Hate Crimes: Clarification from Emotion Theory and Psychological Research

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On February 10, 2015, three Muslim students were murdered in Chapel Hill, North Carolina by Craig Stephen Hicks. The perpetrator had a history of posting anti-religious messages on social media, and the murders provoked a national debate over the motives of his actions. The initial police investigation indicated that Hicks was motivated by an ongoing dispute over parking, whilst the father of the two daughters killed stated that "this has hate crime written all over it."[1] The case was ultimately decided in court, where Hicks was indicted for the triple homicide of three Muslim students, as well as one count of discharging a firearm into an occupied dwelling. Neither the F.B.I. nor the federal prosecutors handling the case chose to label these murders as hate crimes.[2]

On 5th March 2015, Ahmed Al-Jumaili, a recent migrant from Iraq, was shot outside his apartment in Dallas, Texas, as he and his wife took photographs of their first snowfall. As he waited outside the apartment with his wife just before midnight, a group of men entered the complex and shot Al-Jumaili in what appeared to be an unprovoked attack. He died a few hours later at a nearby hospital. Ahmed Al-Jumaili had been in the United States for no longer than three weeks. Given the climate of hostility and religious conflict in and around Dallas at the time, focus fell on whether the murder should be legally considered a 'hate crime.' Just a few weeks before the attack, thousands of local residents had gathered in a nearby suburb to protest a Muslim community conference held at a local event center. The event was meant to raise money to build a center dedicated to promoting tolerance. It was organized by the local school system and was called "Stand with the Prophet Against Terror and Hate." Protestors waved anti-Muslim signs and American flags for hours, surrounding roads and sidewalks leading to the conference and forcing local Muslim families who attended to enter through a barrage of hate. "Go home and take Obama with you," read one sign.[3] Given the context of these tensions, it was surprising

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1. Josh Voorhees, *Parking Dispute Gone Wrong, Hate Crime – or Both?* Slate, Feb. 13 2015, http://www.slate.com/blogs/the_slatest/2015/02/13/chapel_hill_hate_crime_did_suspected_shooter_craig_hicks_gun_down_three.html.
2. Elisha Fieldstadt & Denise Royal, *Judge Rules Craig Hicks, Charged With Killing 3 Muslims, Can Face Death Penalty Trial*, NBC NEWS, Apr. 6, 2015, http://www.nbcnews.com/news/us-news/nc-man-craig-hicks-charged-killing-3-muslims-can-face-n336676.
3. For full details about the incident, *see* Max Fisher, *The Murder of Al-Jumaili in Texas Should be a Front Page Story* Vox, Mar. 7, 2014, http://www.vox.com/2015/3/7/8165583/ahmed-al-jumaili-killed-texas.

that the murder of Al-Jumaili received such little media attention. Nevertheless, both the Chapel Hill shootings and the murder of Al-Jumaili provoked debate over hate crimes in the United States. Controversies surrounding the police investigations and court decisions led to discussions over the causes, proof and effects of hate crimes, as well as the constitutionality and wider desirability of hate-crime laws.

Hate crime statutes have been contested since their modern development in the United States during the 1980s. Legal discussion has been framed, and to an extent clarified by Supreme Court decisions regarding their constitutionality during the 1990s.[4] Despite these judicial decisions, controversy and a lack of consensus over hate crimes persists within scholarly circles - and amongst the general public. There remains ambiguity and debate over the causes, proof of these offenses, and the legitimacy of hate crime laws, illustrated during the aftermath of both the Chapel Hill and Dallas murders. Hate crimes themselves sit at the juncture of a broader issue concerning the tense relationship between emotions and the law. Whilst emotion clearly pervades the law, legal judgment is typically seen as antithetical to passionate emotions. However, the law in the United States sometimes makes explicit mention of emotion in categories of conduct such as "hate crimes,"[5] which lie at the heart of important legal questions about punishment and its relation to mental states. The formalistic and dispassionate character of the law is often seen as antithetical to the subtleties, subjectivity and variations of emotional states.[6] However, the lingering question remains as to whether variability of emotions can be accurately placed in a legal context.

This paper will argue that psychological research and contributions from emotion theory can help inform discussion over hate crimes and their associated statutes. Much contemporary criticism of hate crime laws is based on a limited understanding of the emotional content of hate crimes, their effects and how to prove their occurrence; misconceptions that research and theory can clarify. These misconceptions include the views that hate crimes are themselves caused by the emotional state of hatred, and that hate crime laws uniquely punish motive, and are thus unconstitutional "thought-crimes." Moreover, there is the argument that proving motive in a hate crime is very difficult if not impossible. These misconceptions often lead to the conclusion that punishing hate crimes is wrong on the basis that hate crime statutes are unconstitutional and incompatible with traditional criminal justice aims. Fundamentally, this paper challenges *criticisms* of hate crime statutes, rather than providing a systematic argument for their desirability. I contest these criticisms, arguing instead that the causal relationship between emotional states and hate crimes has been overstated, and that corresponding statutes do not punish motive uniquely. The

For details about the protest, *see Thousands Protest Muslim Conference in Garland*, NBC, Jan. 18, 2015, http://www.nbcdfw.com/news/local/Thousands-Protest-Muslim-Conference-in-Garland-288936351.html

4. *See* U.S. v. Morrison, 529 U.S. 598 (2000); Wis. v. Mitchell, 508 U.S. 476 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
5. Susan Bandes, The Passions of Law (1999) (Bandes has argued that this grants the language of emotion some legitimacy in the arid, formalistic discourse of law).
6. In spite of this, emotions themselves can obviously be discussed in an unemotional way.

assumptions underpinning this controversy can be challenged by drawing on psychological research and the work of emotion theory. This paper will briefly outline hate crimes, their history and the development of the corresponding statutes. It will then reconstruct three dominant criticisms of hate crime laws. The first contests their unique status and required proof. The second rejects hate crime laws from a liberal perspective on the basis that they punish emotional states. The final criticism of these statutes considers them unconstitutional because they punish motive. This paper will argue that ambiguity over the causes, proof and effects of hate crimes has clouded scholarly and legal discussion. There is impetus for greater clarity as this ambiguity has created fertile ground for criticism of hate crime statutes. Psychological research and emotion theory both offer insights that help shed light on the jurisprudential questions associated with hate crime statutes. After clarification of the causes, proof and effects of hate crimes, their corresponding statutes will be found to be more consistent with traditional criminal justice aims.

An Overview of Hate Crimes

Hate crimes are criminal acts committed because of the victim's actual or perceived membership in a particular group. Within the United States, these are legally defined at the federal level as offenses 'motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim.'[7] The categories of identity specified in legislation varies significantly at the state level.[8] Beyond legal definitions, hate crimes should be seen broadly as offenses that demonstrate a perpetrator's prejudice. Examples of 'hate crimes' would include racist cross-burnings to incite fear amongst African-Americans, and assaults against gays. These have historically also been known as 'hate-motivated crimes', 'bias-motivated crimes,' and 'discrimination crimes'; all offenses that evidence prejudice against an individual(s) that the state has deemed worthy of protection.

Hate crimes have existed throughout the history of the United States, yet laws addressing these offenses are relatively new. Broadly, these crimes are typically classified as crimes against persons, property and society. However, only four specific hate crimes account for almost 92% of total hate crimes: aggregated assault, simple assault, intimidation, and vandalism.[9] Since 1979, a trend in criminal legislation has been the enactment of 'hate-crime laws.' These differ from hate speech laws enacted during the first half of the twentieth century, which criminalized bigoted expressions or symbols[10]. Moreover, public attention focused during the 1980s and 1990s on

7. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act [hereinafter "Hate Crimes Prevention Act"], 18 U.S.C. § 249 (2012).
8. As of 10th April 2015, every state statute currently covers bias on the basis of race, religion and ethnicity; 32 cover disability; 31 cover sexual orientation, 28 cover gender; 5 cover political affiliation, and 3 cover homelessness.
9. *See* Glen Kercher, Crime Victims' Institute, Hate Crimes (2008).
10. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the U.S Supreme Court affirmed a state law that punished group-libel or bigoted statements against racial, religious, or ethnic groups. However,

hate crimes as local governments appointed commissions to study the issue. Indeed, scholars such as Maroney have shown that the anti-hate crime movement can be traced in part back to the civil rights and victim rights movements of the 20th century. Many civil rights organizations were founded upon the premise that their struggle first started as one against hate violence. For example, the National Association for the Advancement of Colored People (NAACP) was founded in 1909 in response to racist lynchings and mob violence in the United States, in particular the 1908 Springfield riot.[11] More recently, the Anti-Defamation League (ADL) has been one of the leading advocates for hate-crime legislation in the United States. Specifically, the ADL's blueprint for defining and categorizing hate-crime laws as a penalty enhancement design have been the basis for most of the advancement in hate crime statutes in the United States at the state level. As of 2015, all but five states have passed various laws punishing bigoted or discriminatory crimes.[12]

Hate crimes remain an important problem in the United States. Although they do not represent a significant proportion of overall crime, numbers of reported hate crimes are still large in absolute terms. The Federal Bureau of Investigation (FBI) released a report of data collected under the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act of 2009, which included data about the offenses, victims, offenders, and locations of the bias-motivated incidents reported by law enforcement agencies throughout the United States. The 2013 Report found 6,933 offenses to have been motivated by a bias toward a particular race, gender, gender identity, religion, disability, sexual orientation or ethnicity. Overall, 7,230 victims were reported. In terms of the distribution of victims by bias type, 49% of victims were targeted because of the offender's racial bias, 20% because of their sexual orientation bias, 16% due to their religious bias and 11% as a result of ethnicity bias. In total, 4,430 hate crime offenses were classified as crimes against person during that year. Five of these were murder cases while the majority involved intimidation or simple assault. Furthermore, 2,424 hate crime offenses were classified as crimes against property, with 73% involving acts of destruction, damage or vandalism.[13] However, in spite of this most recent overview of hate crime offenses in the United States, the prevalence of these crimes is rendered unclear due to the significant problem of under-reporting. The Uniform Crime Reporting Program does not estimate offenses for the jurisdictions of agencies that do not submit reports. Furthermore, a Department of Justice Report released in October 2001 indicated that hate-crimes are often under-reported

subsequent Supreme Court decisions have rejected the foundational arguments that were relied upon in this case. For example, in Smith v. Collin, 439 U.S. 916 (1978), the Supreme Court refused to deny order of Court of Appeals allowing a Nazi march on the basis that offensiveness is insufficient basis to punish speech.

11. *See* Terry. A. Maroney, *The Struggle against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. Rev. 564 (1998) for a more detailed account of the emergence of the NAACP in relation to the 1908 Springfield Riot.
12. States that do not have hate crime laws that include crimes based on any characteristics include Arkansas, Georgia, Indiana, South Carolina, Wyoming. Nancy Badertscher, *South Carolina, Georgia, 3 Other States Don't Hate Hate Crimes Laws*, Politifact, Jul. 1 2015.
13. Federal Bureau of Investigations, Hate Crimes Statistics (2013).

at the level of victim. Whilst hate crimes do not represent a significant proportion of overall criminal offenses, it will be shown that the specificity of their impact on victims and communities bears the need for serious examination.

Hate Crime Statutes

Legislation regulating discriminatory or prejudicial conduct in the United States has a long history, but the first specific 'hate crime' statute was enacted in California in 1978. In 1981, the Anti-Defamation League began to provide states with model legislation for hate crime laws that helped them to adopt statutes. Consequently, the vast majority of states now have some form of hate crime statute, although their substance and breadth of coverage can vary dramatically. President George H.W Bush signed the Hate Crimes Statistics Act[14] into law in 1990, which requested that local and state police departments supply the federal government with their data on hate crimes. Following this, the Federal Hate Crime Sentencing Enhancement Act was enacted in 1994. This statute increased sentencing penalties in federal cases with proof of victim targeting based on race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.[15] Limited federal legislation exists in the United States but it has largely been left to states to formulate hate crime laws. The overwhelming majority of states have some form of statute but there exists a wide variety in the specifics of the law. This is particularly true regarding victim characteristics such as race, religion, ethnicity, disability, age and sexual orientation. On this basis, it would not be a stretch to assume the limited consistency between jurisdictions as linked to a wider lack of national consensus within the United States as to what constitutes a hate crime.

Hate-crime legislation at the state level in the United States varies extensively. However, recent scholarship has pointed to four generalized categories: substantive crimes, civil rights statutes, hate-crime reporting laws, and penalty enhancements. Substantive crimes involve the regulation of a specified act such as cross-burning.[16] The most prominent example of a civil rights statute would be the Civil Rights Act of 1964, which prohibited discrimination based on race, color, national origin, religion and gender. It also made any attempt to interfere in a person's ability to engage in constitutionally protected activities such as voting, a federal offense. The 1990 Hate Crimes Statistics Act falls under the banner of hate-crime reporting laws. Finally, penalty enhancements typically increase the level of a hate-crime to a more serious category or assign a hate-crime to a higher sentencing range. This is the most widespread form of hate crime statute but also the most controversial. Notwithstanding some variation at the state level, these laws enhance the penalty for crimes where the defendant was "motivated by" or had "prejudice based on" the actual or perceived

14. Hate Crime Statistics Act [hereinafter "HCSA"], 28 U.S.C. § 534 (1990) (requires the U.S. Attorney General to publish an annual report about crimes that 'manifest evidence of bias based upon race, religion, sexual orientation, or ethnicity').
15. *See* Hate Crime Sentencing Enhancement Act, 28 U.S.C § 994 (1994).
16. *See* Enforcement Act of 1870, 16 Stat. 140 (1870)

membership of their victim in certain categories.[17] Categories of identity typically protected vary widely across states but typically include race, color, religion, sex, sexual orientation, physical disability, and ethnicity. The majority of these identities have tended to be ascriptive (such as race or sexual orientation). In recent years, many states have begun to protect a number of achieved identity categories beyond religion.[18]

The most significant hate crime statute at the federal level is the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), which was signed into law by President Barack Obama on 28th October 2009.[19] This piece of legislation was named in memory of Matthew Shepard, a gay college student who was tortured and murdered in Laramie, Wyoming, and James Byrd, Jr., an African-American man who was dragged to death by a group of racists in Jasper, Texas. HCPA gave the federal Justice Department the ability to investigate and prosecute bias-motivated violence by providing it with jurisdiction over hate crimes, and giving it the ability to assist state and local jurisdictions with their investigations and prosecutions. While the vast majority of hate crimes continue to be prosecuted at the state level, this statute allows federal prosecution and investigative assistance if necessary in order to achieve a just outcome. Indeed, Congress has regularly criminalized behavior in areas with broad national implications such as terrorism and organized crime.

Criticism of Hate Crime Statutes: The Status of Hate Crimes

One of the most common criticisms leveled against hate crime statutes relates to the term "hate crime" itself. The argument typically suggests that the very definition of "hate crime" is itself flawed.[20] Many types of crimes can possibly be motivated by hatred, including some assaults. However, the unique element of 'hatred' in certain crimes does not typically result in the creation of separate categories of punishment. Ultimately, these critics suggest a tenuous rather than necessary relationship between the element of hatred in a crime, and corresponding punishment. The criticism is founded upon the notion that the variety of types of crime that could be motivated by hate suggests that there is not enough specificity to "hate crimes" to justify legislating against them on the basis of their unique element. Consequently, "hatred" of a victim is viewed as irrelevant when sentencing the offender, and therefore the basis of bias-crime penalty enhancement statutes is unfounded. I challenge this criticism of hate crime statutes, arguing that the specificity of a "hate crime" derives from its uniquely detrimental effects rather than "hateful" origins. This criticism of hate crime statutes is based on a flawed understanding of hatred and its

17. *See* D.C. Code § 22-3701 (2010).
18. By 2014, seven states and the District of Columbia had included the achieved identity category of 'homelessness' as a protected status within hate crime legislation. *See* Eleanor Goldberg, *States Classify Attacks Against Homeless as 'Hate Crimes' to Curb Rising Violence*, Huffington Post, Aug. 29, 2014, http://www.huffingtonpost.com/2014/08/29/homeless-hate-crimes_n_5732660.html.
19. Hate Crimes Prevention Act, *supra* note 7.
20. For a detailed articulation of this common objection to hate crime statutes, *see* Randy Blazak, *Isn't Every Crime a Hate Crime? The Case for Hate Crime Laws*, 5 Sociology Compass 244 (2011).

causal relationship with particular bias-crimes. It will be shown that "hate crime" is to an extent a misnomer.

Sociological and psychological research into "hate crimes" dispels misconceptions about the causal mechanisms behind these offenses. In particular, Levin and McDevitt, in their studies of bias-motivated crimes during the 1990s, showed the different types of hate crimes and the correspondingly varied cognitive and emotional drivers.[21] They concluded that resentment could be found, at least to some extent, in the personality of most hate crime perpetrators.[22] In the category of "thrill-seeking" hate crimes that they identified, victims are sought out because perpetrators enjoy "the exhilaration and the thrill of making someone else suffer,"[23] and to gain approval from co-participant peers. Conversely, in "reactive" hate crimes, perpetrators believe that they are taking a protective stance casting outsiders in the role of those actively threatening them or their way of life: "gays are not welcome in our neighborhood." Levin and McDevitt argued that in "thrill-seeking" hate crimes, the leader may be the only member of the group to be motivated by intense hatred of the victim.

Emotion theory also informs discussion over hate crime statutes by clarifying the emotional content of hate crimes. Notably, Jon Elster and Nico Frijda[24] have shown that emotions are typically accompanied by specific action tendencies. In the case of hatred, Elster has argued that 'hatred' is usually oriented towards causing the object of hatred to cease to exist. On the other hand, the action tendency of 'anger' is usually to cause the object to suffer.[25] This follows the distinction made by Aristotle between anger, which is hot and seeks to injure, and hatred, which is cold and seeks to destroy.[26] Given that the vast majority of hate crimes are low-level offenses (such as assaults) rather than homicides, it is therefore more plausible that these crimes involve *anger* rather than hatred. Elster's theoretical account of emotions considered in conjunction with Levin and McDevitt's offense typology indicates that hate crimes are not necessarily motivated by hatred to the extent that the term suggests: "the hatred behind thrill-seeking violence is for most perpetrators actually at a superficial level."[27] More recent scholarship has confirmed this, showing that committing hate crimes in groups brings a sense of security as well as inspiration to the individuals involved, often resulting in psychological and social payoffs.[28] Important factors such as peer group dynamics, economic hardship and beliefs should also be considered alongside prejudicial hatred. An awareness of the complexity of different causal mechanisms and triggers behind various different types of hate crime can

21. Jack Levin & Jack McDevtt, Hate Crimes: The Rising Tide of Bigotry and Bloodshed (1993); Milton Kleg, Hate Prejudice and Racism (1993).
22. Levin & McDevtt, *supra* note 22.
23. *Id*. at 65.
24. *See* Nico Fridja, The Emotions: Studies of Emotions and Social Interaction (1986).
25. *See* Jon Elster, Alchemies of the Mind: Rationality and the Emotions (1998) (a multi-disciplinary account of the role of emotions in human behavior).
26. *See* Aristotle, Rhetoric (discussing the distinction between anger and hatred).
27. Levin & McDevtt, *supra* note 22, at 68.
28. *See* Rayna Momen, *Empirical Study of Hate Crimes in the United States: A Systematic Test of Levin and McDevitt's Typology of Offenders*, Eberly C. of Arts and Sci. (2008).

help undermine criticism of statutes guided by the perception of an immediate and uniform relationship between hatred and the offense. Despite the seeming misnomer, hate crime statutes do not uniquely punish hatred as a criminal motive.

Criticism of Hate Crime Statutes: Proving Hate Crimes

Judicial interpretation of bias motivation in hate crimes has a significant effect on the legitimacy of hate crime statutes. When prosecuting hate crimes, determining the defendant's motive is key. If a heterosexual man assaults a homosexual man, it is not automatically legally defined as a hate crime. For the offense to be distinguished as a "hate crime," under a number of hate crime statutes the defendant must commit the crime "because of" a prohibited bias or prejudice against the victim. Historically, state courts have had difficulty in interpreting the phrase "because of," as this may suggest either motive or intent. A crude example of the distinction between the two would be the difference between: I broke into the house because I *intended* to burglarize it, whereas my *motive* was to steal money in order to pay for my mother's hospital fees. However, different states have had varying interpretations of the "because of" in the case of hate crime statutes. In Washington, courts have taken this to mean that bias merely contributed to the defendant's criminal conduct.[29] However, in California and Texas, "because of" is taken to mean that bias was a substantial factor in contributing to the defendant's criminal conduct.[30] The Texas Court of Appeals clarified this concept by stating that the defendant must have intentionally selected the victim primarily because of their bias or prejudice. By requiring a causal link between the crime and the proven bias, these statutes prevent the prosecution of offenses committed by a person who has expressed bias or prejudice but where these were not a primary motivating factor in the offense charged. The legal difficulty in proving such a direct causal relationship between bias and action has led many to criticize hate crime statutes on the basis that they uniquely punish motive, which itself cannot be precisely ascertained without admitted evidence of prejudicial speech.

Scholars such as Morsch have criticized hate crime statutes on the basis of the practical difficulties associated with their enactment. Specifically, he argues that these laws incorrectly assume that prosecutors can distinguish between the accused racist motive and other possible motives.[31] Morsch argues that hate crime statutes that require proof that the accused attacked his or her victim "because of" that person's race, religion, or sexual orientation classify *motive* as the mental state of culpability. Indeed many criminal offenses impose liability upon proof of a specific intent but do not traditionally do so upon proof of the individual's motive. The penalty for breaking into a building would be different based on whether the offender *intended* simply to trespass or to burglarize it. Traditionally, the law does not take into account the offender's deeper psychological motivations beyond the criminal intent or *mens*

29. *See* Kercher *supra* note 9.
30. *See* Momen *supra* note 29.
31. James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. of Crim. L. & Criminology 659 (1991).

rea element. Morsch argues that the requirement of proof of the racist motives of the accused significantly undermines the ability of prosecutors to obtain convictions under hate crime statutes in all but the most egregious cases. Jacobs has also taken this view, arguing that defining criminal motivation is problematic because it requires getting to the source of the defendant's intent.[32] It would also follow that hate crime statutes create a category of offense that cannot be easily accommodated to traditional criminal justice prosecution. This criticism is instrumental; the efficacy of these statutes is diluted by the difficulties surrounding proof. However, I argue that this criticism is based on a flawed understanding of the *mens rea* element in hate crimes. These statutes typically punish intent, rather than motive. Consequently, difficulties over proving hate crimes have been grossly exaggerated. Furthermore, by drawing on psychological perspectives on hate crimes, it will be shown that a causal relationship between prejudice and the offense can be established to the extent required for prosecution. Collectively, these insights undermine a prominent and long-standing criticism of hate crime statutes concerning the issue of proof.

Recent psychological scholarship has articulated some of the ways in which constructs such as prejudice, bias and hatred can be established as motivations or influences on criminal behavior. For example, Sullaway has emphasized that these constructs are not directly observable and must instead be inferred based on reliable methods such as formal psychological testing or behavioral observation.[33] While one can reliably measure prejudice as a trait or attitude, the presence of such a bias is not in itself illegal. It is imperative to establish a significant causal relationship between bias and a hate crime at the level of the offender in order to prosecute hate crimes effectively. Sullaway herself suggests that behavioral techniques are more appropriate to establish this. For example, if someone breaks into a building to commit a crime while inside, it is usually categorized as burglary, and if not, it is typically labeled as criminal trespassing which is less serious. Under such an approach, intent would be determined using behavioral indicators such as the presence of a pick axe to break into a safe. In the case of hate crimes, police officers are trained to look for behavioral indicators of hate-based motives so that hate or bias motivated criminal behavior can be described in specific and measurable ways, and consequently punished. For example, police officers in many states are typically trained to assess the use of hate speech, hate propaganda and expressed intent (such as verbal behavior). This type of behavioral information can allow the inference of a hate-based motive for a criminal act. Furthermore, Sullaway points to the absence of any other competing, typical criminal motivations such as theft as also characterizing many hate crimes. Out of all reported hate crimes in Los Angeles County between 1994-1997, more than 80% were unrelated to material gain based on inferences through the absence of theft, or robbery or alternative motive.[34] These examples of behavioral techniques suggest that a causal relationship between bias and hate crime offenses can in fact be inferred

32. James B. Jacobs, *Should Hate Be a Crime?*, 113 Pub. Int. 3, 4 (1993).
33. Megan Sullaway, *Psychologcal Perspectves on Hate Crime Laws*, 10 Psychol. Pub. Pol'y & L. 250 (2004).
34. Federal Bureau of Investigations, Crime in the United States (1998).

with less difficulty than previously thought. Whilst critics such as Morsch and Jacobs have indicated the limitations of hate crime statutes based on the alleged impossibility of prosecution proving motive, recent psychological insights offered by scholars such as Sullaway challenge this view.

The Liberal Critique of Hate Crime Statutes

Perhaps counter-intuitively, some of the most vigorous challenges to the penalty-enhancement provisions of hate crime statutes have come from liberal perspectives. Heidi Hurd has expressed such a view, characterizing hate crimes as being different from other offenses in four important ways. Firstly, hate crimes imply the need to consider a defendant's motive for action in a way that no other crimes have ever previously done. Secondly, Hurd sees the motivations with which they are concerned as "emotional states that attend actions, rather than future states of affairs to which actions are instrumental means."[35] Moreover, hate crimes focus on motivations rather than intent. Finally, she believes that the emotional states with which these crimes are concerned constitute standing character traits rather than occurring mental states such as intentions, purposes, and choices. Hurd also presents two common justifications for the increased penalty clauses of hate crime legislation. First, because hate crimes victimize entire communities of people, they constitute greater wrongs than do otherwise-motivated crimes. Secondly, hate crimes reflect significantly greater culpability on the part of the perpetrators because, for example, bigotry is far more culpable than greed. These characterizations of both hate crimes, and common justifications for legislation, will be shown to be important in framing her broader argument challenging the legitimacy of hate crime statutes. Hurd argues that if hatred and bias are construed as *mens rea* elements, as her characterization of hate crimes suggests, then they are alien to traditional criminal justice principles. She argues on moral and political grounds that to criminalize hatred and bias is to move from an act-centered theory of criminal punishment to a character-centered theory.[36] On this basis, liberals should reject hate crime statutes because they are inherently illiberal. As Hurd argues:

> If hate and bias have become new conditions of legal culpability, then hate/bias crime legislation has worked important changes in both our criminal law doctrine and our political suppositions. No longer is character immune from criminal sanctions; no longer is virtue and vice outside the scope of state action. The law now regulates not only what we do, but who we are.[37]

I argue against this liberal critique of hate crime statutes, considering it to be based on a flawed understanding of emotional states and their causal relationship with hate crime offenses. Insights from emotion theory and psychological research can both remedy these misconceptions and strengthen the legitimacy of hate crime statutes.

35. Heidi M. Hurd, *Why Liberals Should Hate Hate Crime Legislation,* 20 L. & Phil. 215-16 (2001).
36. *Id.*
37. *Id.* at 232.

Hurd makes the claim that hate crime statutes constitute a novel jurisprudential move away from an act-centered to character-centered theory of criminal punishment. This is a false claim, and cannot sustain serious examination. In his major work *Rethinking Criminal Law,* Fletcher showed that motive has often been considered as an aggravating circumstance in cases of homicide.[38] Even before the widespread adoption of hate crime statutes from the 1980s onwards, a Georgia statute upheld by the Supreme Court in 1976 listed one such aggravating motive as "the purpose of receiving money, or any other thing of monetary value."[39] In Europe during the 20th century, consideration of certain motives as aggravating factors was even more prevalent than in the United States. For example, as Fletcher notes, a German statute covering all cases of intentional killing included a clause for "base motives" or *niedrige Bweggr*ünde. These "base motives" included vengeance, jealously, racial hatred and avoiding arrest.[40] These examples show that hate crime laws do not necessarily represent such a radical shift in jurisprudential reasoning from an "act' to "character-based" theory of criminal punishment, as Hurd claims. Other motives such as jealousy and monetary gain have historically been placed under consideration as aggravating factors in cases of more serious offenses such as intentional homicides. These have existed across a number of different legal systems, pre-dating the emergence of hate crime statutes in the United States during the 1980s.

"Hate crime" is a particularly misleading term because it incorrectly implies that hatred is invariably the distinguishing characteristic of this type of offense. Whilst some hate crimes involve intense hatred towards the victim, many others do not. Hurd misconstrues hatred both as an emotional state and in terms of its relation with bias-crimes. The language of hate crime statutes has been shown to not presuppose certain emotional states; they are not simply punishments for bad character but for the realization of prejudice into negative actions. Moreover, hate crime statutes do not necessarily criminalize any emotional state at all in the way that the term "hate crime" suggests. Legislation is not framed so as to criminalize involuntary emotional states, but rather to punish the intentional selection of a victim based on some ascribed category of identity (like ethnicity or sexual orientation). Hurd mistakenly characterizes the *mens rea* element of hate crimes as uniquely motivational, with the motive being an emotional state. Instead, Sullaway has shown that in a hate crime, the two concepts of intent and motivation are virtually the same. Given that psychological research has shown the absence of emotional arousal in hate crimes and the presence of other causal factors such as thrill-seeking, the presence or absence of hatred is a poor criterion by which to define hate crimes. The fact that hate crime laws do not penalize specific emotions but rather the intentional selection of a victim based on their perceived group membership presents a challenge to Hurd's argument. Clarity on the emotion of hatred and its limited causal relationship with hate crimes

38. George P. Fletcher, Rethinking Criminal Law (2000).
39. Gregg v. Georgia, 428 U.S. 153, 210 (1976).
40. Fletcher, *supra* note 327.

promises to inform wider scholarly discussion over the supposedly "illiberal" nature of hate crime statutes.

Constitutional Critique of Hate Crime Statutes

In recent decades, the constitutionality of hate crime statutes in the United States has been challenged and refined. Scholarly and judicial debate was highly contested during the early 1990s. Whilst the constitutionality of these laws was clarified by the Supreme Court of the United States in a number of cases, consensus has not followed amongst legal scholars and others. Historically, constitutional challenges to such laws have been brought primarily under the First Amendment, and the Fourteenth Amendment equal protection and due process clause. Specifically, many critics of hate crime laws have argued that these statutes violate the First Amendment,[41] by punishing prejudicial thoughts or motives, regulating the content of speech, and by having a broader "chilling effect" on the exercise of constitutional rights. Beyond this, some have challenged hate crime statutes based on the Fourteenth Amendment,[42] arguing that these laws grant preferential treatment to groups such as ethnic minorities.

Legal challenges against hate-crime statutes on constitutional grounds have historically had limited success. However, in *R.A.V v. St Paul* in 1992, the Supreme Court invalidated such a law. In this case, a number of teenagers burned a cross on the lawn of a black family living in their neighborhood in Minnesota. The city charged them under an ordinance that provided:

> Whoever places 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 ground to know arouses anger, alarm, resentment in others on the basis of race, color creed, religion, or gender, commits disorderly conduct and shall be guilty of a misdemeanor.[43]

R.A.V, one of the defendants, challenged the law on the grounds that it was overly broad and could infringe on free speech rights. The trial court agreed. However, the Minnesota Supreme Court overturned the decision of the trial court, finding that a narrow interpretation of the ordinance was possible, and was thus constitutionally acceptable. The Supreme Court of the United States reversed this decision unanimously, holding the ordinance invalid because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[44] The ordinance was deemed unconstitutional on the basis that it selectively chose which types of messages are tolerated and which are not (for example those related to race, rather than sexual orientation). Justice Scalia explained in the court's decision, that "the point of the First Amendment is that majority preferences must be expressed in some

41. U.S. Const. amend. I.
42. U.S. Const. amend. XIV (prohibiting states from passing or enforcing any law abridging the privileges or immunities of U.S citizens or denying any person within the U.S equal protection of the laws).
43. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).
44. *R.A.V.*, 505 U.S. at 379.

other fashion than silencing speech on the basis of its content."[45] Here, the Supreme Court in 1992 addressed the criticism that these laws punish prejudicial motives and thus thoughts.[46] It distinguished between pure thoughts and speech, including symbolic non-criminal conduct – as protected under the First Amendment, and on the other hand, criminal conduct motivated by thought and speech that may be subject to hate crime statutes. The Supreme Court held that a local ordinance prohibiting cross-burning and bias motivated "disorderly conduct," violated the First Amendment of the American Constitution. However, the court did not indicate at the time whether hate crime penalty enhancement laws were also unconstitutional.

In spite of the Supreme Court's decision in *R.A.V v. St Paul*, the same court just one term later in 1993 upheld a penalty-enhancement hate-crime statute in *Wisconsin v. Mitchell*. The specific enhancement law in this case punished an offender's intentional selection of a victim or property based on the status characteristics of the victim. Characteristics covered by Wisconsin's law included race, religion, color, national origin, and ancestry.[47] The defendant was Todd Mitchell, a nineteen-year old African-American who was a resident of Kenosha, Wisconsin[48]. He was angry about a scene in the movie *Mississippi Burning*, where an African-American child was beaten by White Supremacists as he was praying[49]. Mitchell incited a crowd to viciously beat Gregory Riddick, a white fourteen-year old passerby[50]. Mitchell was convicted of aggravated battery at a criminal court and was sentenced to two years for the primary assault[51]. However, he was assessed another two-year term in state prison for intentionally selecting the victim on account of his race, leading to a total of four years incarceration out of a possible seven-year term.[52] On appeal, the Wisconsin Supreme Court overturned the portion of Mitchell's conviction based on the penalty enhancement hate crime provision[53]. However, in a reversal of the Wisconsin Supreme Court, the United States Supreme Court unanimously upheld penalty enhancements for hate crimes.[54] Importantly, three justifications were given by the court for affirming the constitutionality of the state's statute.[55] Firstly, that government may not punish abstract beliefs, but can punish a vast array of depraved intentions.[56] Secondly, the Supreme Court found that penalty enhancement laws did not prevent people from expressing their views nor did it punish them for doing so.[57] Finally, the Court pointed to the severe nation of hate crimes, stating that they are "thought to be more likely to provoke retaliatory crimes, inflict distinct emotional

45. *Id.*
46. *Id.* at 392.
47. Wis. v. Mitchell, 508 U.S. 476 (1993).
48. *See* David Margolick, *Test of a 'Hate Crime' Law Reaches Center Stage,* NY Times, Apr. 20, 1993.
49. *Mitchell*, 508 U.S. at 480.
50. *Id.*
51. *Id.*
52. *Id.*; *see also* Levin, *supra* note 22.
53. Levin *supra* note 22, at 481-82.
54. *Id.* at 485.
55. *Id.* at 485-88.
56. *Id.* at 485.
57. *Id.* at 488.

harm on their victims, and incite community unrest."[58] In a different turn, the United States Supreme Court appeared to reaffirm the constitutionality of certain hate crime statutes. This was done by indicating that hate crime statutes punish intent rather than motives or thoughts. Furthermore, it recognized the uniquely detrimental effects caused by hate crimes themselves, in particular the "emotional harm" caused.

Whilst the United States Supreme Court in *Wisconsin v Mitchell* went some way towards providing judicial clarification on the constitutionality of hate crime statutes, there has remained a lack of scholarly consensus on this subject. Recently, for example, Sellers has argued that hate crimes amount to "thought crimes" because they punish thought as motivation. Judge Richard Posner, taking a similar characterization of hate crimes, has also argued that crimes should not be punished more severely if they are motivated by disagreeable beliefs. He has stated that "the cognitive element in emotion shows that when a criminal is punished more heavily because of the emotional state in which he committed the crime, we may be punishing cognition, and therefore opinion or belief, and not merely raw emotion."[59] This illustrates a conception of hate crime laws as punishing beliefs, which exposes their unconstitutionality on First Amendment grounds.

While judicial decisions have asserted the constitutionality of hate crime statutes, scholars in recent years have continued to criticize these laws on such a basis. I argue that three forms of clarification will undermine these challenges. Firstly, it is necessary to shift focus towards the *mens rea* element of intent rather than motive in hate crimes. Additionally, the supposed causal link between the emotion of 'hatred' and bias-motivated must be called into question. Finally, psychological research into the harmful effects of hate crimes may help shift the parameters of debate from ambiguous and controversial notions of 'motive', towards *outcomes*. Collapsing the distinction between motive and intent, and a shift towards consideration of the uniquely heinous effects of hate crimes on victims and communities may pose the strongest possibility for scholarly consensus over the constitutionality and legitimacy of hate crime statutes.

Recently, scholars such as Sun have sought to offer a more robust definition of hate crimes in relation to the mental state of offenders. He has argued that the "because" issue in such an offense (conducted *because* of the victim's actual or perceived group membership) refers to the offender's criminal intent and distorted cognitions, rather than to motivations. Glanville Williams, in his seminal assessment of the mental element in crime, argued it to be based on intention and recklessness.[60] *Mens rea* thus indicates intention or recklessness as to the element constituting *actus reus*. Under this analysis, hate crimes require a particular kind of intention or knowledge. The wrongful intent would be the intentional *selection* of a victim based on their real or perceived membership in a specifically protected group. *Mens rea* refers to the blameworthy mental condition whether constituted by knowledge or intention. In the case of hate crimes, the chargeable condition justifying penalty enhancement is the

58. Wis. v. Mitchell, 508 U.S. 476 (1993).
59. *See* Susan Bandes, The Passions of Law 316 (1999).
60. *See* Glanville Williams, The Mental Element in Crime (1965).

prejudicial intent. This conception of the *mens rea* element in hate crimes as *intent* challenges critics of hate crime statutes who posit that they punish motive or thought. In the case of hate crimes, because they involve already criminalized offenses such as assault, the *mens rea* element is fundamental because the act is defined with specific reference to the offender's intent. Significantly, the *mens rea* element for a hate crime is *not* a causal description of the offense, nor is it supposed to be. This point undermines a number of criticisms of hate crime statutes that consider these offenses as caused exclusively by emotional states. Scholarly debate about hate crimes has too often mistaken the legal definition of a hate crime with the scientific explanation for why the offense occurs. This has led to confusion, and has misinformed debate over the constitutionality, legitimacy, and desirability of hate crime statutes. Instead of using sound legal language to describe the required mental state of the offender, many state hate crime laws have adopted victim-focused explanations about why the offender commits a hate crime: for example, "because of" the victim's different group membership. Criminal law has to an extent blurred scholarly discussion by appearing to offer a scientific explanation for the causes of hate crimes whilst also establishing what is legal or illegal.[61] This has led to a misguided conception of the psychological causes of hate crimes.

A number of sociological and psychological studies have confirmed that hate crimes produce uniquely heinous effects at the level of the individual victim. It has been shown that the United States justice system adjusts culpability for conduct in the case of hate crimes according to the level of intentionality. However, scholars such as Levin have argued that the severity of effects produced by hate crimes warrants special treatment of these offenses. In both the courts and wider society, hate crimes have typically been seen as criminologically more severe and risky to victims and society than non-hate crimes. Levin has stated "there is a sense among many Americans that hate crimes, like domestic violence and drunk driving, are more severe offenses than similar crimes."[62] Indeed a number of studies in recent decades have demonstrated that hate crimes are more likely as compared with conventional crimes to involve "excessive violence, multiple offenders, serial attacks, greater psychological trauma to victims, a heightened risk of social disorder, and a greater expenditure to resolve."[63] Two Boston studies conducted during the late 1980s showed that hate crime attacks often consist of multiple victimizations that escalate in severity over time.[64] They are typically more severe because they involve serial attacks, which are often unreported. A Los Angeles study indicated that more than half of crimes in general are reported to police yet only one third of hate crimes are reported.[65] Hate crimes also cause uniquely detrimental psychological trauma to victims, which is an important indicator of their severity. A study conducted by Herek found

61. *See* Key Sun, *The Legal Definition of Hate Crime and the Hate Offender's Distorted Cognitions*, *in* 27 Issues in Mental Health Nursing 597-604 (2006).
62. Levin *supra* note 22.
63. *Id.*
64. *See* Chuck Wexler & Gary Marx, *Boston's Example*, Christian Sci. Monitor (1986).
65. *See* Edward Dunbar, *Assessment of Hate Crime Offendors*, 5 J. of Forensic Psychol. Prac. 1 (2005).

that hate crime victims suffered heightened and more prolonged bouts of depression, stress, and anger than victims of non-hate crimes. Furthermore, victims continued to have symptoms for as long as five years after their victimization.[66] These findings have been confirmed again more recently, where identity based attacks were found to be likely to create depression, heightened risk of post-traumatic stress disorder, behavioral changes and even suicide at greater rates than traditional crime victims.[67] Collectively, sociological and psychological research suggests that hate crimes ought to be conceptualized as a specific category of offense with potential for unique psychological trauma for victims. Consequently, discussion over the desirability of hate crime statutes as a means to protect against bigoted and prejudiced actions must be reframed towards a consideration of the effects of these offenses rather than their motives. This will have significant bearing on constitutional arguments against such laws. Levin himself emphasizes this point: "the criminological data establishes that hate crime laws properly punish uniquely damaging crimes, rather than a citizen's legal rights to thoughts and speech protected by the First Amendment."[68]

Conclusion

It has been shown that three of the main criticisms of hate crime statutes are based on limited understandings of the causes, elements and effects of hate crimes. While controversy over these laws appeared to have been resolved through Supreme Court decisions from the early 1990s onwards, scholarship remains divided on this subject. Research from psychological studies and insights from emotion theory can dispel a number of misconceptions about hate crimes, which are predominantly *not* caused by emotional states. Other important factors such as group dynamics and cognitive beliefs must also be considered. The misnomer of 'hate crime' has led many to mistakenly criticize their associated statutes as punishing emotional states, motives, or thoughts. In the case of hate crimes, the *mens rea* elements of motivation and intent cannot be separated to the extent that critics suggest. Significantly, scholarship has too often mistaken the legal definition of a hate crime with the scientific explanation for why the offense occurs. Discussion over the desirability of hate crime statutes must be shifted from a misguided consideration of motives, to an assessment of the uniquely detrimental psychological effects of these offenses on victims. Fundamentally, there is much impetus for a reassessment of hate crimes in order to ward against increasing criticism of their corresponding statutes. Insights from psychological research and emotion theory can offer much in the way of dispelling criticism of hate crime statutes, and shedding light on the important and necessary role they play within the criminal justice system.

66. See Gregory Heyek, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. of Consulting and Clinical Psychol. 945 (1999).
67. A. R. D'Augelli, A. H. Grossman, & M. T. Starks, *Childhood Gender Atypicality, Victimization and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J. of Interpersonal Violence 1-21 (2006).
68. Levin *supra* note 22.