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PUNISHING HATEFUL MOTIVES: OLD WINE IN A NEW BOTTLE REVIVES CALLS FOR PROHIBITION

Carol S. Steiker*


"Hate crimes" are nothing new: crimes in which the victim is selected because of the victim's membership in some distinctive group (be it racial, ethnic, religious, or other) have been with us as long as such groups have coexisted within legal systems. What is relatively new is their recognition and designation as a discrete phenomenon. But as appellations like "sexual harassment" and "community policing" have begun to teach us, words are only the beginning of the life cycle of a new socio-legal concept. What follows are debates about whether the new category is really a coherent one, what activities should fall within and outside of it, what legal and social strategies should regulate these activities, and, inevitably, whether the whole thing was a good idea in the first place, given the consequences that followed.

The concept of "hate crimes" would be cresting if it were a wave; to stick with the life-cycle metaphor, it is in the prime of its life. Legislators on both the federal and state levels are busy drafting and debating new hate crime laws.1 Courts, including the


1. Jacobs and Potter report that by 1995, "the federal government, thirty-seven states, and the District of Columbia had passed hate crime laws that fall into four categories: (1) sentence enhancements; (2) substantive crimes; (3) civil rights statutes; and (4) reporting statutes." P. 29. Legislative initiatives to pass even more such laws continue. See, e.g., Reno Urges Expansion of Hate-Crime Laws, N.Y. TIMES, Oct. 19, 1998, at A12. (discussing the progress of the White House's Hate Crimes Prevention Act in Congress); Hate Crime Penalty Adjustment Proposed, UPI, Jan. 25, 1999, available in LEXIS, UPI file. (describing the introduction of legislation in the California State Legislature that would make life in prison without parole the penalty for all hate crime murders, regardless of whether the motivation was based on race, religion, gender, sexual orientation, or disability). In the wake of the Sheppard murder in Laramie, Wyoming, see infra note 4, bills have been proposed in both Houses of the Wyoming legislature providing both for enhanced penalties and special reporting procedures in hate crime cases. See WY H.B. 117, 55th Wyoming Legislature, introduced January 13, 1999; WY H.B. 193, 55th Wyoming Legislature, introduced January 15, 1999; WY H.B. 206, 55th Wyoming Legislature, introduced January 15, 1999; WY S.B. 84, Wyoming 55th Legislature, introduced January 14, 1999; WY S.B. 91, Wyoming 55th Legislature, introduced January 14, 1999. In the wake of the Byrd homicide in Jasper, Texas, see infra note 5.
United States Supreme Court, have been called upon to rule on constitutional issues raised by such laws.2 Academics have been publishing articles and books on the topic at a furious rate.3 The general public has been continually engaged in the debate by the intense media attention the topic has attracted, especially in the wake of such high-profile crimes as the gruesome murders last year of Matthew Sheppard, an openly gay student at the University of Wyoming who was beaten, tied to a fence, and left to die by homophobic assailants;4 and of James Byrd, Jr., a black man who was chained to the back of a pickup truck and dragged to his death in Texas by ex-convicts with ties to white supremacist groups.5 Proponents of hate crime laws point to heinous crimes like these as evidence of the need for enhanced law enforcement tools; they argue that realization of our collective commitment to social equality depends on such government initiatives. Opponents of hate crime laws contend that general laws prohibiting assault, murder, and the like are sufficient for even the most egregious offenses and that the many costs of hate crime laws far outweigh their benefits.


James B. Jacobs and Kimberly Potter emphatically add their voices to the latter chorus. Indeed, *Hate Crimes: Criminal Law & Identity Politics* often has something of the quality of an advocate’s brief on the subject, in which it turns out that every conceivable argument in favor of hate crime legislation is simply wrong. Building on some of their earlier work, Jacobs and Potter examine hate crime laws from every possible angle and find nothing, except perhaps good intentions, to recommend them (p. 145). The authors begin with conceptual difficulties in the use of hate crime as a category. They elaborate on the challenges of defining prejudice and figuring out which prejudices should be covered by hate crime laws (pp. 11-21). Moreover, even if these initial conceptual hurdles could be cleared, they argue, determining the causal relationship between prejudice and action is further fraught with problems (pp. 21-27). Potter and Jacobs go on to argue that there really is no need for hate crime laws anyway, marshaling criminological research to contest claims that we are witnessing a hate crime “epidemic” (pp. 45-64). A bit inconsistently, they then assert that there is nothing inherently worse about hate crimes than ordinary crimes committed without bias (implicitly suggesting that even an “epidemic” of hate crimes should not be a cause of special concern) (pp. 79-91). In addition to being unnecessary, contend Jacobs and Potter, hate crime laws are affirmatively harmful in that they pose serious problems of enforcement (pp. 92-93), violate the Constitution by punishing people for “politically incorrect opinions and viewpoints” (pp. 128, 111-29), and “undermine social solidarity” by reinforcing “identity politics” (pp. 144, 130-44).

This is an impassioned book, both benefitted and burdened by the emotional investment that passion lends to analysis and advocacy. On the debit side, Potter and Jacobs sometimes seem one-sided in their presentation of controversies by not always presenting the arguments of their adversaries in the most fair or compelling fashion, or by requiring more empirical support from their adversaries than they are able to provide for their own policy prescrip-

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8. For example, in their chapter on “The Politics of Hate Crime Laws” (Chapter 5), Jacobs and Potter suggest that the primary purpose of what they term “interest groups” in “lobbying” for hate crimes legislation is to “boost[] the morale and the status of the [identity-based advocacy] organizations and their constituencies.” P. 66. This claim that pure self-interest has led victimized groups to embrace victimhood in order to “assert a moral claim to special entitlements and affirmative action” (p. 66) ignores the possibility that people of diverse identities might support hate crime laws (or affirmative action) on the basis of some principled view of what justice requires, rather than because of a prediction about how their own personal well-being might be enhanced.
tions. On the credit side, however, the book's comprehensive
treatment of its subject is likely to give it broad appeal; the wide-
ranging scope of the arguments against hate crime laws assembled
by Jacobs and Potter enhances the likelihood that the book will
have some impact upon a diverse audience. Those who are not con-
vinced of the insurmountability of the conceptual problems might
well find the empirical case against hate crime laws compelling, or
the philosophical case, or the constitutional case, or the pragmatic
case, based on the myriad issues raised by Jacobs and Potter regard-
ing investigation, litigation, and data collection in hate crime cases.
Approaching the book without a passionate commitment of my
own, but leaning by general inclination the other way, I found
myself engaged, although not necessarily convinced, by many of its
arguments. I certainly can say that I finished the book considerably
more thoughtful and, indeed, more troubled than when I began.

Rather than attempt any comprehensive assessment of the dis-
parate arguments advanced in the book, I focus my attention here
on one particular argument — that hate crime laws are unconstitu-
tional (and also a bad idea) because, by punishing disfavored dis-
criminatory motives for criminal acts, they impermissibly punish
thought. This argument, the subject of Chapter Eight of Hate
Crimes, is but one arrow in the authors' hefty quiver of arguments
against hate crime legislation. I focus on it, however, partly because
it is an argument opponents of hate crime laws advance with great
frequency and vehemence, and partly because I find this argu-
ment puzzling every time I come across it. By exploring the source
of my puzzlement, I hope to advance two arguments of my own:
first, that hate crime legislation is not a significant departure from
the rest of the substantive criminal law, and second, that the failure

9. For example, in their chapter on "Justification for Hate Crime Laws" (Chapter 6),
Jacobs and Potter take to task supporters of hate crime legislation for failing to produce
sufficient empirical support for their claims that hate crime victims suffer greater psycholog-
al and emotional injury than other victims (pp. 82-83) and that hate crimes cause unusually
substantial harm to innocent third parties (pp. 86-87). In the same chapter, however, Jacobs
and Potter argue against the need for greater deterrence of hate crimes by asserting rather
vaguely that "it is not clear that the threat of a penalty enhancement will have any marginal
deterrent effect" (p. 89). Similarly, they reject the "moral education" argument for hate
crime legislation by stating simply "we think it unlikely that hate crime laws add much moral
education to the huge body of denunciation of crime and prejudice that already exists" (p.
91). Jacobs and Potter may be right on these last points, but you would not know it from
their empirical support.

10. See, e.g., Lynn Adelman & Pamela Moorshead, Bad Laws Make Hard Cases: Hate
Crimes Laws and the Supreme Court's Opinion in Wisconsin v. Mitchell, 30 GONZAGA L. REV.
1, 27 (1994/95) ("Laws that target motives, particularly motives which are beliefs about issues
like race, religion, or politics, threaten our constitutional right to believe what we will, re-
gardless of how unfounded or offensive our beliefs might be."); Susan Gellman, Sticks and
Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy
crime laws "criminalize pure thought and opinion").
of many commentators (Jacobs and Potter among them) to recognize this continuity camouflages the extent to which the debate surrounding hate crime laws is fundamentally grounded in differences about politics or political strategy.

I. ARE HATE CRIME LAWS DIFFERENT FROM THE REST OF THE SUBSTANTIVE CRIMINAL LAW?

The argument that hate crime laws are unconstitutional under the First Amendment is based on a view of hate crime legislation as radically discontinuous with the rest of substantive criminal law. Under this view, hate crime laws represent a dangerous departure from the heartland of (appropriate) criminal prohibitions in that they punish speech and thought in much — or even exactly — the same way that laws directly criminalizing offensive expression do. Thus, the chapter that Jacobs and Potter devote to this argument begins with a discussion of the history and legal permissibility of so-called “hate speech” regulation (pp. 112-21). Jacobs and Potter build up to the Supreme Court’s 1992 decision in R.A.V. v. St. Paul, in which the Court unanimously rejected as unconstitutional an ordinance criminalizing as a form of “disorderly conduct” the placing of symbols or graffiti like (but not limited to) “a burning cross or Nazi swastika” when one knows or should know that such symbols will cause offense “on the basis of race, color, creed, religion, or gender . . . .” The majority opinion for the Court “acknowledged that the government could criminalize constitutionally unprotected fighting words, but insisted that the government could not criminalize only those fighting words that express ideas that the government disfavors” (p. 124). For Jacobs and Potter, this reasoning rejecting a hate crime law that criminalized purely expressive behavior necessarily entails the rejection of hate crime laws that enhance the punishment of people who engage in criminal behavior when motivated by disfavored attitudes.

Thus, Jacobs and Potter find the Supreme Court’s 1993 decision in Wisconsin v. Mitchell both unfathomable and indefensible. In Mitchell, the Court — once again unanimously — upheld the constitutionality of Wisconsin’s hate crime statute authorizing an increased sentence for any offender who intentionally selects a victim “because of race, religion, color, disability, sexual orientation, national origin or ancestry.” The Court distinguished its decision of the previous year on the ground that “whereas the ordinance struck down in R.A.V. was explicitly directed at expression (i.e., ‘speech’

12. 505 U.S. at 380 (quoting St. Paul city ordinance).
14. 508 U.S. at 480 (quoting Wisconsin statute).
or ‘messages’), the statute in this case is aimed at conduct unprotected by the First Amendment.”15 To Jacobs and Potter, this distinction is wholly unconvincing because “the point remains that the sentence enhancement is triggered by some prejudices and not others. A similarly situated offender, who engaged in the same conduct, but for reasons of personal jealousy or spite, would have received one-third the sentence that Mitchell received” (p. 126).

Viewed in this way, through the lens of First Amendment limitations on hate speech regulation, the Court’s refusal to limit hate crime regulation in a similar fashion can seem oddly contradictory — an exercise in aridly formalistic line drawing, as Jacobs and Potter contend. But viewed through the lens of the substantive criminal law, it is the limitations urged by Jacobs and Potter — not the new hate crime laws — that seem oddly contradictory and out of sync. This is the source of my puzzlement each time I encounter arguments like those advanced by Jacobs and Potter. For it seems obvious that the criminal law frequently makes the definition of criminal offenses and sentencing options turn on some qualitative evaluation of the offender’s reasons for acting. Indeed, the Mitchell Court buttressed its unanimous validation of Wisconsin’s sentencing enhancement provision by invoking judges’ “[t]raditional[ ]” consideration of “[t]he defendant’s motive for committing the offense” in making sentencing determinations.16

Jacobs and Potter recognize that the Court “may have been concerned that striking down the Wisconsin law would have put in doubt the constitutionality of all judicial sentencing based on motive” (p. 126). In contrast to some constitutional critics of hate crime laws,17 Jacobs and Potter do not go so far as to claim that motive should play no role in criminal liability. In their view, however, the Court’s fear is nonetheless unfounded. According to Jacobs and Potter, the kind of motives placed at issue by hate crime laws are fundamentally different from those that the criminal law ordinarily makes relevant:

Sentence enhancements for other motives often do not have the same free speech implications. Unlike greed, jealousy, or simple cold-bloodedness, bigotry is often connected to a system of political beliefs and is never content neutral. The concepts of prejudice and bigotry are political to the core. Hate crime laws explicitly seek to punish people for having bigoted beliefs. The Supreme Court did not even begin to grapple with this issue. [p. 127]

15. 508 U.S. at 487 (citations omitted).
16. See 508 U.S. at 485 (citing general sources and going on to give specific examples from capital sentencing cases).
17. See Gellman, supra note 10, at 364 (“Motive is nothing more than an actor’s reason for acting, the ‘why’ as opposed to the ‘what’ of the conduct. Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense.”) (citations omitted).
Thus, the primary bone of contention between Jacobs and Potter on the one hand and the Mitchell Court on the other is this: Is the way in which hate crime laws make motive relevant to crime and punishment fundamentally the same or fundamentally different from the operation of the rest of our substantive criminal law? I will seek to elaborate upon the Court’s intuition, which I share, that hate crime laws are essentially continuous with the basic structure of Anglo-American criminal law, and that a constitutional challenge to the one necessarily calls the other into question.

Consider first the numerous criminal law doctrines that treat a defendant’s reasons for acting as partially or wholly exculpatory. One of the best examples is the doctrine of mitigation in the law of homicide. In general, the grading of homicides could be fairly described as “stair-cased” based on degrees of intentionality, as opposed to motive. That is, the law of homicide generally inquires as to the degree to which the defendant chose to kill rather than the defendant’s reason for killing. Thus, first-degree murder is traditionally murder that is “premeditated,” while ordinary murder is only intended or even super-reckless, and involuntary manslaughter is merely ordinarily reckless or criminally negligent. In contrast to this formal focus on intentionality, the category of voluntary manslaughter is reserved for those killings that would otherwise be murder based on the degree of intentionality present, but that are mitigated by the existence of the defendant’s “heat of passion” caused by “reasonable provocation.” The traditional, common law view of adequate provocation included only a small number of “paradigms of misbehavior” that could serve to mitigate the killing of the provoker; these were: “(1) an aggravated assault or battery; (2) mutual combat; (3) commission of a serious crime against a close relative of the defendant; (4) illegal arrest; and (5) observation by a husband of his wife committing adultery.” Modern Anglo-American law has softened the rigidity of the common law categories by often delegating to the jury the decision as to what constitutes adequate provocation. Modern juries are generally instructed along the lines that provocation is sufficient if it “might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment . . . .”
defense to bring it in line with the ostensible focus of the rest of homicide law is that it downgrades certain homicides based on the impairment of the defendant’s volition brought about by the emotion aroused by the provoking event.\textsuperscript{24}

Two recent scholarly articles, however, persuasively demonstrate that this volitional view of “heat of passion” manslaughter is simply inadequate. Dan Kahan and Martha Nussbaum mount a comprehensive argument rejecting such a “mechanistic” account of the law of provocation (as well as a wide variety of other criminal law doctrines) in favor of an “evaluative” conception of the role of emotion in criminal liability.\textsuperscript{25} In addition, Victoria Nourse has offered a devastating unmasking and critique of the evaluative judgments that lie just beneath the surface of the law of provocation and passion.\textsuperscript{26} Both of these articles elaborate upon the way in which the law of voluntary manslaughter “focuses on motives”\textsuperscript{27} and makes normative evaluations of those motives. While Kahan and Nussbaum’s project is largely to demonstrate and defend the existence of evaluation in the law of voluntary manslaughter (and the criminal law generally), Nourse goes on to critique the substance of the law’s evaluation of motives in the manslaughter context. Nourse compellingly demonstrates the way in which modern understandings of provocation and passion “have actually helped to entrench norms about relationships,”\textsuperscript{28} creating “a murder law that is both illiberal and often perverse.”\textsuperscript{29}

The relevance of a defendant’s motive to criminal liability is not by any means limited to the context of voluntary manslaughter, although this doctrine presents an especially good vantage point from which to consider the issue. On the contrary, a great many other criminal law doctrines share this feature. Kahan and Nussbaum’s article goes on to develop their argument about the criminal law’s evaluative stance toward emotion in a number of other doctrinal contexts, including the doctrines of premeditated murder, self-defense, duress, involuntary act, and insanity.\textsuperscript{30} To

\begin{itemize}
\item \textsuperscript{24} See id.; Joshua Dressler, Provocation: Partial Justification or Partial Excuse?, 51 Mod. L. Rev. 467, 479-80 (1988).
\item \textsuperscript{25} See Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269, 305-06 (1996).
\item \textsuperscript{26} See Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 Yale L.J. 1331 (1997).
\item \textsuperscript{27} Kahan & Nussbaum, supra note 25, at 315.
\item \textsuperscript{28} Nourse, supra note 26, at 1337.
\item \textsuperscript{29} Id. at 1332.
\item \textsuperscript{30} Other scholars have made similar arguments about the significance of motive to criminal liability. See, e.g., Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635, 747 ("This Article has argued that the evil motive concept of mens rea plays a vital role within the context of certain narrowly defined defenses but is generally undesirable at the offense definition
their list, I would add the more general defense of necessity, of which self-defense might be seen as a subspecies. In all of these contexts, the law makes criminal liability (or, in the law of premeditation, the grade of criminal liability) turn on some normative evaluation of the defendant’s reasons for acting. Determinations about which motivations are good ones or bad ones are deeply inscribed in the law itself.

If this general argument is right — that the existence or degree of criminal liability often turns on some normative evaluation of a defendant’s motive that is inscribed or “written into” the law — what does it entail for Jacobs and Potter’s argument that hate crime laws punish motive in an impermissible way? Is the way hate crime laws consider motive different in some important way from how, say, the law of voluntary manslaughter does? Jacobs and Potter contend that the motive singled out for special punishment by hate crime laws — they call it “bigotry” — is different from other motives, because “[u]nlike greed, jealousy, or simple cold-bloodedness, bigotry is often connected to a system of political beliefs and is never content neutral” (p. 127). But this argument does not seem to distinguish between the motives of defendants who kill in the “heat of passion” but without what the law accepts as adequate provocation and the motives of those who commit hate crimes. Imagine, under either the traditional common law categories or modern, liberalized provocation law, the claim of “heat of passion” by a white supremacist who becomes enraged and kills when he discovers that his daughter is romantically involved with a black man. Clearly, such a discovery does not come even close to one of the narrow categories of “adequate provocation” developed by the common law. Even in a modern jurisdiction with a liberalized provocation doctrine, a jury would likely conclude that the provoking event was not one that would move a man “of fair average disposition” to violence. Thus, the white supremacist gets punished more — and considerably more, given that his crime is now murder rather than manslaughter — because his racist attitudes are not ones that the law recognizes as mitigating. Had he found his wife in bed with another man (black or white), he would have a classic partial defense of “heat of passion” based on adequate provocation.

level.”); Douglas N. Husak, Motive and Criminal Liability, 8 CRIM. JUST. ETHICS, Winter/ Spring 1989, at 3, 5 (1989) (“I will argue that motive is relevant to criminal liability according to virtually any conception of motive that satisfies the most minimal criteria of adequacy.”) (emphasis in original); Paul H. Robinson, Hate Crimes: Crimes of Motive, Character, or Group Terror?, 1992/1993 ANN. Surv. OF AM. L. 605, 605 (“I will argue that motive ought to be and commonly is, notwithstanding the claims to the contrary, an element in determining liability or grade of offense.”). The definitions of “motive” offered by these scholars is similar in all salient respects to Kahan and Nussbaum’s definition of “emotion;” indeed, Kahan and Nussbaum sometimes refer to “motive” as synonymous with “emotion.” See, e.g., Kahan & Nussbaum, supra note 25, at 315.
The law's choice to mitigate the latter killing itself inscribes, as Nourse teaches us, deeply held views about the proper roles of men and women in intimate relationships. Viewed in this way, the doctrine of "adequate provocation" appears to be exactly what Jacobs and Potter decry about hate crimes legislation — "political to the core" (p. 127).

It is a bit difficult to come up with a precise parallel to the operation of hate crime laws in the manslaughter (or other defense) context: legal defenses mitigate or forego punishment based on a less culpable motive, while hate crime laws aggravate or impose punishment based on a more culpable one. But the law of sentencing is consonant with the law of criminal liability. Just as the existence or degree of criminal liability can often turn on a normative evaluation of the defendant's reasons for acting, so too the degree of punishment imposed after a finding of criminal liability often turns on such an evaluation. The clearest examples of this tendency are in the capital sentencing context, because constitutional constraints on the imposition of the death penalty have led legislatures to specify those circumstances that "aggravate" a murder so as to make the defendant eligible for this punishment. As the Supreme Court recognized in Mitchell, the death penalty is "surely the most severe 'enhancement' of all." Death penalty statutes routinely designate as aggravating circumstances motives for killing that are considered worse than the usual motives a defendant might have for committing a crime of violence.

The Mitchell Court gave as its primary example the fact that many states treat murder committed for pecuniary gain as aggravated murder for which the defendant becomes death-eligible. One opponent of hate crime laws attempted to rebut this argument by suggesting that "murder for hire is a different act than other murder; the state is not seeking to punish or deter the motive of profit-seeking, but the medial end of creating contracts to kill." The problem with this argument is that if states really were primarily concerned with punishing "contracts to kill," it would be odd indeed to phrase the aggravating factor as "murder for pecuniary

31. See Nourse, supra note 26, at 1332 ("Our most modern and enlightened legal ideal of 'passion' reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.").

32. See Furman v. Georgia, 408 U.S. 238 (1972) (finding the wholly discretionary capital punishment system that prevailed throughout the United States violative of the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a new capital punishment scheme that guided sentencer discretion through the use of aggravating and mitigating circumstances).


34. See 508 U.S. at 485 (citing capital statutes from Arizona, Florida, Mississippi, North Carolina, and Wyoming).

35. Gellman, supra note 10, at 365.
gain.” This latter locution would not necessarily include within its ambit the solicitor of the contract who initiates it and pays the actual killer, because such a solicitor might well be acting not for pecuniary gain at all, but rather engaging in an act of terrorism, or jealously eliminating a rival lover, or settling an old score. It makes much more sense to view the prevalent “pecuniary gain” aggravator as inscribing the belief that killing for money is simply worse than killing for some other reason.

But although the Mitchell Court saw that the “pecuniary gain” aggravator supported its argument about the enhancement of punishment based on motive, it oddly neglected the best examples in capital punishment law of aggravating factors that designate certain motivations as worse than others. A common aggravating factor in state death penalty schemes asks whether the murder was “especially heinous, cruel or depraved.” The Arizona Supreme Court interpreted “depraved” murder to mean murder where “the perpetrator ‘relishes the murder, evidencing debasement or perversion’ or ‘shows an indifference to the suffering of the victim and evidences a sense of pleasure’ in the killing.” In another case involving the interpretation of this aggravating factor, the Arizona Court elaborated: “Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions . . . . ‘[D]epraved’ means ‘marked by debasement, corruption, perversion or deterioration.’” In Idaho, the death penalty statute permits the finding of an aggravating circumstance when “the defendant exhibited utter disregard for human life,” which the Idaho Supreme Court interpreted to mean when the defendant acted as a “cold-blooded, pitiless slayer.” In upholding this construction against charges of excessive vagueness, the United States Supreme Court explained, “The terms ‘cold-blooded’ and ‘pitiless’ describe the defendant’s state of mind: not his mens rea, but his attitude toward his conduct and his victim.”

36. This is the language of Arizona’s statute, Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1989), although different states have other, similar locutions. Aggravating factors of this type were first proposed and are probably based upon the Model Penal Code’s formulation. Model Penal Code § 210.6(3)(h) (Complete Text as Adopted 1962) (“The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.”).
41. 507 U.S. at 473.
tor has been constitutionally controversial, that conflict has revolved around the potential breadth and vagueness of such factors rather than their inherently evaluative nature.

It is hard to see how the valuations of defendants’ reasons for acting embodied in these death penalty statutes are any less “political” than the negative valuation of “bigotry” to which Jacobs and Potter object. The enhancement for killing that brings “pleasure” punishes the sexual sadist, or the killer who derives special satisfaction from killing a particular sort of victim (very much along the lines of a hate crime law). The enhancement for killing “coldly” or without “pity” punishes the terrorist or political activist who kills as the calculated means toward a political end more than the jealous husband or jilted lover. Even if there would be First Amendment concerns raised by punishment for the expression of violent, sadistic fantasies or for the expression of satisfaction at the prospect of harm or death to certain disfavored people or groups, enhanced punishment for killings done for such reasons are commonplace in our law.

Moreover, even if Jacobs and Potter were still to insist that there is something different and special about punishment for “bigoted” motives, it is and has always been commonplace — in noncapital as well as capital cases — to punish what we now call “hate crimes” more than ordinary assaults or murder, even before a single hate crime law was ever passed. In discretionary sentencing regimes, which completely dominated the American sentencing scene until quite recently and remain quite prevalent today, judges have wide latitude to take into account all of the circumstances of a crime in determining an appropriate penalty from what is often a very wide range of permissible ones. As one classic treatise on criminal law puts it: “Motives are most relevant when the trial judge sets the defendant’s sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives.”

The whole point of discretionary sentencing is to permit the sentencer to take into account the relevant differences between crimes that the formal offense definition of necessity leaves out, and very often differences in offender motivation fall into this category. Although discretionary sentencing schemes have become less favored in recent years, with the federal government and a substantial minority of states turning to sentencing guidelines, the primary legislative purpose behind limiting judicial sentencing discretion has not been to eliminate the sentencer’s consideration of motive, but rather to

42. LaFave & Scott, supra note 18, § 3.6(b).
standardize sentencing in order to avoid disparities. Thus, both traditional discretionary sentencing and the growing trend in guidelines sentencing envision a role for the consideration of offender motivation in sentencing.

Quite apart from judicial sentencing discretion, prosecutorial charging discretion also has traditionally permitted the differentiation of punishment based upon offender motivation. It is axiomatic in American law that "the American prosecutor has complete discretion with respect to the selection of the charge. He can charge the most serious offense or offenses, or charge one or more less serious offenses." The exercise of prosecutorial discretion of course involves a number of considerations, many of which are unrelated to offender motive, such as resource considerations and cooperation agreements. The prosecutor, however, will also consider "a great many different kinds of defendant-specific or case-specific factors" in determining whether or what to charge, and these facts will necessarily include an evaluation of the defendant's motives for committing the underlying offense, if they are evident from the information available to the prosecutor. In contrast to the movement to reduce or eliminate sentencing discretion, no successful institutional reform movement has limited in any substantial way the charging discretion of prosecutors; indeed, many commentators have argued that recent limitations on sentencing discretion have actually increased the amount and the significance of the prosecutor's discretion in charging. Thus, the very structure of our

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44. See Kevin Cole, The Empty Idea of Sentencing Disparity, 91 Nw. U. L. Rev. 1336, 1336 (1997) (describing and critiquing the Federal Sentencing Commission's "central preoccupation" with "reducing sentencing disparity"). The best evidence that the Federal Sentencing Guidelines were meant not to eradicate but rather to standardize the consideration of evidence of motive is the addition of § 3A1.1 by the Commission in response to the Violent Crime Control and Law Enforcement Act of 1994, which provides for a three-level upward adjustment in the offense level where the defendant "intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." This particular "hate crime motivation" adjustment reflects a particular application of the Guidelines' more general command that "relevant conduct" be taken into account at sentencing, relevant conduct being defined as "acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood." § 1B1.3(a) (as amended Nov. 1998) (italics added).


46. Id. at 1274.

institutions of criminal justice deliberately create opportunities for the exercise of discretion in determining the appropriate punishment for an offender based on offender motivation. These institutional arrangements only add to my sense that it is Jacobs and Potter, rather than hate crime laws, that are out of step with the administration of criminal justice in our country today.

II. Why Do Hate Crime Laws Seem Different?

If hate crime laws do not treat defendants' motives differently from the way much of the criminal law and the criminal justice system do, why is it that Jacobs and Potter, among many others, perceive something fundamentally different about such legislation? This is another puzzle to me, the answer to which might help advance the current debate about the wisdom and efficacy of hate crime laws. My sense is that hate crime laws might appear to be new and different because the ways in which the rest of the criminal law deals with disfavored motivation are hidden and hard to see. I do not mean to suggest that the drafters of our current criminal law codes or the generations of common law judges who developed the foundations of our substantive criminal law intended to obscure the true nature of their enterprise. Rather, I mean to suggest that certain kinds of motivations were, and perhaps still are, so widely accepted as mitigating or aggravating that the ways in which these evaluations are written into the law do not seem like "evaluations" at all. Rather, we might say that these evaluations simply "are" the law. It is only when we attempt to inscribe new evaluations of motivation into the law, evaluations that are more contested than the ones already long woven into the law's fabric, that we are able to see clearly the act of evaluation at all.

Victoria Nourse has recently written a wonderful review of James Q. Wilson's book on the so-called "abuse excuse"48 in which she powerfully demonstrates how Wilson's calls for "moral judgment" in the criminal law lead him to criticize new kinds of defenses (such as the claims of battered women) without seeing how more "traditional" defenses (such as the law of provocation) are identical in their underlying structure to the ones he excoriates.49 Says Nourse: "If Wilson is to take judgment seriously, he cannot indict some defenses for failing to judge — demanding that battered women, for example, show more self-control — but not others — partially excusing provoked men precisely when they do


lose self-control.” Wilson’s inability to see that his defense of the “traditional” law of provocation was a kind of “abuse excuse” itself, arose from the uncontroversial nature of that traditional (partial) excuse. For instance, men who were provoked by their wives’ adultery to commit homicide did not need expert witnesses to testify about “cuckolded husband syndrome” precisely because it was taken for granted by the law (and society) that any “reasonable” person would be moved to violent anger by such an experience. It is only when law reformers seek to write in new judgments about reasonableness that the evaluative nature of the criminal law appears prominent and, necessarily, controversial.

But what, one might ask, is so new and controversial about the evaluations that hate crime laws seek to add formally to the criminal law? No one, and certainly not Jacobs or Potter, argues that racial hatred (or other group-based animosity) is a social good. So why should the negative valuation of such motivations in the criminal law be so controversial? The first reason is the one that Jacobs and Potter explicitly offer through their arguments about the constitutionality of hate crime laws: the criminal law should not “punish people for [their] beliefs” (p. 127). The ways in which the criminal law already does punish belief (by punishing disfavored reasons for acting) are sometimes hard to see and apparently were not seen by Jacobs and Potter. Thus, they would likely argue that the extent to which the criminal law ever punishes belief in a way similar to hate crime laws is similarly problematic. Their argument against hate crime laws would necessarily extend to all valuations of motive by the substantive criminal law. So, at the most open and obvious level, hate crime laws are problematic for Jacobs and Potter because they threaten a conception of the criminal law as “content neutral” — to use a phrase that Jacobs and Potter borrow from First Amendment law (p. 127). Jacobs and Potter seek to protect and promote a criminal law that is “neutral” as to reasons for and attitudes about action, punishing only in accordance with the intent to bring about certain proscribed harms. The normative attractiveness of this conception of criminal law is an important question, one that is very much engaged by recent scholars of substantive criminal law, some of whom, in the words of Victoria Nourse, have posited a “new normativity.” But as these scholars have amply demonstrated, normative evaluation of reasons for action — of belief and attitude — are hardly foreign to the criminal law as it now exists and as it has long existed. Thus, to bar the door at hate crime laws is a bit like barricading a house against an intruder who is already in the living room with his feet up: the controversy over “content neu-

50. Id. at 1438.
51. Id. at 1456.
trality” should not start with hate crime laws, but with the law of homicide through and through, as the earlier examples indicate.

A second, less obvious reason why hate crime legislation seems so new and controversial is that its strategy for combating racial hatred is deeply controversial in our society right now. While the disfavoring of racial and other group-based hatreds is not itself controversial, the appropriate means for combating such attitudes are very much contested. Many — Jacobs and Potter clearly included — question the wisdom and efficacy of strong group affiliations and group-based policies on the grounds that such affiliations and policies narrow identities and produce perverse incentives. These sorts of concerns are evident in the very title of Jacobs and Potter’s book, which implies that hate crime laws are the product of what the authors term “identity politics.” They define “identity politics” as “a politics whereby individuals relate to one another as members of competing groups based upon characteristics like race, gender, religion, and sexual orientation” (p. 5). This definition reveals its clearly pejorative nature in the use of the word “competing” — to Jacobs and Potter, strong identification with an identity group implies a kind of zero-sum game. They go on to explain how such “identity politics” create perverse incentives: “According to the logic of identity politics, it is strategically advantageous to be recognized as disadvantaged and victimized. . . . The ironic consequence is that minority groups no longer boast about successes for fear that success will make them unworthy of political attention” (p. 5). What Jacobs and Potter fear most is that the recognition and deployment of group identities through law will ultimately serve to “harden and exacerbate social divisions” (p. 10).

It is this second, more subtle controversy that I believe lies at the heart of Jacobs and Potter’s book. This controversy — about the uses and abuses of group identity by law — explains both why Jacobs and Potter see hate crime laws as so fundamentally different from the rest of criminal law and why they are so passionate in their attack on hate crime legislation. It might also explain why the debate over hate crimes laws should occupy a central place on our political agenda, rather than be fought out on the more arid battleground of constitutional doctrine.

III. Conclusion: Why Should We Care?

Jacobs and Potter have written a telling book in two senses of the word. First, the book makes a number of telling points about deficiencies in the theory and practice of hate crime legislation from a number of different perspectives — moral, political, and prudential. In particular, Jacobs and Potter’s elaboration of the conceptual issues that remain unresolved in the debate over hate crime
laws and their concern about the difficulties inherent in addressing them is well-presented. Should gender be a hate crime category? How can one tell whether violent crimes against women are committed "because" the victim is a woman? Are all rapes hate crimes? (pp. 19-20). Moreover, Jacobs and Potter's suggestion that, given the demographics of violent crime, hate crime laws might primarily affect blacks who victimize whites (pp. 16-17), is an important warning about the possibilities of unintended consequences.

The book, however, is even more telling in a different sense. The inability or unwillingness of opponents of hate crime legislation to see such laws as essentially continuous with much of the rest of the criminal law reveals the extent to which race (or group) consciousness is contested as a strategy for racial (or group) equality in our society. It is this controversy that makes the lack of "content neutrality" of hate crime laws visible, even as the normativity of the rest of the criminal law remains shrouded.

Once this controversy is brought to the surface, the debate about hate crime laws should take its place next to debates about affirmative action, single-sex education, and other debates about group consciousness as a strategy for achieving group equality in our society. Much of the constitutional debate about hate crime legislation might be viewed more profitably in these terms.