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# Unnecessary, Counterproductive, and Unjust: The Case Against Hate-Crime Legislation

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“All social movements carry with them the germinating seeds of their countermovements.”<sup>1</sup>

## Introduction

High-profile murders and mass shootings have made headlines in recent years where aggressors, motivated by hatred for their victims, are later convicted of hate crimes.<sup>2</sup> But if the Constitution is colorblind,<sup>3</sup> why aren't our criminal statutes?

In 2021, the shootings of six Asian spa workers in Atlanta brought the hate-crime question to a head. On March 16, 2021, Robert Aaron Long shot and killed eight people in the Atlanta area.<sup>4</sup> Long is a white male, and six of the eight victims were Asian women.<sup>5</sup> The killings occurred at a time when America was experiencing a rise in anti-Asian sentiment, likely related to COVID-19.<sup>6</sup>

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<sup>1</sup> Jo Morgan, *US Hate Crime Legislation: A Legal Model to Avoid in Australia*, 38 J. SOCIO. 25, 43 (2002).

<sup>2</sup> The mass shooter at the Mother Emanuel AME Church in Charleston, South Carolina, targeted his victims in 2015 due to their race. Meg Kinnard & Denise Lavoie, *Court Upholds Death Sentence for Church Shooter Dylann Roof*, ASSOCIATED PRESS (Aug. 25, 2021, 6:20 PM), <https://perma.cc/XQF4-RK2B>. As did the mass shooter at the Cielo Vista Walmart in El Paso, Texas, in 2019. Press Release, Department of Justice, Texas Man Sentenced to 90 Consecutive Life Sentences for 2019 Mass Shooting at Walmart in El Paso, Texas, Killing 23 People and Injuring 22 Others (July 7, 2023), <https://perma.cc/4NLR-YJQB>.

<sup>3</sup> See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2177 (2023) (Thomas, J., concurring).

<sup>4</sup> Robert Hart, *Here's What We Know About the Atlanta Shooting Victims*, FORBES (Mar. 18, 2021, 8:31 AM), <https://perma.cc/6E26-966A>.

<sup>5</sup> *Id.*

<sup>6</sup> Tami Abdollah & Trevor Hughes, *Hate Crimes Against Asian Americans Are On the Rise. Here's What Activists, Lawmakers and Police are Doing to Stop the Violence*, USA TODAY (Mar. 4, 2021, 12:24 PM), <https://perma.cc/EHZ8-ZVMS>.

The FBI director concluded that the Atlanta killings did not “appear [to be] racially motivated.”<sup>7</sup> Local police appeared to agree with the FBI’s assessment that the crimes were not racially motivated.<sup>8</sup> The available evidence supported their conclusion and pointed to a different motive: sex addiction. Long grew up attending a Southern Baptist church that explicitly viewed fornication and pornography as “sinful and offensive to God.”<sup>9</sup> Long’s parents and a former roommate acknowledged that he sought treatment for pornography addiction and frequently paid for sexual services at one of the massage parlors where he later carried out his assaults.<sup>10</sup> Someone who attended addiction treatment with Long described how Long was “militant” about his sex addiction and that he “hated the pornography industry. He was pretty passionate about what a bad influence it was on him. He felt exploited by it, taken advantage of by it.”<sup>11</sup> Long even had plans to commit further violence focusing on the porn industry.<sup>12</sup>

An alleged anti-Chinese Facebook post by Long surfaced, which purported to be him blaming China for a COVID-19 coverup.<sup>13</sup> But the image of this post was revealed to be a fraud.<sup>14</sup> There is no evidence supporting the notion that Long targeted his victims because of their race. On the contrary, Long had strong convictions against racism.<sup>15</sup> A high-school classmate recalled Long becoming angry when a fellow student used a racial slur.<sup>16</sup> Despite this evidence, some officials voiced suspicion that the crime was motivated by racial animus.<sup>17</sup> The charges Long ultimately faced vary by county. In Cherokee County, where investigators

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<sup>7</sup> Joe Walsh, *FBI Director Says Atlanta Shooting ‘Does Not Appear’ Racially Motivated*, FORBES (Mar. 18, 2021, 6:34 PM), <https://perma.cc/B5EN-RQ2Q>.

<sup>8</sup> Alison Durkee, *Atlanta Shooting Updates: Police Say Suspect Claims to Be Motivated by Sex Addiction, Was Planning to Head to Florida*, FORBES (Mar. 17, 2021, 5:20 PM), <https://perma.cc/7EW8-NY7W>.

<sup>9</sup> Mark Berman, Brittany Shammass, Teo Armus & Marc Fisher, *The Atlanta Spa Shooting Suspect’s Life Before Attacks*, WASH. POST (Mar. 19, 2021, 8:41 PM), <https://perma.cc/H4CY-P9TG>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Durkee, *supra* note 8.

<sup>13</sup> McKenzie Sadeghi, *Fact Check: Facebook Post Claiming to be from Atlanta Spa Shooting Suspect is Fake*, USA TODAY (Mar. 20, 2021, 5:59 AM), <https://perma.cc/2W4E-E2D7>.

<sup>14</sup> *Id.*

<sup>15</sup> *See* Berman et al., *supra* note 9.

<sup>16</sup> *Id.*

<sup>17</sup> Alison Durkee & Robert Hart, *Officials Urge Vigilance Against Anti-Asian Violence Amid Skepticism of Atlanta Shooting Suspect’s Motive*, FORBES (Mar. 17, 2021, 4:23 PM), <https://perma.cc/Z6XL-BDX6> (“[Regarding the claimed motivation of sex-addiction,] Atlanta Mayor Keisha Lance Bottoms told CCN she was taking Long’s claim about his motivation ‘with a grain of salt’ as ‘it’s very difficult to believe what he says.’”).

found no evidence of racial bias, he pled guilty to murder.<sup>18</sup> But in Fulton County, where all of his victims were Asian, the district attorney is seeking the death penalty and hate-crime sentence enhancements.<sup>19</sup>

Although there is no universally agreed-upon definition, hate crimes are generally violent crimes motivated by prejudice, where the victim is targeted because of his membership in a protected class.<sup>20</sup> Bias-motivated crimes in the United States have a long history.<sup>21</sup> The modern concept of “hate crime” was introduced to state legislatures in the 1980s.<sup>22</sup> Some states chose to codify new crimes<sup>23</sup> while other states added sentencing enhancements to their existing statutes.<sup>24</sup> The first federal hate-crime law of similar vintage was the Hate Crimes Statistics Act (“HCSA”) of 1990, which only mandated the collection of data on hate crimes.<sup>25</sup> In 2009, the federal government passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“Shepard-Byrd Act”), expanding the scope of

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<sup>18</sup> Kate Brumback, *Man Pleads Guilty to 4 Asian Spa Killings, Sentenced to Life*, ASSOCIATED PRESS (July 28, 2021, 7:37 PM), <https://perma.cc/N9R7-6WCK>.

<sup>19</sup> Emily Wu Pearson, *Two Years After the Atlanta Spa Shootings, Asian American Legal Advocates Help Support Victims’ Families*, WABE (Mar. 16, 2023), <https://perma.cc/ER9K-DLVH>.

<sup>20</sup> Valerie Jenness & Ryken Grattet, *The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of “Bias-Crime” Legislation in the United States*, 39 SOCIO. PERSPS. 129, 130 (1996).

<sup>21</sup> Laurel Westbrook, *Vulnerable Subjecthood: The Risks and Benefits of the Struggle for Hate Crime Legislation*, 52 BERKELEY J. SOCIO. 3, 5 (2008).

<sup>22</sup> Here, “hate crime” refers primarily to *sentencing enhancements* for certain crimes motivated by bias, although the federal government and some states have also codified distinct crimes that include bias as an element of the offense. It is important to distinguish between these (modern) conceptions of hate crime and older, federal civil-rights laws which protected minorities in their exercise of federally protected activities. For instance, 18 U.S.C. § 249(b)(2), enacted as part of the Civil Rights Act of 1968, introduced criminal penalties where a defendant “injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with” any person *because of* that person’s race, color, religion or national origin *and because* that person engaged in a protected activity (like going to public school). The federal law didn’t merely re-criminalize assault; with its second “because of” element—engaging in protected activities—it criminalized interference with civil rights. Similarly, while the Enforcement Acts of 1870 and 1871 undoubtedly targeted racially-motivated violence during Reconstruction, they too were drafted as a means to protect civil rights (and root out the Ku Klux Klan). See VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 39–40 (1997).

<sup>23</sup> *E.g.*, Mass. Gen. Laws Ch. 22C, §§ 33–35 (“Assault or Battery for Purposes of Intimidation; Punishment”).

<sup>24</sup> *E.g.*, Nev. Rev. Stat. § 193.1675 (“Additional Penalty: Commission of Crime Because of Certain Actual or Perceived Characteristics of Victim”).

<sup>25</sup> Westbrook, *supra* note 21, at 5.

federal hate-crime laws.<sup>26</sup> By early 2022, only two states were without active hate-crime laws.<sup>27</sup>

This Article examines the often-overlooked problems with hate-crime legislation. Critiques of hate-crime legislation covered include arbitrariness of which groups are protected classes; incentivization of unhealthy competition among disadvantaged groups; inconsistent enforcement; and counterproductive effects.

## I. Arbitrary Politics and Classifications Means Arbitrary Protections

Hate-crime legislation only protects enumerated groups or classes of people.<sup>28</sup> There is significant variation among hate-crime laws regarding which groups of people receive protection.<sup>29</sup> Some hate-crime laws protect a limited number of groups, such as those based on race, ethnicity, and religion.<sup>30</sup> Others are more expansive, protecting additional groups such as those based on disability, gender, political affiliation, and membership in the armed forces.<sup>31</sup>

The variations are politically arbitrary,<sup>32</sup> as historically demonstrated by the debate over whether to include gender as a protected class within

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<sup>26</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified as 18 U.S.C. § 249). Unlike previous civil-rights laws, *see supra* note 22, this law does not require a victim to be engaging in a federally protected activity. It is a direct hate-crime statute that criminalizes bodily injury (or attempted bodily injury) motivated by bias against certain protected classes.

<sup>27</sup> Those states were South Carolina and Wyoming. *See* Jeffrey Collins, *S Carolina Push to Be 49th State with Hate Crime Law Stalls*, ASSOCIATED PRESS (Feb. 12, 2022, 1:45 PM), <https://perma.cc/KAK5-4E9P>. But some scholars add Arkansas and Indiana to this list, arguing that the statutes in those states are too ambiguous and broad to be properly characterized as hate-crime laws. MOVEMENT ADVANCEMENT PROJECT, POLICY SPOTLIGHT: HATE CRIME LAWS 11 (2021), <https://perma.cc/PUF4-RVCU>. Some add North Dakota for similar reasons. MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CENTER FOR JUSTICE, FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 35 n.153 (2019), <https://perma.cc/DNY7-GA9D>.

<sup>28</sup> Beverly A. McPhail, *Hating Hate: Policy Implications of Hate Crime Legislation*, 74 SOC. SERV. REV. 635, 638 (2000).

<sup>29</sup> *Id.* at 644.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> But not constitutionally arbitrary. Under its enumerated powers, Congress may pass legislation reaching race, color, religion, or national origin under its Thirteenth Amendment authority. To reach protected classes such as gender, sexual orientation, gender identity, or disability, it relies on its authority under the Commerce Clause—but to do so it must include, as an element of the crime, evidence that the crime was committed with some nexus to interstate commerce. *See, e.g., United States v. Cannon*, 750 F.3d 492, 497–98 (5th Cir. 2014) (explaining the constitutional bases for the different provisions of the Shepard-Byrd Act hate-crime law).

the HCSA. Advocates argued that gender-motivated crimes like rape deserved to be treated as hate crimes. In contrast, opponents—which included the coalition trying to pass the HCSA—argued against inclusion because (1) statistics on rape and domestic violence were already collected and (2) violence against women was mostly perpetrated by aggressors who knew their victims *individually* and were (arguably) not motivated by anti-female bias *generally*.<sup>33</sup> Of course, some male criminals *do* select victims because they are women, and men who are acquainted with their female victims might still be motivated by misogynistic biases.<sup>34</sup> Gender protections were eventually added to the federal statute in 2009 as part of the Shepard-Byrd Act.<sup>35</sup> But as of 2021, among the states that have passed hate-crime laws, thirteen states still do not include sex or gender as a protected class.<sup>36</sup> It is unclear why the greater victimization of one group somehow justifies less legal protection.

There are other anachronisms that may seem peculiar to modern concerns of minority status. Federal hate-crime laws passed under Congress's Thirteenth Amendment authority, for instance, treat a person's Jewish identity as "race."<sup>37</sup> And to gain support from socially conservative politicians, the HCSA—which collected hate-crime statistics based on sexual orientation—required a section noting that "[n]othing in this Act shall be construed . . . to promote or encourage homosexuality."<sup>38</sup>

The refusal to protect victims targeted because of their profession further demonstrates the arbitrary nature of who receives protection.<sup>39</sup> Sex workers are specifically targeted with violence because of their profession but are not protected under hate-crime laws.<sup>40</sup> Conversely, abortion-clinic workers—who are also targeted for their occupation—receive protection from federal civil-rights law under the Freedom of

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<sup>33</sup> JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 72–73 (1998).

<sup>34</sup> *Id.*

<sup>35</sup> 18 U.S.C. § 249(a)(2).

<sup>36</sup> Those states are Alabama, Colorado, Florida, Idaho, Kansas, Kentucky, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, and Wisconsin. MOVEMENT ADVANCEMENT PROJECT, *supra* note 27, at 14 tbl.1A.

<sup>37</sup> Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (finding that Jews were considered a "race" at the time of the Thirteenth Amendment's enactment).

<sup>38</sup> JACOBS & POTTER, *supra* note 33, at 71. Lesbian and gay advocates at the time nevertheless hailed the legislation as a milestone advancement in federal civil rights law. *Id.* The language is still codified today at 34 U.S.C. § 41305 under "Findings."

<sup>39</sup> Morgan, *supra* note 1, at 33.

<sup>40</sup> *Id.* at 33–34.

Access to Clinic Entrances (“FACE”) Act,<sup>41</sup> passed in 1994 in response to the murders of two abortion doctors and a bodyguard outside two clinics in Florida.<sup>42</sup> Timothy McVeigh’s targeting of law enforcement officers in the 1995 Oklahoma City bombing also serves as an example of a hateful act not covered by hate-crime legislation.<sup>43</sup>

The Atlanta spa shootings further illustrate this principle. Since the evidence indicates Long targeted his victims based on their working profession at a spa, it is not a hate crime. But if he had targeted these same people because they were Asian, it would have been a hate crime. It is unclear why the former deserves a less harsh punishment than the latter. Although one might argue race is more worthy of protection because it is an immutable trait—while jobs are not—this would not explain why religious associations (which are not immutable traits) should receive protections, while professional associations—that are highly victimized—do not.

As hate-crime legislation advocates promote, one of the benefits of including a group as a protected class is the symbolic nature of recognizing that its members deserve protection.<sup>44</sup> But implicit in this position is the assumption that groups not included as protected classes are less worthy of protection. Scholars in the 1990s<sup>45</sup> looked at contemporary activist movements. They noted, within hate-crime politics, the dichotomy of status between more mature civil-rights movements—centered on race, religion, and national origin—and the more controversial newcomers—at the time, gay-rights advocacy.<sup>46</sup> Other scholars theorized that groups not receiving hate crime protection often felt depreciated.<sup>47</sup> These excluded

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<sup>41</sup> Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C.A. § 248). Notably, the law protects both abortion clinics as well as pregnancy resource centers.

<sup>42</sup> Natasha Lennard, *Reproductive Rights Activists Charged Under Law Intended to Protect Abortion Clinics*, *The Intercept* (Feb. 3, 2023, 6:00 AM), <https://perma.cc/33FQ-WLLZ>.

<sup>43</sup> Morgan, *supra* note 1, at 33. Today at the federal level, there is bipartisan support to pass hate-crime legislation to protect law enforcement officers. Emanuella Grinberg, *New Bill Offers Police Officers Protections Similar to Those for Hate Crime Victims*, *CNN* (May 8, 2018, 11:25 PM), <https://perma.cc/7E8J-UV4M>. And today all fifty states have sentence enhancements for harming a police officer. *Id.* Some states have gone further to create distinct hate crimes for targeting a law enforcement officer, firefighter, or emergency medical services provider. *See, e.g.*, LA. STAT. ANN. § 14:107.2.

<sup>44</sup> Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL’Y 1, 50 (1994).

<sup>45</sup> Described by some as the “decade of hate—or at least hate crime.” Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference,”* 91 J. CRIM. L. & CRIMINOLOGY 653, 658 (2001) (quoting David E. Rovella, *Attack on Hate Crimes is Enhanced*, *NAT’L L.J.*, Aug. 29, 1994, at A1).

<sup>46</sup> McPhail, *supra* note 28, at 638; JENNESS & BROAD, *supra* note 22, at 42.

<sup>47</sup> McPhail, *supra* note 28, at 646.

groups then tend to jockey for position to be included—as was evident during the politicking to include women and disabled individuals in the original HCSA.<sup>48</sup> Laurel Westbrook argues that spotlighting a group’s vulnerability through high-profile acts of violence has the effect of creating fear within that group.<sup>49</sup> Westbrook argues, for example, that in the fight to include transgender people as a protected class, the one-sided focus on the victimization transgender people receive may have discouraged some from pursuing their transgender identities.<sup>50</sup>

James Jacobs and Kimberly Potter argued that “identity politics” is harmful because groups view other disadvantaged groups as their competition for limited resources.<sup>51</sup> This competition elevates victimization as a means to an end—and therefore, victimization becomes something to be sought out.<sup>52</sup> Advocacy in this competitive environment requires not just the emphasis of a group’s victimization but the relative victimization compared to other groups.<sup>53</sup> This incentivizes the group seeking victimization to downplay the persecution of other groups.<sup>54</sup> This competition fosters division among victimized groups rather than support and encouragement.<sup>55</sup>

Even the difference between having some form of hate-crime laws and having no hate-crime laws is largely arbitrary. A 1996 study examining the propensity to adopt hate-crime legislation found no correlation between the decision to adopt legislation and relevant factors such as violent crime rates, economic vitality, commitment to women’s rights and minority rights, and social cohesion.<sup>56</sup> Instead, the study found that factors such as media coverage and political opportunities for elected officials drove the enactment of hate-crime legislation.<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Westbrook, *supra* note 21, at 13, 18.

<sup>50</sup> *Id.* at 18. Today, however, consider the opposite trend: an increase in the number of youths diagnosed with gender dysphoria, as well as treatment with gender-affirming care. Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS (Oct. 6, 2022, 11:00 PM), <https://perma.cc/QFS9-SYN8>.

<sup>51</sup> McPhail, *supra* note 28, at 646.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.*

<sup>54</sup> JACOBS & POTTER, *supra* note 33, at 72–73.

<sup>55</sup> McPhail, *supra* note 28, at 647 (“Additionally, Jacobs and Potter (1998) believe that categorizing victims and offenders by race, class, or religion will contribute to the ‘Balkanization’ of American society. Balkanization refers to the state of affairs in the Balkan countries, which continues today, where there is a long history of conflict and division based on ethnic and religious differences.”).

<sup>56</sup> Morgan, *supra* note 1, at 31.

<sup>57</sup> *Id.*

## II. The Subjectivity of Proving Motive

Judges and juries are often tasked with determining a defendant's mental state, such as whether a murder was premeditated. However, hate-crime legislation goes further, requiring judges and juries to determine the psychological motivations behind why the defendant committed the crime.<sup>58</sup> This is a novel *mens rea* requirement absent from any other *mens rea* requirements.<sup>59</sup>

As acknowledged by the FBI in the *Hate Crime Data Collection Guidelines*, “because motivation is subjective, it is difficult to know with certainty whether a crime was the result of an offender’s bias.”<sup>60</sup> This subjectivity leads to trials focused on strange aspects, such as a case where a white defendant accused of attacking a black victim had witnesses testify that he had many close black friends and idolized a black person in the community.<sup>61</sup> This inherent subjectivity has led to some describing hate-crime legislation as a “conceptual swamp.”<sup>62</sup> Complicating matters further is ambiguous and overbroad language—what is a court supposed to make of a statute that prohibits *any* prejudice or bias?<sup>63</sup>

## III. Questionable Justification for Disparate Punishment

Hate crimes may be more likely to involve vicious and senseless acts that make them more deserving of punishment.<sup>64</sup> This is no justification, however, for why two identical acts deserve different punishments

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<sup>58</sup> Anne B. Ryan, *Punishing Thought: A Narrative Deconstructing the Interpretive Dance of Hate Crime Legislation*, 35 J. MARSHALL L. REV. 123, 135 (2001).

<sup>59</sup> Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation,”* 20 L. & PHIL. 215, 217 (2001).

<sup>60</sup> McPhail, *supra* note 28, at 639 (quoting FBI, U.S. DEP’T OF JUST., TRAINING GUIDE FOR HATE CRIME DATA COLLECTION: UNIFORM CRIME REPORTS 4 (1999)); *see also* FBI, CRIM. JUST. INFO. SERVS., HATE CRIMES DATA COLLECTION GUIDELINES AND TRAINING MANUAL 4 (2015) (“Due to the difficulty of ascertaining the offender’s subjective motivation, bias is to be reported *only if* investigation reveals sufficient objective facts to lead a reasonable and prudent person to conclude that the offender’s actions were motivated, in whole or in part, by bias.”).

<sup>61</sup> Fleisher, *supra* note 44, at 14, 16.

<sup>62</sup> McPhail, *supra* note 28, at 640.

<sup>63</sup> *See* *Botts v. Georgia*, 278 Ga. 538 (Ga. 2004) (striking a hate-crime law that was too vague, which “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications” (internal quotation marks and citations omitted)).

<sup>64</sup> *See* Jo Morgan, *US Hate Crime Legislation: A Legal Model to Avoid in Australia*, 38 J. SOCIO. 25, 26 (2002); John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal “Hate Crime” Legislation*, 80 B.U. L. REV. 1191, 1211 (2000).



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because the victim of one act was chosen based on a protected classification. Imagine two assaults that consist of the exact same actions and result in the exact same damage. If one victim was targeted because of his race and the other targeted at random, why does the latter assault deserve a lesser punishment? It seems unlikely that the latter victim would find any solace in knowing that he was targeted at random and not because of his race. And the attacker who targeted his victim based on race is just as dangerous to society as an attacker who targeted his victim at random.

The Atlanta spa shootings illustrate this principle. What explanation could justify why Long deserves a lesser punishment because he targeted his victims for their occupation rather than their race?<sup>65</sup> Long is no less culpable, and the victims' families are no less devastated because of this difference.

#### IV. Inconsistent Enforcement and Media Reporting

The inconsistent enforcement of hate-crime laws is harmful because inconsistent justice is inherently unfair and results in public distrust in the system. This public distrust surrounding contentious issues may then lead to more divisiveness and racial animosity in society.

The Atlanta spa shootings and another attack that same month in Pittsburgh illustrate the dangers of how the public interprets the choice to pursue hate-crime charges.<sup>66</sup> In the Atlanta spa shootings, some called

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<sup>65</sup> The Supreme Court offered one rationale in 1993 when it unanimously upheld the constitutionality of a sentencing enhancement where the defendant had selected his victim based on race. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Chief Justice William Rehnquist wrote:

[The hate-crime] statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

*Id.* (citations omitted). According to the Department of Justice, "Hate crimes have a broader effect than most other kinds of crimes. Hate crime victims include not only the hate crime's immediate target but also others like them. Hate crimes affect families, communities, and at times, the entire nation." U.S. DEP'T OF JUST., *Learn About Hate Crimes*, <https://perma.cc/X7WE-H3X4>. *But see* Brianna Alongi, Comment, *The Negative Ramifications of Hate Crime Legislation: It's Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 PACE L. REV. 326, 340–41 (2016) (arguing that data is inconclusive as to the deterrence effect of hate crime legislation).

<sup>66</sup> Berman et al., *supra* note 9; Stephanie Pagones, *Pittsburgh Man Accused of Stabbing Boy, 12, at McDonald's Used Racial Slurs, Bit Witness: Police*, FOX NEWS (Mar. 22, 2021), <https://perma.cc/36SA-9TE4>.

for hate-crime charges to be filed.<sup>67</sup> The same month, a black man in Pittsburgh stabbed a twelve-year-old white boy in the neck at McDonald's, after which he was recorded as having used racial slurs, including "white devil" and "white satan."<sup>68</sup> This incident received no calls from local officials to charge the man with a hate crime.

This apparent inconsistency produced passionate responses such as, "Only white people are charged with 'hate' crimes. All laws are interpreted through an antiwhite lens to persecute us for being white."<sup>69</sup> These perceived inconsistencies in hate-crime law enforcement accelerate the polarizing harm of identity politics. Such sentiment is not productive to society.

The Pittsburgh incident also illustrates the power media plays in shaping public perceptions. While the Fox News report mentions the multiple racial slurs, the CNN account omits this information.<sup>70</sup> Consequences from such media framing can be far-reaching. For instance, the murder of Matthew Shepard, the namesake of the 2009 Shepard-Byrd Act, was originally portrayed in the media as an anti-gay hate crime. However, later interviews debunked this original narrative.<sup>71</sup> The murderer's girlfriend initially provided this motive to police and media because she thought his criminal defense would be easier if he could mount a "gay panic" defense.<sup>72</sup> But the original narrative lingers and even finds its way into Supreme Court opinion.<sup>73</sup>

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<sup>67</sup> Kate Brumback, *Spa Shootings Could Be First Test of Georgia Hate Crimes Law*, ASSOCIATED PRESS (Mar. 20, 2021), <https://perma.cc/MBR6-CL4M>; see also Marlene Lenthang, *Prosecutor Seeks Hate Crime Charges, Death Penalty in Atlanta Spa Shootings*, ABC NEWS (May 11, 2021, 6:18 PM), <https://perma.cc/3TLN-EB3E>; Durkee & Hart, *supra* note 17.

<sup>68</sup> Pagones, *supra* note 66.

<sup>69</sup> See, e.g., DiversityisConflict, *Comment to Pittsburgh Man Accused of Stabbing Boy, 12, at McDonald's Used Racial Slurs, Bit Witness: Police*, FOX NEWS (Mar. 23, 2021), <https://perma.cc/3ZRQ-8QES>.

<sup>70</sup> See Heather Law & Ronnie Glassberg, *A 12-Year-Old and His Family Were Waiting in Line at McDonald's When a Man Stabbed the Boy in the Neck, Police Say*, CNN (Mar. 21, 2021, 4:57 PM), <https://perma.cc/CD7A-MLSA>.

<sup>71</sup> Shepard's killers claim the murder was motivated by money and drugs. ABC NEWS, *New Details Emerge in Matthew Shepard Case* (Nov. 26, 2004), <https://perma.cc/UF6B-FZ8M>.

<sup>72</sup> *Id.* The "gay panic" defense has legitimized and excused violent and lethal behavior against the LGBTQ+ community. It is a "legal strategy which asks a jury to find that a victim's sexual orientation or gender identity is to blame for the defendant's violent reaction, including murder." Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, AM. BAR ASS'N (Mar. 31, 2020), <https://perma.cc/2Q42-SBGY>.

<sup>73</sup> Haley Strack, *Fact Check: Liberal Supreme Court Justices Rely on False Claims about Racism, Anti-Gay Bigotry to Bolter Dissents*, NATIONAL REVIEW (June 30, 2023, 1:12 PM), <https://perma.cc/953C-R8SG>. Another high-profile example of charged media narratives is the 2016 shooting at the Pulse nightclub in Orlando. Media reports initially suggested that the shooter targeted

Notably, even without state hate-crime statutes, Shepard's murderers were sentenced to life in prison without the possibility of parole.<sup>74</sup>

## V. Counterproductive

The previously explained problems with hate-crime laws are even more salient when considering the lack of counterbalancing benefits. Hate-crime legislation is unlikely to prevent hate crimes.<sup>75</sup> It is hard to imagine that the type of person considering assaulting someone based on race would possess the awareness and restraint to choose not to do so because it might result in a longer sentence than a non-hate-motivated assault.

Not only do hate-crime laws have a dubious deterrent effect,<sup>76</sup> but they may even increase the very crimes they are implemented to reduce. For instance, a hate-crime conviction might serve as a badge of pride for members of hate groups.<sup>77</sup> Hate-crime charges might then validate a martyrdom narrative, which is a powerful tool allowing hate groups to motivate existing members and enhance recruitment efforts.<sup>78</sup> In such a world, "straightforward, 'neutral' crimes are preferable" as a foil for ideologically motivated defendants.<sup>79</sup>

The increased focus on the biased motive of a crime may intensify hostility and conflict between groups, thus leading to retaliatory crimes.<sup>80</sup> Additionally, punishing an offender under a hate-crime statute may increase his hatred by causing him to blame his punishment on the group he victimized.<sup>81</sup> Indeed, the very concept of hate crimes may encourage a

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Pulse because it was a gay club, but the criminal investigation never corroborated this motive. Instead, the shooter appeared to have been motivated by retribution for U.S. violence in Muslim countries. Some argue that the initial anti-gay storyline generated enough anger to cause authorities to bring questionable charges against the shooter's wife. Glenn Greenwald & Murtaza Hussain, *As the Trial of Omar Mateen's Wife Begins, New Evidence Undermines Beliefs About the Pulse Massacre, Including Motive*, THE INTERCEPT (Mar. 5, 2018, 5:19 PM), <https://perma.cc/PS9E-6QDC>.

<sup>74</sup> Michael Bronski, Ann Pellegrini & Michael Amico, *Hate Crime Laws Don't Prevent Violence Against LGBT People*, THE NATION (Oct. 2, 2013), <https://perma.cc/A7PH-82PX>.

<sup>75</sup> See Westbrook, *supra* note 21, at 6–7; Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It's Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 PACE L. REV. 326, 340 (2016).

<sup>76</sup> Bronski et al., *supra* note 74; McPhail, *supra* note 28, at 642; see also Kay Whitlock, *Reconsidering Hate: Policy and Politics at the Intersection*, POL. RSCH. ASSOC. 10 (2012).

<sup>77</sup> See Jesse Larner, *Hate Crime/Thought Crime*, DISSENT, Spring 2010, at 76.

<sup>78</sup> Mitch Berbrier, *The Victim Ideology of White Supremacists and White Separatist in the United States*, 33 SOCIO. FOCUS 175, 188 (2000).

<sup>79</sup> Baker, *supra* note 64, at 1198.

<sup>80</sup> Westbrook, *supra* note 21, at 7.

<sup>81</sup> *Id.*

“pessimistic and alarmist portrayal of a divided conflict-ridden community [thus creating] a self-fulfilling prophecy and exacerbat[ing] societal divisions.”<sup>82</sup>

Some scholars also argue that hate crimes ultimately “misdirect us from looking at much deeper issues,” such as the systemic causes of racism, homophobia, and xenophobia.<sup>83</sup> And some activist groups, whose constituencies are the supposed beneficiaries of hate-crime laws, criticize the carceral solution to these issues.<sup>84</sup> They call for “community-based alternatives” to “structural violence” to “replace cycles of trauma with cycles of safety and liberation.”<sup>85</sup>

### Conclusion

Advocates of hate-crime legislation often argue that hate-crime statutes allow society to voice its disapproval symbolically.<sup>86</sup> While this may be true, the legislation results in real—not symbolic—problems. The significance of these problems is exacerbated when considering the absence of any tangible benefit. Those who advocate for hate-crime legislation no doubt have laudable motives. But regardless, as this Article demonstrates, the costs are dire. Hate-crime legislation is arbitrarily applied, incentivizes victimized groups to compete against each other, and is counterproductive.

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<sup>82</sup> James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 391 (1996).

<sup>83</sup> James Doubek, *How Well Do Hate Crime Laws Really Work?*, NPR (June 28, 2015, 7:03 AM), <https://perma.cc/Z4DX-SKBK>.

<sup>84</sup> Whitlock, *supra* note 76, at 18–19.

<sup>85</sup> *Id.* at 18.

<sup>86</sup> Fleisher, *supra* note 44, at 50.