear, and its application is predictable. Of course, one last trajectory a legal construct can follow is what we might call "extinction." Here, the concept is invalidated and left unused. In this situation we would not expect to see much further discussion of the concept either, not because its meaning has been "taken for granted," but because it has been deemed illegitimate.

[19] Courts have tended to consider hate crime statutes as a "class" of statutes. As a result, differences in wording across jurisdictions have been largely ignored as courts frequently "borrow" reasoning from other jurisdictions. In fact, 54% (19 of 35 ) of the cases explicitly cite the opinion of at least one other state court (not including citations to the Supreme Court). The denominator for this percentage is 35 cases rather than 38 cases because we exclude three cases: the first case in the series (*State v. Beebe*), which could not

construct elaboration is evident in several aspects of the appellate opinions, two examples stand out.

*Speech, Motives, and Criminal Penalties*

A common strategy used by petitioners was to claim that the statutes punish speech. As an Oregon petitioner argues, the state hate crime law is unconstitutional "because it punishes belief and proscribes opinion or a subject of communication" (*State* v. *Hendrix* 1991:739). The punishment-of-speech claim rests on the following logic: if the punishment for a parallel crime (i.e., the same crime absent the bias-motivation) represents the punishment for the *conduct* involved in a particular offense, then the additional penalty under a hate crime conviction can only reflect punishment for the *motive*. According to this view, the bias-motivation standard taps into an offender's beliefs and opinions, and thus hate crime laws punish beliefs and opinions. The Ohio Supreme Court notes:

> The predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished in R.C. 2927.12, but which is not an element of the underlying statutory offense. . . . The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive. (*State* v. *Wyant* 1992: 570–71)

But most courts were not convinced that "something more" was actually punished under hate crime statutes. Judges rejected the reasoning that one could dissemble hate crime into its motive and conduct components and consequently identify which portion of the punishment was directed to each. Instead, judges argued that motive is, and always has been, a completely appropriate consideration in punishment.[20] As a California Court of Appeals notes:

> It is not true that an actor's reason for acting is never relevant in criminal or civil law. The same conduct may be punished differently depending on the reason the defendant acted. . . .

possibly cite another state court, and the two Supreme Court cases (*R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*), which must cite the state court from which the case originates. Hate crime is not unique in this regard. Interstate citations have been observed in other settings as well (Walsh 1997; Caldeira 1985).

[20] After this argument was introduced in the seventh case where the punishment-of-speech claim was raised (*Dobbins* v. *State* 1992: 924–25), it was replicated in 65% (11 of 17) of the remaining punishment-of-speech cases (*People* v. *Miccio* 1992:701; *People* v. *Joshua* H. 1993: 1749–51; *People* v. *Superior Ct.* 1993:1608–9; *Wisconsin* v. *Mitchell* 1993:14–18; *State* v. *Ladue* 1993:630; *In re M.S.* 1993:1773; *State* v. *Talley* 1993:205; *State* v. *McKnight* 1994:394; *State* v. *Vanatter* 1994:756–57; *State* v. *Mortimer* 1994:528; *People* v. *McKenzie* 1995: 1267–68).

> For example, a homicide may be charged as first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter, or it may be excused altogether, depending on the perpetrator's motive. (*People* v. *Joshua H.* 1993:1750–51)

Courts also argued that hate crime laws punish the action of selecting a particular victim, not speech; committing a crime against another person because of the victim's protected characteristic constitutes a hate crime, but speech alone does not.[21] However, courts argued that speech can be used as evidence of bias-motivation.[22] An Illinois appellate court explains both arguments:

> We find that the statute at issue here does not punish an individual for merely thinking hateful thoughts or expressing bigoted beliefs. Instead, section 12–7.1 punishes an offender's criminal conduct in selecting a victim by reason of those beliefs or hatred, and then committing one of the criminal acts included in section 12–7.1. . . . Furthermore, it is well settled that the first amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. (*In re Vladimir P.* 1996:1073–74)

Acting in concert, these judicial arguments clarified the role of motive and speech in hate crime statutes. Motive can and should be a consideration in the determination of penalties, and speech is not the object of punishment, but instead provides *evidence* of motive. A handful of opinions went further by indicating that speech is not necessary for a hate crime conviction. Evidence of motive can be gleaned from other sources, as illustrated in the following excerpt: "[I]f the state showed that every Saturday night for two months the defendants traveled to an area with a large Hispanic population and assaulted a Hispanic person, the trier of fact could infer that the defendants intended to cause physical injury to the present victim because he is perceived to be Hispanic (*State* v. *Plowman* 1992:166)." Thus, because speech was not central to the establishment of an act as a hate crime, it could not be interpreted as the target of punishment.

Together, this bundle of arguments was crucial for distinguishing hate crime statutes from hate speech codes and, conse-

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[21] Once this argument was introduced in the first punishment-of-speech case (*State* v. *Beebe* 1984:742), it was replicated in 87% (20 of 23) of the remaining punishment-of-speech cases (*People* v. *Grupe* 1998:8–9; *State* v. *Hendrix* 1991: 739–40; *State* v. *Plowman* 1992: 165, 167–69; *Dobbins* v. *State* 1992:923–25; *People* v. *Miccio* 1992:700; *People* v. *Joshua* H. 1993:1743, 1745–47; *Wisconsin* v. *Mitchell* 1993:19; *State* v. *Ladue* 1993:630; *In re M.S.* 1993:1772, 1774; *State* v. *Talley* 1993:199–203; *People* v. *Baker* 1993:8–9; *State* v. *McKnight* 1994:395–96; *State* v. *Vanatter* 1994:757; *State v. Stalder* 1994:1076; *Groover* v. *State* 1994:692; *State* v. *Mortimer* 1994:527–28; *People* v. *McKenzie* 1995:1267–68; *In re Vladimir P.* 1996:1073; *Illinois* v. *Nitz* 1996:367–70; State v. *Nye* 1997:510–13).

[22] This point is explicitly made in the following cases: *State* v. *Hendrix* (1991:740), *State* v. *Plowman* (1992:166–67), *State* v. *Talley* (1993:205, 209), and *In re Vladimir P.* (1996:1074).

quently, hate crime from hate speech. In the early 1990s, the line between the two was ambiguous (Goldberger 1992/1993). But as case law continues to mount, it is increasingly clear that hate crime statutes apply to hate-motivated conduct rather than hate speech. Construct elaboration is thus evident in the increasingly specified role of motive and speech in defining and punishing hate-motivated behavior.

*Proportionality of Bias-Motivation*

Construct elaboration is also evident in judicial arguments regarding the "proportionality of bias motive" question: what proportion of an offender's motive must be related to bias for a crime to be designated a hate crime? As is well known, crime victims are often selected for multiple reasons: presumed level of guardianship, location, appearance, potential for material gain, vulnerability, etc. None of the hate crime statutes specify exactly how to deal with mixed motives. But in *People* v. *Superior Court* (1993:1604–7), a California court of appeals introduced the notion that bias must be a "substantial factor" in the selection of a victim, and other courts followed suit.[23] In fact, the question of mixed motives now has been resolved in the same manner each time it has been raised.

Adoption of the "substantial factor" criterion allowed courts to distinguish hate crimes from crimes in which bias was present, but peripheral. For example, shouting a racist epithet during a robbery would reveal bias, but bias might be a trivial factor in the selection of the victim compared to vulnerability. Or an assault could be based on bias, but the offender robs the victim because injuries from the assault create vulnerability. Both crimes involve bias and vulnerability. Yet only the second scenario would be a hate crime under the substantial factor standard. Thus, the substantial factor standard elaborates the meaning of hate crime by clarifying the required degree of bias-motivation.

It is important to note that the question of proportionality could have been resolved in a narrower manner. For example, courts could have required that bias be the "sole factor." Or courts could have applied a "but for" standard; the crime would not have occurred "but for" the race, religion, or sexual orientation of the victim. In fact, some law enforcement training programs (Bureau of Justice Assistance 1997; Berk et al. 1992) recommend that police officers adopt a "but for" standard when investigating potential hate crimes.[24]

[23] *People* v. *Baker* 1993:14–17; *In re M.S.* 1995:25–35; *People* v. *Superior Court* 1995:741; *Wichita* v. *Edwards* 1997:10–12.

[24] Elaboration of the construct with respect to the punishment of speech issue is evident in some other areas as well, although the patterns are not as clear as the examples previously discussed. For example, a court has refined the concept by fleshing out forms of *expressive* conduct that can be regulated (*In re M.S* 1992). Although the United States

Our analysis suggests that the elaboration of hate crime is well underway, although perhaps not complete. In the examples regarding speech and motive, the meaning of hate crime is narrowed from the possible interpretations of the statute and increasingly becomes settled. Through construct elaboration, broad ambiguous hate crime statutes are infused with specific meaning. Moreover, elaboration is occurring in markedly homogenous ways; courts in different jurisdictions, considering statutes with slightly different wording, employ similar rhetoric to respond to challenges. The result is a more delimited and complex construction of hate crime and the creation of an arsenal of justifications for defending the concept against challenges. More generally, construct elaboration serves to build up the justification for a concept and reflects the concept's increasing acceptance and institutionalization within judicial discourse. However, as a concept becomes more embedded, courts appear to shift attention from elaborating the concept to expanding it to encompass new behavior and circumstances.

## Expansion of the Hate Crime Concept

### *Toward a Higher Quotient of Expressive Conduct*

Over time, judges are presented with a more diverse array of behavior and situations to reconcile with a particular legal construct. In such circumstances the reach of a construct may actually expand. Although the number of hate crime cases is small and any conclusions must be tentative, the domain expansion of hate crime appears to be underway.

Figure 2 illustrates the behaviors considered in appellate hate crime cases across time. All early hate crime cases involved bodily injury to the victim. Later, property damage cases were considered, and several of the most recent cases revolve around harassment and intimidation. Thus, the domain of the hate crime construct appears to have expanded over time to include a higher quotient of expressive behavior. In the early case of *State* v. *Hendrix* (1991), for example, the offenders beat several Mexican men with baseball bats and clubs outside a convenience store. And in *People* v. *Lashley* (1991) the offender shot an African-

Supreme Court decision in *R.A.V. v. St. Paul* (1992) appeared to signal considerable limitations on the incorporation of expressive conduct into hate crimes, most statutes contain wording that shades into expressive activity, such as "harassment," "menacing," "terrorizing," and "intimidation." Subsequent decisions have ruled that such conduct can be punished if it meets the established legal standard of a true threat. A true threat occurs when the speaker has the ability to carry out the threat and appears likely to do so. Application of the true threats standard expands the domain of hate crime beyond bodily injury and vandalism. But it also restricts the meaning of hate crime. Notably, hate crime does not include speech that is unconnected to a "true threat." Even when hate speech is connected to a threat the court could decide that the threat is not credible and imminent. These refinements are consistent with the construction of motives and the role of speech as evidence, described previously.

American man who was fishing at a lake with his cousins. Yet in a recent case, *State* v. *Nye* (1997), the offenders were convicted of putting bumper stickers which read "NO I do not belong to CUT" on area road signs, in mailboxes, and on property that belonged to the Church Universal and Triumphant.

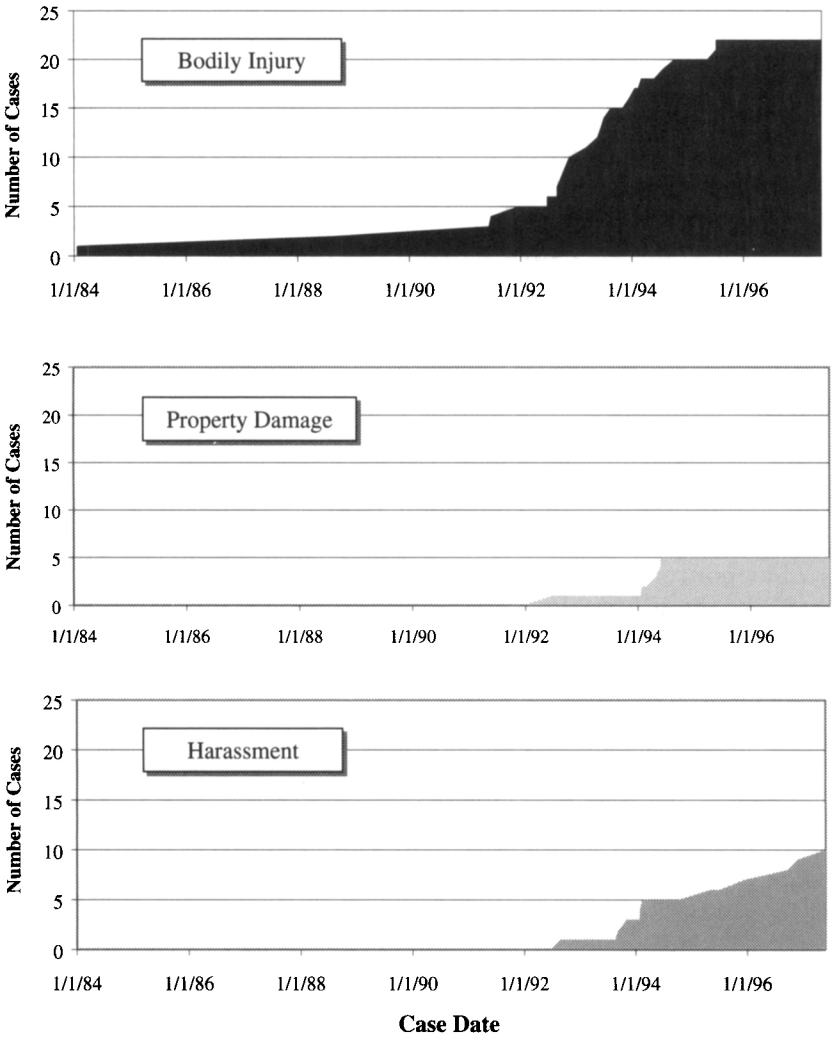


**Figure 2.** Cumulative frequency of hate crime cases by type of conduct considered.

Such a pattern suggests that the legitimacy of hate crime laws as a response to violent conduct was embedded first. Given the centrality of concerns about whether the laws punish expression, prosecutors—and perhaps judges—presumably believed that cases involving bodily injury were "easier" to pursue. Once the "easy" cases were upheld, prosecutors began to push the envelope and go after more ambiguous circumstances. More theoreti-

cally, the shift to harassment and intimidation cases suggests that institutionalization is an incremental process; the core provisions of a statute must be cemented before more peripheral issues can be considered.[25] A second area of domain expansion is reflected in the shift from judicial interpretations of the statutes as covering "hatred" to covering "bias."[26]

*From Hate Crime to Bias Crime*

As we have noted, critics argued that hate crime laws invite unprecedented scrutiny of offenders' motives (Gellman 1991). Often officially designated as "hate crime" statutes within a state's criminal code, the laws seem to imply that "hate" is the prerequisite motivation that must be shown. However, culminating with the U.S. Supreme Court opinion in *Wisconsin* v. *Mitchell* (1993),[27] courts have rejected the idea that hatred (or, for that matter bigotry or prejudice) is punished under hate crime laws. Relying heavily on the logic of earlier antidiscrimination laws, courts argued that the pivotal question is whether the victim was *intentionally selected because of* his or her race, religion, national origin, etc. Put another way, it is the perpetrator's *act of discrimination*—not the perpetrator's hate or prejudice—that is punishable. This interpretation adopts and extends the understanding provided by earlier courts that hate crimes statutes only punish action. The implication is that hate crimes are not "thought crimes" any more than discrimination is a thought crime; the perpetrator's attitudes are irrelevant, only the act of discrimination matters. As the Florida Court of Appeals has ruled:

> It does not matter why a woman is treated differently than a man, a black differently than a white, a Catholic differently than a Jew; it matters only that they are. So also with section 775.085 [Florida's hate crime statute]. It doesn't matter that

[25] Uniform Crime Report (UCR) data on hate crimes reveal the same pattern. Hate crimes involving harassment and intimidation represent an increasing proportion of the total number of hate crimes, rising from 7% in 1990 to nearly 40% in 1997 (Bureau of Justice Statistics 1997).

[26] There is also some indication that domain expansion is occurring with respect to the range of victims. Although most cases involve racial violence, the number of cases involving homosexual victims has increased significantly since 1993. This pattern is even more evident in the UCR data on hate crimes, in which crimes based on sexual orientation are making up an increasing proportion of the total number of hate crimes. There is also a civil case involving the gender provision of the Violence Against Women Act currently pending before the Supreme Court (*Brzonkala* v. *Morrison,* pending 1999). This case has implications for the gender category in hate crime laws. Domain expansion to the categories of disability appears likely over the next few years.

[27] The conventional view is that the U.S. Supreme Court simply intervened, applied the "proper" analysis, and clarified the motive/intent issue. In fact, all the judicial arguments used to dispose of the overbreadth and punishment-of-speech claims in *Wisconsin v. Mitchell* (1993) were employed in the six appellate decisions that preceded *Wisconsin v. Mitchell* (1993). Thus, the U.S. Supreme Court opinion might be better thought of as replicating arguments made in the previous cases, rather than as crafting a truly innovative solution.

> Dobbins hated Jewish people or why he hated them; it only mattered that he discriminated against Daly by beating him because he was Jewish" (*Dobbins v. State* 1992: 925).

To reflect this change in the conception of hate crime some subsequent commentators have shifted to calling the laws "bias crime" rather than "hate crime":

> 'Bias crimes' is a more accurate term than 'hate crimes.' The statutes under consideration likely apply to many criminal acts in which hate, understood as a particular subjective emotion, is not involved. . . . Likewise, the statutes under consideration do not apply to many criminal acts based upon hate (Dillof 1997:1016).

Such a shift broadens the applicability of the laws because hate does not need to be present; only bias does. Acts by virulent racists or offenders with a mild disrespect for the victim's group are punished equally, and an offender's underlying philosophy and degree of bigotry are irrelevant. Thus the domain of hate crime expands because a wider set of circumstances than "hatred" can qualify for punishment under the laws.[28]

In sum, the accumulation of appellate cases has influenced the meaning of hate crime in two distinct ways. First, the judicial conception of hate crime has become more elaborate and complex than the handful of signifiers contained within the statutes would seem to imply. In other words, today one would not be able to understand what exactly hate crime laws cover by looking at the statutes alone. Additional layers of meaning have been added as judges have worked to spell out the precise legal definition of hate crime and delineate the boundaries of what is included in the concept and what is not. This activity is crucial to justifying and defending the concept from challenges. Second, and perhaps more surprising, courts have recently expanded the scope of what they recognize as hate crime. Thus, once the core of the concept was largely secured from challenges, courts began to apply the concept to novel circumstances. Both these characteristics, which we have termed construct elaboration and domain expansion, are indicative of a concept that is gaining acceptance, or settling.

[28] In some instances, this elaborated conception of motive was imposed on statutes that appear to require more information about the offender's state of mind than is implied in the "because of" construction. For example, Florida's statute, which enhances penalties if the crime "evidences prejudice based upon race, religion, etc.," seems to invite an investigation of the precise character of the offender's motivation. However, the Supreme Court of Florida (*State* v. *Stalder* 1994) narrowly interpreted the statute as providing for enhancement when the victim was "*intentionally selected because of* race, religion, etc." In other words, the court ignored the specific terms included in the statute (e.g., that prejudice was required) and aligned its interpretation with the one we described previously. Thus the precise words contained in a statute may not necessarily have determinate implications for the meanings attached to the statute.

## Measuring and Explaining Patterns of Settling

### Measures of Settling

Although the first part of our analysis has been devoted to interpreting the ways that settling is manifest in the changing meaning of a legal construct, settling can also be seen in more formal aspects of judicial rhetoric. Approaching the problem of settling through an analysis of the formal characteristics of judicial rhetoric allows us to continue to explore how settling is reflected in hate crime case law, but it also allows us to define, measure, and operationalize indicators of settling that will potentially stimulate research in other substantive areas. We previously described our basic approach to coding claims and arguments, now we turn to the other measures we constructed.

Institutionalization is a process by which rules become "taken for granted" by social actors (Jepperson 1991; Edelman & Suchman 1997). As a rule becomes more "taken for granted," we suggest that the amount of rhetorical work devoted to justifying the rule should decline; if the meaning of a rule is obvious, there is no need for lengthy explanations. Thus settling should be reflected in changing patterns of rhetorical work. We coded the following two indicators of rhetorical work:

- *Words per claim*: The average number of words used in response to petitioner's claim(s).
- *References per claim*: The average number of case references cited in response to petitioner's claim(s).[29]

The words-per-claim variable assesses the extent to which judicial arguments in response to petitioners' claims are established, reducing the need for discussion. The references-per-claim variable also gauges how much judicial arguments are entrenched, reducing the need for justificatory references.[30]

[29] Word and reference counts were only computed for the portion of the opinion that addresses a particular claim. Case law history, the factual set-up, minority opinions, and discussion of procedural matters not related to the constitutionality questions are all excluded from the counts. In the overwhelming majority of cases, this was entirely straightforward, given the formulaic approach to opinion-writing most judges use. Most opinions use section headings to explicitly mark off portions of the opinion devoted to particular constitutional challenges (e.g., vagueness), which makes it easy to identify the beginning and end of the discussion of a particular claim.

[30] Some research indicates that the volume of references might be expected to increase over time (Walsh 1997; Knight & Epstein 1996). As a concept becomes more embedded, courts will merely list a series of cases rather than consider the findings of each in detail (Friedman et al. 1981). This is a plausible argument and represents an important dimension along which the institutionalization hypothesis and alternative views can be compared. If, as we suggest, settling decreases the need for legitimation, then the words-per-claim and references-per-claim measures should be positively correlated. If the alternative view is correct, then the words and references measures should be inversely related. Thus, in the coming analysis, we explore both the distribution of the words and references measures over time, and the correlation between the measures.

The logic of these measures is perhaps best illustrated in a familiar context, such as the settling of a quantitative technique in social science research. Early on, articles employing a new quantitative technique require a lengthy section with many supporting references to explain and defend the use of the technique. But as debates about the use of the method are increasingly resolved, and the scholarly community becomes more accepting of it, sections devoted to its justification contain fewer supporting references. Later on, a brief description and a citation to a well-known reference suffice. Ultimately, no description or citation is needed—such as the use of ordinary least squares regression in sociological articles. This example suggests that rhetoric may be used to measure settling in both legal and nonlegal research settings.

**Hypotheses**

We predict that settling will be reflected in judicial rhetoric in the following three ways. First, we expect early judicial responses to petitioners' claims to be lengthy as judges puzzle over how to situate hate crime statutes into the existing structure of the law. By contrast, we expect later judicial responses to be more economical and formulaic. Fewer words are required when the meaning of the law is more fixed and taken for granted. Second, although early cases require numerous citations to provide substantial rhetorical support for the courts' arguments, we expect that fewer citations will be needed in later cases. Settling decreases the need for justification to be rooted in external sources of authority because arguments come to be seen as self-evident and commonsensical. Third, we expect early cases to be marked by a variety of arguments as jurists experiment with various responses to constitutional challenges, whereas later cases will coalesce around a limited number of arguments, indicating the establishment of a "recipe" for negotiating petitioners' claims. Thus, we hypothesize that the number of words per claim, the number of references per claim, and the range of judicial arguments will decline over time.

Although we predict a general decline in words per claim and references per claim over time, we are also interested in the precise pattern of the reduction. We imagine three "ideal types" of settling, each associated with a particular form of social action: "linear decay," "log normal decay," and "diminishing peaks." A linear decay in rhetorical work would indicate that settling progresses arithmetically through a "learning" process. It would signal a rapidly formed consensus, as challenges are raised and summarily resolved, and subsequent courts merely devise more economical language for disposing of such challenges. A log normal decay would suggest that the contested meaning of a con-

struct grows gradually and then subsides once a consensus regarding meaning is reached through precedent. The diminishing peaks model suggests that settling is a "rocky" and contested, yet progressive, process. The most central constitutional claims requiring the most rhetorical work are raised and resolved first. Over time, progressively less central claims requiring progressively less rhetorical work are raised and resolved.

**Empirical Tests of Settling Patterns**

To test our first two hypotheses regarding the reduction in words and references over time, we regress our measures of rhetorical work (words per claim and references per claim) on variables that correspond to the linear decay, log normal decay, and diminishing peaks patterns. The linear decay variable is measured as a series that decreases at a uniform increment, beginning at 1 for the first case and ending at 0 for the last case. The log normal decay variable resembles a log normal probability distribution. The variable is measured as a series that begins at 0 for the first case, increases to an apex at the precedent-setting U.S. Supreme Court decision in *Wisconsin v. Mitchell* (1993), and then decreases to 0 for the last case. The diminishing peaks variable is measured as a linear decay whose values are doubled for cases in which a hate crime law was declared unconstitutional. This gives the diminishing peaks series a general decay that is spiked by periodic controversies reflected by the unconstitutional cases.

The results of our analysis are presented in Table 1.[31] The results suggest that the linear decay and log normal decay variables are poor predictors of settling.[32] However, the diminishing peaks variable is a strong predictor of both words per claim and references per claim, and it alone explains from 33% to 36% of the variance in such measures of rhetorical work.[33] Thus it ap-

[31] That the findings for these analyses, and those that follow, are identical for both dependent variables is a reflection of fact that the two are highly correlated ($r = 0.89$). Thus the two can be thought of as measuring much the same thing. This fact confirms the appropriateness of referring to both as measures of the broader construct of "rhetorical work."

[32] For all of the reported models, Durbin-Watson statistics were computed to determine the presence of serially correlated errors, which is commonly present in time series data. Only the model containing the log normal variable showed evidence for serial correlation. For this model, we applied the appropriate generalized least squares estimation (AR - 1). Although the Durbin-Watson statistic indicated that this corrected the serial correlation problem, the results for the log normal variable remained the same. Thus we report the initial ordinary least squares findings. In addition, residuals for all models were plotted and did not indicate heteroskedasticity, non-linearity, or influential outliers (Neter et al. 1985).

[33] Because the scale of the diminishing peaks variable is arbitrarily set, it doesn't make sense to interpret the impact of a one-unit change on the expected value of the dependent variable. However, a one-unit change occurs between the unconstitutional sixth case (*State* v. *Wyant* 1992) and the sixteenth constitutional case (*State v. Ladue* 1994). From these results we would predict that the number of words per claim would have dropped more than 1,700 words, or roughly six pages of opinion text.

pears that the settling of hate crime law took a rather stormy path but is indeed becoming more taken for granted as measured by judicial rhetoric.

**Table 1.** Coefficients for Univariate OLS Regression of Measures of Rhetorical Work on Three Alternative Temporal Patterns of Institutionalization ($N$ = 38 cases, standard errors in parentheses)

| | Independent Variables | | |
|---|---|---|---|
| | (1) Linear Decay | (2) Log Normal Decay | (3) "Diminishing Peaks" |
| Dependent Variables | | | |
| *Words per claim* | | | |
| Coefficient | 1,275.2 (701.25) | −400.89 (−617.97) | 1,737.24 (382.14)** |
| Constant | 758.77 (396.87) | 1,545.56 (331.13)** | 353.37 (281.71) |
| Adjusted $R^2$ | 0.05 | 0.00 | 0.34 |
| F | 3.31 | 0.42 | 20.67** |
| *References per claim* | | | |
| Coefficient | 10.18 (6.52) | −3.25 (−0.57) | 15.12 (3.62)** |
| Constant | 6.29 (3.7) | 12.59 (3.05)** | 2.32 (2.66) |
| Adjusted $R^2$ | 0.04 | 0.00 | 0.30 |
| F | 2.43 | .32 | 17.46** |

* = $p < 0.05$
** = $p < 0.01$

Note: The "linear decay" variable is computed as a series that decreases at a constant increment from 1 at the beginning of the series to 0 at the end. The "Log Normal Decay" is computed as a log normal probability distribution ranging from 1 to 0 and with an apex at the 14th case (*Wisconsin v. Mitchell*). The "diminishing peaks" variable is computed as a linear decay whose values are doubled for cases in which a statute was declared unconstitutional.

The effects of time and iteration must be compared to other factors that may influence settling, however. Having established the basic functional form of the relationship between time and rhetorical work, we now consider such other factors. Given the small number of cases, it makes sense to control for only a handful of variables.

We control for the influence of court level because we hypothesize that higher courts, being more prestigious and authoritative, will produce longer and more considered opinions (state and U.S. Supreme Courts coded 1, all others 0) (Walsh 1997). We also control for whether a court within the same state had previously upheld the law. We hypothesize that state courts considering the initial appeal of a statute will construct longer opinions (previously upheld coded 1, 0 otherwise). Moreover, part of the time effect might be explained by the fact that early courts were considering these laws for the first time. Finally, we control for the influence of precedent. Following the legal model, we hypothesize that the emergence of the precedent-setting *Wisconsin v. Mitchell* case (1993) would reduce the volume of rhetorical work in subsequent cases (after *Wisconsin v. Mitchell* coded 1, pre 0).

**Table 2.** Coefficients for OLS Models of the Effects of Selected Factors on Measures of the Institutionalization of Judicial Rhetoric about Hate Crime Statutes (standard errors in parentheses)

| | Dependent Variables | | | |
|---|---|---|---|---|
| | Words Per Claim | | References Per Claim | |
| | (1) | (2) | (3) | (4) |
| Independent Variables | | | | |
| "Diminishing peaks" measure | 1,634.68* | — | 17.04** | — |
| | (674.12) | | (6.51) | |
| Court level | 622.30 | 1,102.6** | 3.61 | 8.62* |
| | (407.77) | (381.15) | (3.93) | (3.83) |
| Previous court upheld | −59.27 | −140.74 | 0.47 | −0.38 |
| | (345.74) | (367.97) | (3.34) | (2.87) |
| After *Wisconsin* v. *Mitchell* | 50.91 | −1,162.82** | 3.24 | −9.42* |
| | (611.92) | (376.45) | (5.91) | (4.08) |
| Intercept | 164.23 | 1,745.44** | −2.51 | 13.98** |
| | (740.94) | (376.26) | (7.15) | (3.82) |
| Adjusted $R^2$ | 0.36 | 0.26 | 0.29 | 0.17 |
| F | 6.12** | 5.42** | 4.8** | 3.5** |
| Increment significance (F) | 5.86* | | 6.89* | |

* = $p < 0.05$
** = $p < 0.01$

Note: The "Diminishing Peaks" variable measures a temporal pattern that consists of a linear decay which is periodically disrupted by spikes of controversy. It is computed from the "linear decay" variable and data on which cases were declared unconstitutional. Court level is a dummy variable coded "1" if the court that decided the case was a state supreme court or the U.S. Supreme Court. For lower courts, it is coded "0." "Previous Court Upheld" is also a dummy variable measuring whether a court within the state has previously held that's state's statute constitutional. "After *Wisconsin v. Mitchell*" is a dummy variable coded "0" prior to the U.S. Supreme Court's Decision in *Wisconsin v. Mitchell* and "1" after.

Table 2 reports the results of the multivariate analyses. The diminishing peaks measure retains its magnitude and significance in both models, even when other factors are controlled. In the full models (columns 1 and 3), our controls for court level, previously upheld, and after *Wisconsin v. Mitchell* do not have a significant effect on either the words-per-claim or references-per-claim variables. Part of the reason for this lack of a significant effect, however, is the pattern of intercorrelations, particularly between the after *Wisconsin v. Mitchell* variable and the diminishing peaks measure, which share much of the same variance ($r = 0.75$). The diminishing peaks variable also has a slight ($r = 0.2$) correlation with the court level variable. Although regression diagnostics did not indicate the presence of collinearity,[34] the small sample size and the behavior of the standard error estimates (which double from models 2 to 1 and 4 to 3) suggest otherwise.

[34] Specifically, the variance inflation factors were below conventional thresholds (Fox 1991).

When the diminishing peaks variable is removed from the equation, the after *Wisconsin v. Mitchell* and court level variables both become significant (columns 2 and 4 in Table 2). Thus the results suggest that, at least in these data, temporal effects, court level, and precedent provide a somewhat overlapping explanation of settling. However, increment comparisons show that the diminishing peaks variable adds significantly to the proportion of explained variance. Thus the diminishing peaks variable captures the phenomenon of settling more fully than do the after *Wisconsin v. Mitchell* and court level variables. The substantive conclusion is that institutionalization occurs through a gradual decay of rhetorical work that is periodically disrupted by controversial cases. In these data, court level and precedent effects are coincidental with these temporal effects. Further work is needed to disentangle these relationships and to identify other variables that contribute to the diminishing peaks effect.

We now consider our third hypothesis: whether judges converge around particular clusters of arguments to handle particular claims. How judges fashion arguments in response to petitioners' claims can be understood as a process of innovation, replication, and the creation of clusters of well-rehearsed arguments—what we refer to as a "toolkit" (Swidler 1985). As Figure 3 shows, judges have crafted a variety of responses to the claim that hate crime statutes punish speech. The upper part of the diagram shows the cumulative frequency of judicial arguments that were introduced in early cases and then picked up and repeated in most subsequent cases where the claim was raised. Marked by the darkly shaded distributions, these include the argument that hate crime laws punish action rather than speech and the argument that the laws are justified by the state's "compelling interest" in combating hate-motivated violence. The speech issue has been discussed previously. The compelling interest argument refers to the idea that hate crime laws are justified because they fulfill a government interest that is unrelated to the suppression of free speech (e.g., curbing rising levels of intergroup violence) and because the potential gains of pursuing that interest outweigh the regulation of speech risked by the laws (*U.S. v. O'Brien* 1968).

The middle of Figure 3, marked by distributions with the medium shading, represents arguments that were introduced somewhat later and that diffused across subsequent cases more slowly. Among these are the arguments that motive is a proper consideration in punishment and that there is a parallel between hate crime laws and earlier antidiscrimination laws—both of which we've previously discussed. The lower part of the figure displays judicial arguments that were introduced but were seldom or never replicated in subsequent cases, such as the argument that

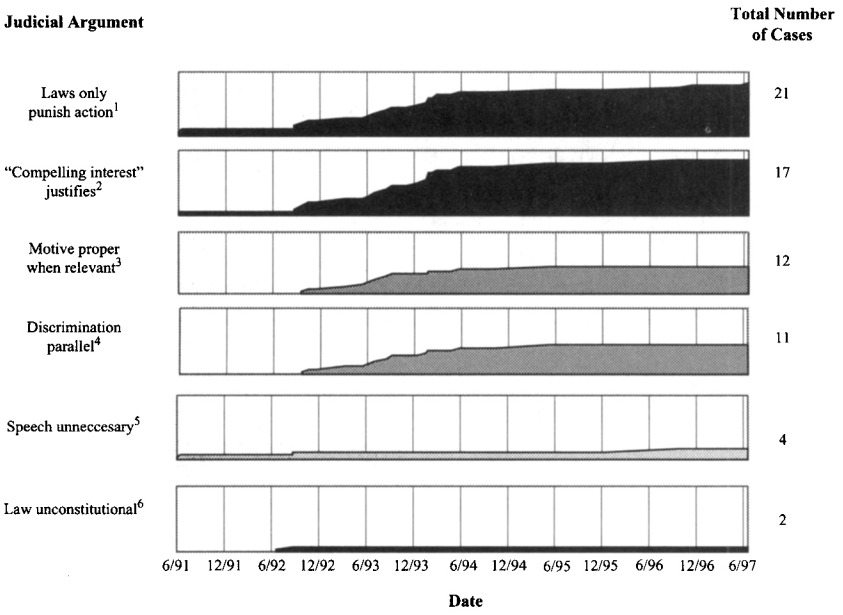


**Figure 3.** Selected judicial arguments given in response to petitioner claims that hate crime statutes violate First Amendment protections by "Punishing Speech." Cumulative frequency by type of argument and case date, 1991–1997 ($N$ = 24 cases)[7].

NOTES:

[1] The law's scope is confined to the punishment of action and therefore does not punish offender's speech or thoughts.

[2] Any small regulation of First Amendment rights is justified by the state's interest in preventing the harms associated with hate crimes.

[3] The motive of the offender is a proper consideration in the enhancement of a criminal punishment.

[4] The logic of hate crime laws and discrimination laws are identical; each punishes bias-motivated actions.

[5] A hate crime can occur absent speech, thus, it cannot be considered to be directed specifically at speech.

[6] Laws are unconstitutional for any of the following reasons: the discrimination parallel is invalid, the laws punish offender's speech and motives, it is improper to consider motive prior to the sentencing phase, penalties are dissimilar from other laws.

[7] The time scale begins with 3rd case. Earlier cases, in 1984 and 1988 were excluded to provide a better sense of the overall patterns. The "Punishment-of-Speech" claim was raised in 24 or 38 cases.

speech is unnecessary for a hate crime, as well as arguments that suggested that hate crime laws are unconstitutional.

Taken together, three things are notable about these patterns. First, it appears that the rate of innovation of judicial arguments diminishes after about the eighth case (*People* v. *Miccio* 1992). After a certain level of cases accumulated, judges stopped offering new arguments in the face of punishment-of-speech claims, and instead relied on arguments introduced earlier. Second, not all arguments are replicated. This could occur because later courts did not see some arguments as useful or legitimate. Third, the figure reveals the emergence of a "toolkit," or reper-

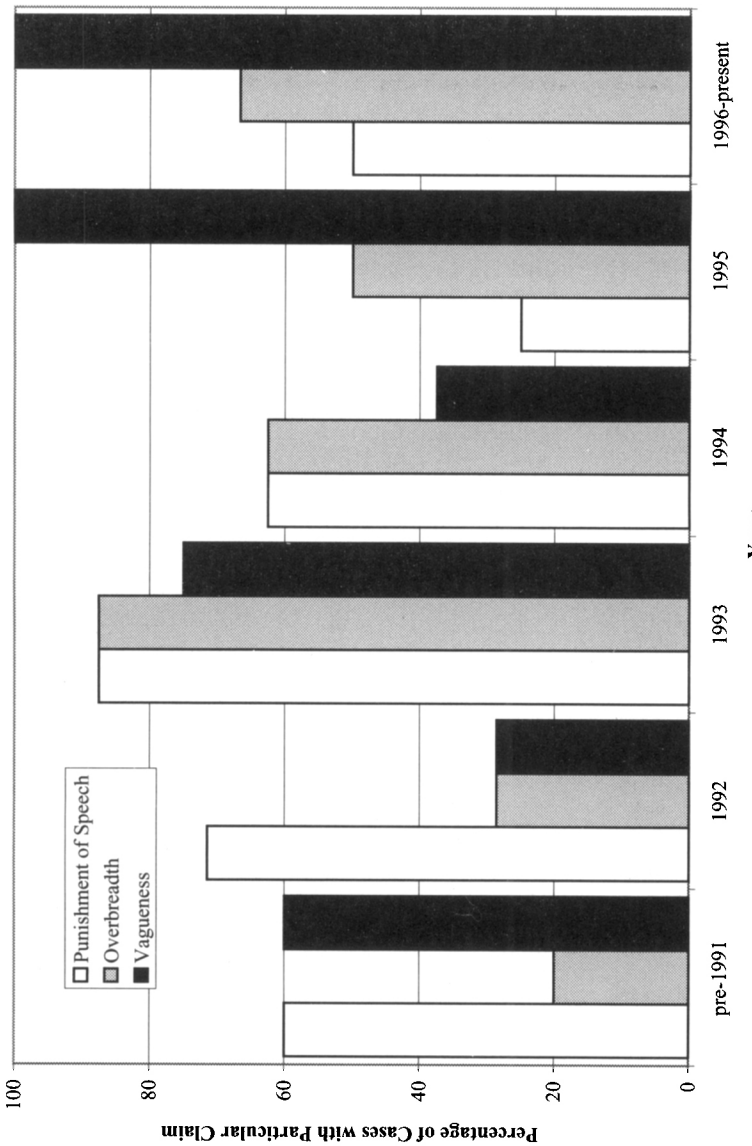


**Figure 4.** Composition of claims of unconstitutionality presented in hate crimes cases.

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toire of responses, to the punishment-of-speech claim. The compelling interest argument and the hate crime only punishes action argument, both discussed before, appear to form the central toolkit from which judges have drawn. A second tier of arguments, including the discrimination parallel and the argument that motive is a proper consideration in sentencing, amount to a set of auxiliary tools that are also frequently invoked. Each of these three patterns, the early end to innovation, the selective replication of some arguments but not others, and the formation of a cluster of arguments, is also present in jurists' responses to the vagueness and overbreadth claims. These patterns suggest that the range of judicial arguments has indeed constricted over time, providing support for our third hypothesis.

Finally, the emergence of a patterned set of responses to one claim also appears to cause challengers to shift attention to other claims. As Figure 4 shows, the distribution of different types of claims appears to change over time. Whereas early cases are dominated by punishment-of-speech claims, later on such claims are raised less frequently. Instead, petitioners shift to Fourteenth Amendment vagueness challenges. This shift suggests that the punishment-of-speech claim had become a futile line of attack for petitioners, causing a change in strategy. Thus, as judges coalesce around a set of arguments for responding to a claim, petitioners must shift their focus to another claim that seems to be "less settled."

## Conclusions

The controversy about hate crime has been fundamentally about the meaning that should be attached to the concept. The meaning of hate crime is not just assigned at the moment when political actors and legislators formulate statutes, or when police officers and prosecutors determine whether the behavior they confront can be plausibly interpreted within those statutes. Hate crime is also infused with meaning through appellate opinions that address constitutional questions. Such cases reflect a struggle between the parties to impose a particular meaning on the statute; and judges intervene in this process to assign an authoritative meaning. The judicial opinion is the primary vehicle through which this meaning is transmitted to other members of the legal field. Thus we can observe the construction and settling of the meaning of hate crime across the series of opinions.

The settling of hate crime law is reflected in several features of judicial rhetoric. Through the twin processes of construct elaboration and domain expansion, settling is manifest in changes in the substantive meaning judges attach to hate crime. Settling is also indicated by a decline in the volume of rhetorical work over time; judges increasingly respond to petitioners'

claims in an economical and formulaic manner through a standardized set of arguments.

But there are also other signs of settling. For example, courts are considering far fewer appeals of hate crime convictions. In 1992 and 1993, during the height of the controversy surrounding hate crime laws, courts considered 15 appellate cases, yet in 1998 and 1999 courts considered only three appellate cases. Additionally, hate crime cases are being prosecuted more successfully. California data show that the proportion of hate crime cases that result in a conviction rose from 57% in 1995 to 89% in 1996 and 1997. These figures compare favorably with conviction rates in California during the same time period for felony assault (80%) and stalking (86%) (California Department of Justice 1998). Defendants are also more likely to capitulate rather than to contest the laws. In California, the proportion of hate crime convictions that came from a plea bargain increased from 86% in 1996 to 92% in 1997; and the proportion of felony convictions nationwide that result from a plea bargain is also 92% (U.S. Dept. of Justice, Bureau of Justice Statistics 1998). These trends suggest that there are other indicators that the concept of hate crime has become more solidified, more fixed in its meaning, and more determinate in its application.

The findings presented here are relevant for the political and legal controversies that surround the concept of hate crime, not because they point to particular forms of hate crime law that are better or "more effective" than others but because they help to temper the dominant critique of the laws.[35] For example, in their recent criticism of hate crime laws, Jacobs and Potter (1998) argue that the concept is so amorphous and unfamiliar to judges, prosecutors, and law enforcement that it results in resource waste and selective enforcement as these actors strain to determine when to use the law and when not. But part of what makes a legal concept "useful" to officials is whether they share a "fixed" sense of what it means. Our research shows that the property of "fixedness" results from a temporal process involving the institutionalization of the category and the rhetorical practices that surround it. To critique a concept because it appears ambiguous to officials within the criminal justice system amounts to a critique of the concept's "newness." As they have done with other innovative crime concepts, such as domestic violence and stalking, judges and prosecutors are quite clearly converging around what hate crime means.

The institutionalization process described here must be distinguished from the traditional focus on *stare decisis,* or precedent, as the key determinant of the validity and meaning of a

[35] For a more general discussion of the dilemmas associated with intervening in policy debates in the name of fostering greater effectiveness see Sarat & Silbey (1988).

statute. Certainly, some arguments (such as the parallel between hate crime statutes and antidiscrimination laws and the "compelling interest" standard) indicate that judges have, at least in part, infused hate crime with meaning through the application of established legal practices and concepts. However, arguments for and against hate crime statutes are routinely connected to precedent. In other words, if hate crime laws were uniformly struck down, we could tell a similar story about a different set of precedents. If anything, the pervasiveness of precedents in judicial rhetoric may be more indicative of a normative expectation that all arguments be couched in terms of precedent (Knight & Epstein 1996) than a determining cause of decisions.

*Stare decisis* does not directly address the issue of settling. Instead, precedent explains how judicial behavior conforms to institutionalized rules. We are interested in how such rules become settled, how meaning is attached to rules, and how settling can be measured and explained. Moreover, *stare decisis* implies that precedent has a decisive impact on judicial behavior; once established, subsequent decisions fall in line. We show that both the development of precedent (e.g., *Wisconsin* v. *Mitchell* 1993) and its effect appear to be much more gradual, contingent upon the circulation and communication of rhetorical justifications. Also, *stare decisis* is silent about the role of construct elaboration and domain expansion in the settling process. As a consequence, we are not rejecting rule by precedent as a core process in the development of law so much as situating it within a larger sociological framework.

Finally, as a theoretical concept, institutionalization provides insight on an enduring issue raised by critical perspectives on law and jurisprudence. From Holmes to critical legal scholars (Kelman 1981), the "indeterminacy" of legal rules has been the focal point of criticism of the legal order. The term indeterminacy means that legal rules and concepts are inherently open to multiple and sometimes contradictory interpretations. Justice Holmes' famous challenge, "I will admit any general proposition you like and rule the case either way" (cited in Rumble 1968:40) nicely illustrates this idea. The question is how, in the face of this indeterminacy, are such legal actors as judges, legislators, and law professors able to proceed ***as if*** legal rules have fixed and determinant meanings and are exterior to and constraining of their actions (Ewick 1992)? Thinking about legal "meaning-making" as a manifestation of the broader concept of institutionalization offers a way of understanding how legal actors come to affix meaning and develop stable patterns of interpreting and rhetorically justifying legal rules.

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Deprivation of Rights Under Color of Law, 18 U.S.C 242
Federally Protected Activities, 18 U.S.C. 245

**Appendix.** Judicial Arguments in Response to Claims that Hate Crimes Statutes are Unconstitutional, 1984-1999

| | Cases | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| | **Appellants' Claims** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | *Fourteenth Amendment. Vagueness, (N = 26)* | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Judicial Arguments** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Plain meaning/law clear | | | * | * | | | | | | | | | | | | | | * | | | | | | | | | | | | * | | * | * | * | * | * | | * |
| Causality solves ambiguity | | | * | * | | | | | * | | | | | | | | | | * | | | | * | * | * | * | | * | | | | | | | | * | | |
| Specific intent construction | | | | | * | | | | | | | | * | * | | | * | | | | | | | | | * | | | * | * | | | | | | * | * | |
| Dissimilarity unnecessary | | | | | | | | | * | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Law vague and unclear | | | | | | | | | | | | † | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Substantial factor test | | | | | | | | | | | | | | * | | | | | | * | | | | | | | | | * | * | | | | | * | | |

"†" = Claim accepted (i.e, law declared unconstitutional)
"*" = Claim rejected (i.e., law held constitutional)

**Appendix (continued).** Judicial Arguments in Response to Claims that Hate Crimes Statutes are Unconstitutional, 1984-1999

| | Cases | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 |
| | *First Amendment. Punishment of Speech (N = 24)* | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Judicial Arguments** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HC laws only punish action | * | * | | * | | | | | * | * | * | | * | | * | * | * | * | | * | * | * | * | | * | * | | | * | | | | * | * | | * | | |
| Compelling interest just | | * | | | | | | | * | * | * | | * | | * | * | * | * | | * | * | * | * | | * | * | | | * | | | | * | | | | | |
| Speech not necessary for HC | | * | | * | | | | | * | | | | | | | | | | | | | | | | | | | | | | | | * | | | | | |
| Speech as evidence acceptable | | | | * | | | | | * | | | | | | | | | * | | | | | | | | | | | | | | | * | | | | | |
| Punishes speech, motive | | | | | | | † | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Exclusionary criteria not met | | | | | | | † | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HC/Disc. law logic not parallel | | | | | | | † | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Penalty not like other laws | | | | | | | | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Motive improper consideration | | | | | | | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Slippery slope metaphor | | | | | | | | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| HC/Discrimination parallel | | | | | | | | | | * | * | | * | | * | * | * | * | | | * | * | | | | * | | | | | | | | | | | | |
| Motive proper when relevant | | | | | | | | | | * | * | | * | * | * | * | * | * | | | * | * | | | | * | | | * | | | | | | | | | |

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**Appendix (continued).** Judicial Arguments in Response to Claims that Hate Crimes Statutes are Unconstitutional, 1984-1999

| | Cases | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 |
| | *First Amendment. Overbreadth, (N = 20)* | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Judicial Arguments** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Law punishes conduct | | | * | | | | | | | | | | | * | | | * | * | * | | | | | | | * | | | | * | | | | * | | * | |
| Speech as evidence acceptable | | | * | | | | | | | | | | * | * | * | | * | * | | * | * | | | | | | | | * | | | | | | | | |
| Prior speech unacceptable | | | | | | | † | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Crime must evidence prejudice | | | | | | | | | | * | | | * | * | | | * | * | | | | | * | | * | | | | * | | | | | | | | |
| Predicate crime solves | | | | | | | | | | | | | | * | | | | | | | | | | | | | | | | | | | | | | | |
| Chance of self-censorship low | | | | | | | | | | | | | | * | * | | * | | | * | * | | | | | * | | | * | | | | | * | * | * | | |
| Speech unnecessary to prove | | | | | | | | | | | | | * | | | | | * | | | | | | | | | | | * | | | | | | | | |
| HC/Discrimination parallel | | | | | | | | | | | | | | | | | | | * | | | | | | | | | | | | | | | | | | |
| True threats construction | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | * | | | | | | | |
| True threats and specific intent | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | * | | | | | | | |

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**Appendix (continued).** Judicial Arguments in Response to Claims that Hate Crimes Statutes are Unconstitutional, 1984-1999

| | Cases | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 |
| | *First Amendment. Content Discrimination (N = 7)* | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Judicial Arguments** | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Violates viewpoint neutrality | | | | | | † | | | | | | | | | | | | † | | | | | | | | | † | | | | | | | | | | |
| Beyond proscribable elements | | | | | | † | | | | | | | | | | | | | | | | | | | | | † | | | | | | | | | | |
| Beyond secondary effects | | | | | | † | | | | | | | | | | | | | | | | | | | | | † | | | | | | | | | | |
| Not narrowly tailored to interest | | | | | | † | | | | | | | | | | | | | | | | | | | | | † | | | | | | | | | | |
| Involves suppression of ideas | | | | | | † | | | | | | | | | | | | | | | | | | | | | † | | | | | | | | | | |
| Meets proscribable elements | | | | | | | | | | | | | | | | | * | | | | | | | | | | | | | * | | | | | | | |
| Meets secondary effects | | | | | | | | | | | | | | | | | * | | | | | | | | | | | | | | | | | | | | | |
| No suppression of ideas | | | | | | | | | | | | | | | | | * | | | | | | | | | | | | | * | | | | | | | |
| True threat—no content disc. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | * | | | | | * | * | | |
| True threat/disc. parallel | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | * | | | | | | | | |

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