

What Trump Can Teach Us About Con Law Hate Crimes

Roman Mars [00:00:00] Just a warning that this episode quotes evidence in a legal case surrounding an assault that includes swearing and racist slurs. So, we are recording on Thursday, May 27th in the morning. And so, what are we going to talk about today?

Elizabeth Joh [00:00:13] Let's go back to the 1980s.

Roman Mars [00:00:15] Okay. I'm ready.

Elizabeth Joh [00:00:16] All right. Here we go. In June of 1982, a 27-year-old man was having his bachelor party with his friends at a place called the Fancy Pants Lounge--that's a bar and a strip club--in Highland Park, which is just outside of Detroit, Michigan. But they ended up getting into a bar fight with two strangers. And they called the man a "chink" and a "nip." They were all ejected from the bar. Now, the two strangers were a man named Ronald Ebens and his 22-year-old stepson, named Michael Nitz. Now, after they were ejected, they retrieved a baseball bat from their car, and they went looking for two of the men from the bachelor party group. And they found them in a parking lot next to a nearby McDonald's. And they beat the 27-year-old man with a baseball bat. They beat him until he was unconscious. And two cops inside the McDonald's arrested Ebens and Nitz. The victim died a few days later on June 23rd, 1982, at Henry Ford Hospital. And his name was Vincent Chin. He was Chinese American. Now, Ebens was a foreman at a local auto plant, and his stepson, Michael, had recently been laid off. Now, according to some who had witnessed the fight, Ebens said, "It's because of you little motherfuckers that we're out of work." "You" meaning Japanese, I think, because Ebens apparently thought Chin was Japanese and was upset about Japanese car imports. Both Ebens and Nitz were charged with second degree murder. Both eventually pleaded to manslaughter, but the judge gave neither man prison time. Instead, he gave each of them a three-year probation term and a fine of \$3,780.

Roman Mars [00:02:06] Wow.

Elizabeth Joh [00:02:07] As a result of this, Asian-Americans were upset by the sentences, and they organized. Their efforts prompted the Department of Justice to pursue charges against Ebens and Nitz under a federal criminal civil rights law. There's absolutely no dispute that the men had killed Vincent Chin, but the government would have to prove that Chin's race was a motivating factor. But both men were ultimately acquitted of those federal charges, and neither spent a day in prison for killing Chin. So, Vincent Chin's death is often credited with inspiring the modern civil rights movement for Asian-Americans, and his death is also widely considered a hate crime. On May 20th, President Biden signed the COVID-19 Hate Crimes Act. This bill was aimed at hate crimes and made special mention of hate crimes against Asian-Americans.

Joe Biden [00:02:57] We have to change our hearts. We have to change the hearts of the American people. I mean this from the bottom of my heart--hate can be given no safe harbor in America. I mean it. No safe harbor! It can't be dismissed like, "Well, that's just what happens."

Elizabeth Joh [00:03:19] Now, what's the connection? Why is it called COVID-19? Don't forget that during his presidency, Trump tweeted about the so-called "China virus." He first tweeted about it in March of 2020, and then he kept referring to the "China virus" and the

"kung flu" at rallies and White House appearances. And of course, many people have seen viral videos of seemingly random attacks against Asian-Americans that appear to be motivated just by their race. But what exactly is a hate crime? And why do we punish hate crimes? And what does the Constitution say about it?

Roman Mars [00:03:56] Let's find out. This is What Trump Can Teach Us About Con Law, an ongoing series that needs a new name--I'll get to that eventually, I swear--where we take current events in the world of government and politics and use them to examine our Constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow perpetual student and host, Roman Mars. So, what exactly is a hate crime?

Elizabeth Joh [00:04:51] It turns out that the answer is pretty complicated because it can mean a lot of different things. In criminal law terms, we're talking about punishing bad conduct more severely--or especially--because the offender chooses the victim because of some essential, unchangeable characteristic they have. That means their race, ethnicity, religion, national origin, categories like that. And hate crimes are a little bit different than the stuff we see on the Internet all the time, like "hate speech." That's a common term. When people talk about that, they often mean racist or otherwise really highly offensive speech--but just speech. And the concerns about hate speech and hate crimes are similar because we worry about the impacts of bigoted views. But for important constitutional reasons, we don't generally allow people to be punished just for saying offensive things, no matter how awful or offensive they are. So, when we think about hate crimes then, we might go back to the 1968 Civil Rights Act. A portion of that can be considered sort of the grandfather of today's hate crime laws. One portion of the 1968 Act responded to the violence that happened during civil rights marches, voter registration drives, and attempts to racially desegregate the public schools. And what this federal law does is that it makes it a crime to use or threaten to use force when someone's involved in what the law calls a "designated federally protected activity." And that violence happens because of the victim's race, color, religion, or national origin. So, these protected activities--there's a long list of them--they can be everything from being a juror in federal court to being a patron of a public accommodation, like a hotel or a bar. But as far as the term hate crime is concerned--it wasn't used widely before the 1980s. And it wasn't until the Federal Hate Crime Statistics Act of 1990 that we see the federal government recognize the actual term hate crime as a legitimate category of crime. So, what this particular law does is require the Justice Department to collect information on crimes that are based on prejudice because of race, religion, sexual orientation, or ethnicity. And disability was also added as a category some years later. So, this is a data collection law. And in the most recent report, which collects information from 2019, the FBI said that there were more than 7000 hate incidents--including 158 anti-Asian incidents--from around the country. The federal numbers use crime victimization surveys and a standardized crime reporting system called the UCR (Uniform Crime Reports.) But what that exactly means is hard to say. A lot of non-governmental organizations collect information, too, and these can differ a lot from the official federal numbers. So, for instance, a group called Stop AAPI Hate has said there were more than 3,700 anti-Asian hate incidents in the past year.

Newscaster [00:07:45] Alameda County's DA-- That's out in the bay area, where Oakland is located, where some of these attacks have been happening in their Chinatown. Over a two-week span, they recorded 18 incidents of anti-Asian racist attacks. That ranges from people being spat upon, to being yelled at, to the physical violence that you're seeing...

Roman Mars [00:08:04] So the Civil Rights Act is federal, which is the prosecutorial part of prosecuting hate crimes. How many hate crimes are prosecuted on the federal level?

Elizabeth Joh [00:08:13] Well, compared to the states, not that many--essentially, for two big reasons. Federal law actually limits the reach of what federal prosecutors can do. So, for example, there's another law, the federal Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. And that also provides for federal criminal prosecutions for hate crimes, but it requires a certification from the attorney general for a hate crimes prosecution. And that certification is only limited to certain circumstances. The other reason that hate crime prosecutions don't happen that frequently at the federal level is just an answer about criminal law. Most criminal law happens at the state level. Most criminal prosecutions of every kind--not just hate crimes--happen because they're pursued by local district attorneys. They account for most of the criminal cases in the United States.

Roman Mars [00:09:04] So then what do the state laws say about hate crimes?

Elizabeth Joh [00:09:08] So there are many different kinds of hate crime laws. So, let's go through a couple of big examples. Some states create separate crimes where a person is guilty of something called a hate crime. So, we can use our own state as an example. In California, you can be guilty of a standalone crime called a hate crime if you threaten or use force to deprive someone of their legal rights because of that person's protected characteristics. And that can be--in California--disability, gender, nationality, race, things like that. But actually, most state hate crimes aren't of this kind. Most of them enhance the punishment for a crime that already exists if you committed that crime because of some specified characteristic of the victim. So, we can use California again. In our state, if a person can be punished more for a hate motivated crime, that happens in a couple of ways. Let's say that you're convicted of a minor crime, and you're motivated by hate or bias, then you can be punished more than what you'd normally receive if you were just convicted of that minor crime. Or let's say you're facing a felony conviction. The prosecution can ask for a greater sentence if there was proof that the crime was motivated by hatred of the kinds that we've just talked about. But that's not all. Hate crimes can also refer to reporting laws. So, some states might require that police departments in the state collect information about how many hate motivated crimes that they know about, either because they actually arrested someone or because a victim came forward and complained about it. So why don't we get to this pandemic year and what this has to do with that? Roman, do you remember the shootings in the Atlanta area?

Roman Mars [00:10:47] I do. Yeah. They were horrible.

Elizabeth Joh [00:10:50] They were horrible. And you remember during the pandemic, because most people were at home or a lot of people were at home, we just had a lot less of these horrible mass shooting events. But in March, eight people were shot to death at two Asian-run spas in the Atlanta area. Six of the eight victims were Asian, two were white, and seven of the eight were women. And the person arrested for the shooting was a 22-year-old white man named Robert Aaron Long. And so far, he's been charged with eight counts of murder and one of aggravated assault. Now, because some of the victims--or I should say most of the victims--were Asian women, this raised concerns that the shooting ought to be considered a hate crime. The problem here, of course, is that the defendant denied that the shootings were racially motivated. He told investigators that he had struggled with a sex addiction and that accounted for his conduct. The shootings took place in two counties, and the Fulton County DA said that she would seek hate crime charges against the defendant. The other district attorney hasn't yet said whether that's

going to happen for that separate prosecution. Now, Georgia law, like many laws, adds an increased penalty to a crime if it's determined to be a hate crime. But that hasn't satisfied many civil rights groups, and part of this was the reason why we had a House Judiciary Committee recently to hold a hearing on violence that targeted Asian-Americans. The hearing was actually scheduled weeks before the shootings, but it was definitely on the minds of House members who were at the hearing. And that's where we got to that bill. So, in May, President Biden signs a bill sponsored by Senator Mazie Hirono and Representative Grace Meng. So, the COVID-19 Hate Crimes Act cites the Atlanta shootings and a perceived increase in racially motivated attacks on Asian-Americans. Now, the new law does a couple of things, but overall, it's more or less a law designed to improve the systems designed to identify hate crimes. So, it does things like encourage the states to develop hate crime reporting systems. It gives grants to police departments to train their officers. And it's trying to speed up the review of hate crimes at the Justice Department. So, this particular law doesn't create any new crimes or enhanced punishments for certain crimes. So, you can say that the law has a lot of symbolic value. Of course, symbolism isn't a small thing.

Roman Mars [00:13:14] You mentioned that one district attorney is pursuing a hate crime against the shooter in Atlanta, and one isn't maybe. You know, what are the good and bad pros and cons of adding a hate crime to another prosecution?

Elizabeth Joh [00:13:28] Well, there are many people who support having more acceptance of hate crime laws and punishment enhancements, but they're definitely controversial. And so, let's start with the good, right? So, in a pure criminal law sense, you could say that hate crimes are justified because committing a crime based on some immutable characteristics of the victim is just more morally blameworthy than committing the crime because of all the other bad reasons human beings commit crimes--anger, greed, power, revenge, whatever. You'd have to accept that premise. Not everybody does. But if you believe that that's true--that hate crimes are special and deserve extra punishment--then it makes sense to punish these crimes more severely if it's based on bias or some hatred of the individual for these particular reasons. And then there's a deterrent value in the criminal law, right? So, by punishing a hate crime--let's say that there's an assault based on a racist motive against the victim--we're hoping to deter other people from doing this in the future. And symbolically, the laws, of course, have what we call an expressive effect, right? The very existence of a law like a hate crime means that the government rejects this conduct. We absolutely stand against it. So, all of that makes sense. But then there are the criticisms of hate crimes, right? Maybe the biggest one is practical. And that is how do you know you're dealing with a hate crime? In a lot of different cases, it's not possible to say for sure what the offender's motivation is. So, proving that the offender chose the victim because of who they are can be extremely hard for the prosecution to prove. Of course, there's going to be some easy cases, where the defendant is really open about their hateful motive. But that's not really typical. And what do you do in cases of mixed motivation? Maybe there's bias and some personal grudge. Or what do you do when the defendant also suffers from some mental illness? Is that a situation where we really say that's a clear case of a hate crime? And that's a problem because it affects what prosecutors do. Prosecutors--like everybody else--they like to be successful. And you're successful if you secure a conviction. So, if you're a prosecutor and there's a choice between proving an ordinary assault--let's say--and one with an additional and maybe more difficult burden of proving a hateful motive, maybe if you're a prosecutor, you pick the easier conviction. So, there's a kind of proof problem here.

Roman Mars [00:15:57] We've talked about prosecutors piling on charges, you know, to get them reduced or begin to start the process of bargaining. Is a hate crime ever used in that way?

Elizabeth Joh [00:16:08] It could be. But, you know, again, there just may be a choice early on made by the prosecutor because it just seems like it's going to be too difficult to go on when there are certainly many other reasons--let's face it--in America's criminal justice system to find or to seek harsher punishment against the defendant. So, there's definitely a well-known proof issue with hate crimes. The other issue is kind of more philosophical, right? There's just an extreme variability in hate crime. So, we just said that states are mainly where hate crime prosecutions happen--and they're really varied. Most states in the United States have some kind of hate crime legislation, but some have more limited categories of what counts versus others. So, what does that mean in terms of what counts as a hate crime? And some categories are not ones that everybody agrees on. So, for example, should gender motivated violence be a hate crime? I mean, that's half of the population. So, if something's motivated by gender--hatred of gender--is that a hate crime? It's not really clear. Some states have proposed crimes against police officers because they're police officers as hate crimes. Should we count those as hate crimes? And so, as the categories increase, then you wonder whether the term hate crime really has any meaning--whether it's a meaningful category at all. And then there's an even more deeper question, and that is why should some victims deserve more protection or recognition? It's not obvious to some people that the fact that you were targeted because of your race, religion, or your sexual orientation means that the defendant in your case needs to be punished more than, you know, just a random attack, which can be, just in terms of the practical effects in your life, really horrible--just as horrible with or without the hateful motive. And of course, that leads people to think maybe hate is just not the kind of problem the criminal justice system should solve--that it's definitely a problem in society, but by trying to tweak the criminal justice system this way, we're not really helping anybody or really truly addressing the problem.

Roman Mars [00:18:11] Yeah, yeah. You mentioned at the top, what does the Constitution say about hate crimes? And my guess is it says nothing about them. But since you teased it, what is the connection there?

Elizabeth Joh [00:18:24] Well, that's right. There's nothing about hate crimes in particular, but there are cases where the Supreme Court has addressed or talked around the issue. And probably the two most important cases here are from the 1990s. One case is called *R.A.V. versus City of St. Paul*. So, in that case, a white teenager and his friends decide that they'll burn a wooden cross made out of broken chair legs on the lawn of a Black family. Because it was a teenager--the person's only known by his initials R.A.V.--He was charged and convicted under a local law. What the law said here is important, so I'm going to read it. "St. Paul made it a crime for someone to place on public or private property a symbol, object, appellation, characterization, or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." So, if you're guilty of this, it's a misdemeanor. It's a minor crime. It's still a crime. So R.A.V. is convicted of this. And he argues in this pretty minor case. I mean, it's pretty bad motivation, but it's a minor case--a misdemeanor. He argued that his conviction violated his First Amendment rights. So as a background, the Supreme Court has said that there are some categories of unprotected speech. One of them is so-called "fighting words"--that's a First Amendment term. These are words that are directed to someone, and they're likely to provoke some kind of violent reaction. So, in theory, you know, the

government can ban what are called "fighting words." So, St. Paul says, "Look, that's what we are doing here. We are banning these highly objectionable fighting words--the kind that the Supreme Court said count as unprotected speech." But the problem here is that the city was only banning some kinds of objectionable expression because of specific hateful messages. So R.A.V. was guilty presumably for violating the law because he was a racist in his expression, through the burning cross. But if he had expressed a message that was based on, let's say, his anti-LGBTQ views, he wouldn't have been convicted; that wasn't covered under the law. The city was disfavoring only some objectionable viewpoints. And in 1992, the Supreme Court said that this was unconstitutional.

Roman Mars [00:20:49] Wow. I can't even imagine fighting this. You know, like, what a horrible punk... Useless kid. Okay.

Elizabeth Joh [00:20:59] All right. But then there's another case, too. The very next year, the Supreme Court considered a different case--again, involving a group of teenagers. Todd Mitchell was a Black teenager who was watching a movie called Mississippi Burning in Kenosha, Wisconsin. If you've never seen the film, it's about the murder of civil rights workers in the South in the 1960s.

Eulogist [00:21:22] I am sick and tired of going to the funerals of Black men who have been murdered by white men.

Alan Ward [00:21:29] What's wrong with these people?

Trailer Narrator [00:21:32] 1964... When America was at war with itself.

Elizabeth Joh [00:21:36] And one scene in particular depicts a white man who beats a Black boy who's praying. So as the group leaves the theater, they see a white teenager outside. And Mitchell said to the group, "Do you all feel hyped up to move on some white people?" And unfortunately, the group of teenagers beat the white teenager unconscious. Mitchell didn't physically participate, but he was there, and he's part of the group. So, Mitchell's eventually convicted of the crime of aggravated battery under state law. And ordinarily, Wisconsin law says you could receive two years maximum in prison for that crime. But under Wisconsin state law, if the prosecution could prove that the victim was chosen because of some characteristic like race, religion, or disability, then the punishment could be increased. So that's the kind of law we talked about before, right? Increasing the punishment for an ordinary crime. So that's exactly what happens in Mitchell's case. He's sentenced to seven years in prison instead of two. So, like the teenager in the R.A.V. case, Mitchell says, "Look, this law violates my First Amendment rights." He's being punished for his beliefs. But in 1993, the Supreme Court disagreed. The Wisconsin sentencing enhancement wasn't like the St. Paul ordinance. The Supreme Court said it wasn't like that because here, this was a law that was aimed at conduct. And as the Supreme Court said, "The Wisconsin statute singles out for enhancement bias inspired conduct because this conduct is thought to inflict greater individual and societal harm." Two cases, two different results. The Court said that one involves speech, so it wasn't okay. And the other involved conduct, which is okay. Is it really a huge difference between the two? It's not an entirely satisfactory distinction. And of course, ironically enough, R.A.V., who won his case, didn't say a thing in his case. Whereas Mitchell, in his case, of course, did say something that was quite hateful.

Roman Mars [00:23:35] Wow.

Elizabeth Joh [00:23:36] It's because there's some kind of vague sense that hate crime laws might raise First Amendment questions. But you also see today, like, a lot of political opportunism. The law that we just talked about that President Biden just signed had widespread bipartisan support. Only one senator voted "no," and that was Senator Josh Hawley. His complaint? He tweeted that the law "raises big free speech questions." That particular bill? Absolutely not.

Roman Mars [00:24:04] Yeah, well, that sounds in keeping with Senator Hawley.

Elizabeth Joh [00:24:12] So remember the sad story of Vincent Chin. In 2012, someone decided to look up Ronald Ebens, one of the two men who killed Vincent Chin. He granted an interview. He was in his 70s and retired. He said, "Killing Chin was the only wrong thing I ever done in my life." In his version of events, Ebens said that there was no racial hatred behind the fight in the strip club or the events outside of it. Ebens noted, as others have actually, that it was Vincent Chin who actually threw the first punch. And sometimes missing from the story when it's retold--and of course it's been retold thousands of times--is the fact that after the men were all kicked out of the Fancy Pants Lounge, Chin challenged Ebens and Nitz to fight some more. Now, none of this excuses what happened to him, of course, but it does kind of complicate the way the story is typically told. And in the 2012 interview, Ebens said, "It should never have happened. And it had nothing to do with the auto industry, or Asians, or anything else. Never did. Never will. I could have cared less about that. That's the biggest fallacy of the whole thing."

Roman Mars [00:25:25] Establishing a hate crime is really, really hard.

Elizabeth Joh [00:25:28] It's really hard. It's one of those things in the law where I think a lot of people can agree that, you know, when people are motivated by hate, it's awful. But the problem is that what to do about it as a legal matter is not very easy. And it raises some of the more basic questions about how you do this in a fair way that actually has some practical impact that helps people--and it's not clear what that is.

Roman Mars [00:25:53] I mean, when it comes to laws like these--you've talked about them being symbolic and being a reflection of the values of the government--what does it matter if it's hard, never used, or never used really well if maybe their point is to just represent us as a people rather than to be used as prosecutorial tools?

Elizabeth Joh [00:26:14] Well, I think that's a good point. And then sometimes the very existence of a law can be meaningful to communities where the law is addressing them directly--like, "We care about you, we care about the fact that you're targeted, and this shouldn't happen." I think the thing that people worry about is that it's not that the laws never get used, it's that there's some concern that they get used without an even hand--that some people, with some zealous, aggressive prosecutor, will have these enhancements that other people won't. And then that becomes problematic. And then depending on the way in which states decide to define hate crimes laws, they can sometimes be kind of vague, where people wonder, "Why are you including these categories and not these other categories?" And that can be problematic, too. So as with most things, the problem is in the details and the execution--but not the motivation.

Roman Mars [00:27:21] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You find us online at trumpconlaw.com. All the music in Trump Con Law is provided by the great Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get merch, and learn about their monthly membership

exclusives--of which I just got a package in the mail I'm very excited about--at doomtree.net. Along with my other show, 99% Invisible, we are now part of the Stitcher and SiriusXM Podcast Family.