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Beware That False First Step

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Beware That False First Step*

BY DAVID R FINE**

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* © 1993 David R Fine. In THE AENEID, Virgil wrote: "*Facilis descensus Averno,*" which was liberally translated by one judge considering a hate crimes law as "Beware that false first step." See *Wisconsin v. Mitchell*, 485 N.W.2d 807, 814 n.14 (Wis. 1992) (Heffernan, J.). A more precise translation would be "The descent to Hell is easy."

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INTRODUCTION

"Do you all feel hyped up to move on some white people? You all want to fuck somebody up? There goes a white boy; go get him."¹ With that, a group of about ten black teenagers in Kenosha, Wisconsin, set upon Gregory Riddick, a fourteen-year-old white boy. The group beat Riddick and stole his athletic shoes. Gregory Riddick remained comatose for four days and may well have suffered permanent brain damage.²

At the ensuing trial, some witnesses testified that Todd Mitchell, the young man who uttered the inciting words, did not actually take part in the beating. Indeed, he tried to stop it and eventually sought police officers to intervene.³ The jury nonetheless convicted Mitchell as a party to the crime of felony aggravated battery, an offense punishable in Wisconsin by a two-year sentence.⁴ A short time later, Judge Jerold Breitenbach sentenced Todd Mitchell to four years incarceration—two years for the battery and an additional two years because the attack was racially motivated and, as such, was a violation of Wisconsin's penalty enhancement statute.⁵

¹ Wisconsin v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992).

² Marcia Coyle, *High Court to Examine State Hate-Crime Statute; Does It Clash with the First Amendment?*, NAT'L L.J., April 26, 1993, at 1. The black men had recently seen the film "Mississippi Burning" and were discussing a scene in which white men attack a praying black child. *Id.*

³ Bill Lueders, "Satan's" Victim Says: Don't Punish Him For Hateful Ideas, SACRAMENTO BEE, April 28, 1993, at B7.

⁴ See Brief of Respondent at 1, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515).

⁵ WIS. STAT. ANN. § 939.645 (West 1989-90). The statute mandates as follows: Penalty; crimes committed against certain people or property.

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime in par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000

"Come on, let's get it on you faggot queer,"⁶ Joshua H.⁷ yelled, though he barely knew his neighbor, William Kiley, a homosexual man. There were, however, bad feelings between the H. family and Kiley after a dog owned by one of Kiley's tenants bit Mrs. H. and had to be put to sleep.⁸ Kiley would later complain that, from that point on, the H. family persecuted him because of his sexual orientation. Kiley spoke with an attorney who told him that any legal action would lack force without evidence.⁹ Kiley determined to get proof, and he succeeded on June 11, 1991. On that day, he aimed a video camera at his property and began watering the lawn. After some friction between Kiley and Joshua and Joshua's family, Joshua pummeled and kicked Kiley, calling him "faggot," "punk," and "queer." Kiley never struck back, but his camera captured the attack. The State of California then prosecuted Joshua in juvenile court for the beating and added a charge under California's bias-crimes law.¹⁰ Joshua was convicted of both charges.

and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

⁶ People v. Joshua H., 17 Cal. Rptr. 2d 291, 294 (Ct. App. 1993).

⁷ The California court did not refer to the family's actual last name, presumably because the defendant, Joshua, was a minor. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ CAL. PENAL CODE § 422.7 (West 1988 & Supp. 1993) makes punishable the following:

any crime which is not made punishable by imprisonment in the state prison . . . if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him by the constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, under any of the following circumstances, which shall be

"We didn't have this problem until those niggers moved in next to us. I ought to shoot that black mother fucker. I ought to kick his black ass."¹¹ David Wyant, his wife, and some relatives rented a campsite at the Alum Creek State Park in Ohio. Their neighbors in the camping area were Jerry White and his girlfriend, Patricia McGowan, who are black.¹² On June 2, 1989, White complained to park officials about loud music from L-18, the neighboring campsite that Wyant had rented. The park personnel asked Wyant to turn off his radio, and he did so—for less than a half hour. He then turned the radio on again and loudly yelled racially derogatory remarks and threats toward White and McGowan.¹³ Hearing the tirade, White and McGowan informed officials and left the park. Authorities charged Wyant with one count of ethnic intimidation, and he was subsequently convicted.¹⁴

"Jew boy. . . . Die, Jew boy."¹⁵ John Daly was Jewish and he was rebellious. Rejecting both his family and his heritage, he joined a group of "skinheads," an anti-Semitic organization.¹⁶ He eventually learned that his new associates held their virulent intolerance more closely than any loyalty to Daly. Upon learning that Daly was Jewish, they beat him severely.¹⁷ One of Daly's assailants, Michael Earl Dobbins, was charged and convicted under Florida's hate crimes statute.¹⁸

charged in the accusatory pleading:

(a) The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury

¹¹ Ohio v. Wyant, 597 N.E.2d 450, 450 (Ohio 1992).

¹² *Id.*

¹³ *Id.* The remarks are quoted above. See *supra* note 11 and accompanying text.

¹⁴ *Id.* Actually, *Wyant* involved several consolidated cases. The facts of only one case are presented here, but the legal arguments employed by the Ohio Supreme Court are common to all. OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992 & Supp. 1993) states as follows:

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

¹⁵ Dobbins v. State, 605 So. 2d 922, 923 (Fla. Ct. App. 1992).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see FLA. STAT. ANN. § 775.085 (West 1992 & Supp. 1993). The statute provides:

(1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin

No one, except perhaps the offenders, believes that hate crimes are anything but odious and malevolent.¹⁹ The victims are selected not for what they may have done, but merely for who they are. Their immutable characteristics become red flags and the victims receive a singular message: you must always be on guard, wary, and afraid. The message is a pernicious and malignant one, and one that ideally should be contained.

The question then becomes how best to remedy the increasing incidence of hate crimes in our society. To many, the panacea is a hate crimes law, a statute that punishes an offender if, in the commission of his crime,²⁰ he was motivated by prejudice.²¹ Such hate crimes statutes generally enhance penalties for existing crimes motivated by bias or create new offenses comprised of existing crimes augmented by bias.²² To others, however, hate crimes legislation reaches a laudable goal only by first riding roughshod over the First Amendment to the United States

of the victim.

¹⁹ As a threshold matter, when used in this Article, "hate crime" refers to a crime against a person or against property motivated by the offender's bias against persons of the victim's race, ethnicity, religion, national origin, gender or sexual orientation. This definition follows those of virtually all state and federal laws concerning hate crimes. *See, e.g.*, CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1993); FLA. STAT. ANN. § 775.085 (West 1992 & Supp. 1993); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1992 & Supp. 1993); and the proposed federal statute, H.R. 1152 § 2(b). For a description of the proposed federal statute, see *infra* notes 67-68 and accompanying text.

²⁰ This Article employs the masculine pronoun in general references. This practice should be viewed not as an assertion that women are not often either the victims or perpetrators of hate crimes, but as an acquiescence to my traditional training in English. *See* Irving Younger, *The English Language Is Sex-Neutral*, 72 A.B.A.J. 89 (1986).

²¹ Indeed, in *Mitchell*, 113 S. Ct. 2194 (1993), the United States Supreme Court unanimously upheld the Wisconsin hate crimes statute. *Id.* at 2195, 2196.

²² Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 343-44 (1991). *See, e.g.*, FLA. STAT. ANN. § 775.085 (West 1992 & Supp. 1993) (new offense); WIS. STAT. ANN. § 939.645 (West 1989-90) (penalty enhancement).

For doctrinal purposes and the purposes of this Article, the two types of hate crime statutes are indistinguishable. Certainly, there are distinctions between statutes that create separate crimes and those that enhance penalties. However, for the purposes of this Article's First Amendment focus, the statutes present no notable distinction; predicate offenses are punished more rigorously because of an offender's motivation. For a listing of which states have which types of hate crimes statutes, see THE ANTI-DEFAMATION LEAGUE, HATE CRIMES STATUTES: A 1991 STATUS REPORT 22-23 (1991) [hereinafter ADL STATUS REPORT].

Constitution, which protects free speech and, presumably, free thought.²³ Such an approach is anathema to many First Amendment purists.

This Article follows the latter conviction. Part I briefly outlines the problem addressed by hate crimes statutes.²⁴ Part II describes the legislative approach to hate crimes, including the influential Anti-Defamation League ("ADL") model statute.²⁵ Part III addresses the judicial response to state hate crimes legislation, including the U.S. Supreme Court's determination in *Wisconsin v. Mitchell*²⁶ and the earlier state court treatments.²⁷ Part IV provides a detailed analysis of hate crimes legislation in light of the United States Supreme Court's First Amendment jurisprudence and suggests that such statutes are inherently offensive to the Constitution.²⁸ The analysis concludes with an alternative approach for striking down state hate crimes statutes, an approach that relies upon state constitutions and the New Judicial Federalism.²⁹

I. THE PROBLEM

There is little dispute that the prevalence of hate crimes is a serious problem in the United States, one that grows with each passing year.³⁰ In 1993, the Federal Bureau of Investigation made public for the first time data collected pursuant to the Hate Crimes Statistics Act of 1990.³¹ Only thirty-two states provided information to the FBI, but the total

²³ See *Wisconsin v. Mitchell*, 485 N.W.2d 807, 811 (Wis. 1992) ("Even more fundamentally, the Constitution protects all speech and thought, regardless of how offensive it might be."). Justice Oliver Wendell Holmes aptly asserted that "[i]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). None of the *Mitchell amici curiae* dispute the assumption that the First Amendment applies with equal vigor to thought. See, e.g., Brief of Petitioner, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

²⁴ See *infra* notes 30-52 and accompanying text.

²⁵ See *infra* notes 53-77 and accompanying text.

²⁶ *Mitchell*, 113 S. Ct. 2194.

²⁷ See *infra* notes 78-136 and accompanying text.

²⁸ See *infra* notes 137-202 and accompanying text.

²⁹ See *infra* notes 203-10 and accompanying text.

³⁰ See Brief of *Amicus Curiae* Ohio, Alabama, *et al.*, in Support of Petitioner at 5-6, *Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515) and sources cited therein.

³¹ See *infra* note 64 and accompanying text; see also Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, in Support of Petitioner at 6, *Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

number of hate crimes reported was 4,558.³² Sixty per cent of those were racially based.³³

In addition to sheer number, hate crimes are also cause for concern because they are of a different character than other crimes.

Research on bias-motivated crimes is in its infancy, but the available evidence indicates that these crimes are generally much more violent and have a significantly greater community impact than other crimes. One researcher, for example, analyzed 452 hate crime cases in Boston during the period between 1983 and 1987 (the "McDevitt Study"). The data revealed that 74% of bias-motivated assault incidents (including assault and battery and assault with a dangerous weapon) involved some physical injury to the victim. The national figure for all assault cases was considerably less at 29%.³⁴

Likewise, the effects of hate crimes are different and potentially more far-reaching than the effects of other types of crimes.

There appears to have been only limited research on the topic of discrimination crime, but at least one study found that victims of violent discrimination suffer greater emotional harm. Victims of ethnic violence suffered 21% more symptoms of stress than victims of similar acts of non-ethnic violence.³⁵

Finally, but of no lesser significance, is the harm that the commission of hate crimes causes to the entire community. Hate crimes can "directly intimidate the entire segment of the community with which the victim is identified, making large sections of the population feel unprotected by the law."³⁶

Social scientists and legal reformers have not only attempted to document the effects of hate crimes, they have also looked for the causes.³⁷ One

³² Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 6.

³³ *Id.*

³⁴ *Id.* at 7 (citing JACK MCDEVITT, THE STUDY OF THE CHARACTER OF CIVIL RIGHTS CRIMES IN MASSACHUSETTS (1983-1987) (1989)).

³⁵ Brief of Petitioner, *supra* note 23, at 27 (citing Joan C. Weiss, *et al.*, *Ethno-violence at Work*, J. OF INTERGROUP RELATIONS 17-28 (1991-92)). Some of the symptoms include sleep problems, concentration problems, alcohol abuse, aggressiveness, and hopelessness. *Id.* (citing Weiss, *supra*, at 27). See also Brief of *Amicus Curiae* Ohio, Alabama, *et al.*, *supra* note 30, at 6-8 (supporting the theory that victims of hate crimes experience greater emotional trauma).

³⁶ Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 8.

³⁷ JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY

obvious cause is resentment.³⁸ It is not so much resentment toward an individual, or even at an entire group; rather, it is often resentment toward society as a whole.³⁹

It is the wider society from which a perpetrator is estranged, and it is the wider society that he perceives as having rejected him. He is convinced that the country has changed for the worse, that political leaders are taking us down the road to total ruination, and that people like himself—the “little guys”—have lost all control of their destiny.⁴⁰

Thus, the hate crime perpetrator seeks to rebuild his tenuous self-esteem by preying on someone whom he perceives as inferior.⁴¹

One specific type of resentment is economic. In the last decade, increasing numbers of industrial jobs have been eliminated as the American economy moves toward a more service-oriented economy.⁴² Many lower-middle-class workers have had to accept lower-paying, more menial jobs.⁴³ “The traditional American middle-class lifestyle is slipping away, and *somebody somewhere must be responsible.*”⁴⁴

Specific local, national, or international events have also triggered hate-inspired violence. For example, at the time of the 1991 Persian Gulf War, Arab-Americans were the victims of hate crime on several occasions.⁴⁵ Moreover, in 1992, a jury in Simi Valley, California, chose not to convict four white police officers who had been videotaped while beating black motorist Rodney King.⁴⁶ To many, the beating was a race-based crime.⁴⁷ After the announcement of the verdict, several days of rioting left more than fifty people dead and entire blocks of South Central

AND BLOODSHED 45-63 (1993) [hereinafter RISING TIDE].

³⁸ *Id.*

³⁹ *Id.* at 47-48.

⁴⁰ *Id.*

⁴¹ *Id.* at 48 (citing THEODORE W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950)).

⁴² RISING TIDE, *supra* note 37, at 49-50 (citing KEVIN PHILLIPS, *THE POLITICS OF THE RICH AND THE POOR* (1990) and KATHERINE S. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* (1988)).

⁴³ RISING TIDE, *supra* note 37, at 50-51.

⁴⁴ *Id.* at 52.

⁴⁵ See Stephen Franklin, *Arab-Americans Still Feeling War's Effects*, CHICAGO TRIB., Aug. 5, 1991, at 4.

⁴⁶ See Ken Foskett, *Verdicts Returned in L.A. Beating: Downtown Buildings Hit By Protesters*, ATLANTA J. & CONST., April 30, 1992, at A12.

⁴⁷ *Id.*

Los Angeles in ashes.⁴⁸ In several instances, black rioters specifically chose to burn Korean-American-owned shops because they believed that the Korean merchants had a history of treating black people disrespectfully.⁴⁹ In addition, a group of young black men beat white truck driver Reginald Denny nearly to death.⁵⁰

Changes in traditional social structures have also resulted in increasing numbers of Americans feeling alienated from the society.⁵¹ Often, those disenfranchised people choose to redeem their battered self-esteem by blaming others and by hurting those whom they come to believe have caused their discomfort, a phenomenon that is hardly unique to the last quarter of the twentieth century.⁵²

II. THE LEGISLATIVE APPROACH

A. *The Anti-Defamation League Model Statute*

The Anti-Defamation League ("ADL") has played an important role in the proliferation of ethnic violence or hate crimes laws.⁵³ The ADL was founded in 1913 and its mission, as set forth in its charter, has been "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens."⁵⁴ The ADL became involved in promoting the legislative prohibition of hate crimes in 1981, after noting a sharp increase in anti-Semitic violence.⁵⁵ As a part of this promotion, the ADL's legal affairs department drafted model legislation in 1981. The model statute has four parts, including criminal proscriptions against both

⁴⁸ See David Nyhan, *Paying the Price of Malign Neglect*, BOSTON GLOBE, May 17, 1992, at 87.

⁴⁹ See Pat Morrison, *After the Riots*, L.A. TIMES, May 7, 1992, at B3.

⁵⁰ See *L.A. Driver Recovering, Doctors Say*, ATLANTA J. & CONST., May 4, 1992, at A8.

⁵¹ RISING TIDE, *supra* note 37, at 49-51.

⁵² The history of Germany in the years between 1919 and 1945 serves as an example of a beleaguered society that found scapegoats. See generally MARTIN GILBERT, *THE HOLOCAUST: A HISTORY OF THE JEWS OF EUROPE DURING THE SECOND WORLD WAR* (1986) (discussing the anti-Semitic politics and policies of the Nazis during the war). Sadly, the newly unified Germany is home to some tragically similar ethnic violence. RISING TIDE, *supra* note 37, at 149-52.

⁵³ More than half of the state hate crimes laws now in force are in some way derivative of the ADL model statute. ADL STATUS REPORT, *supra* note 22, at 22-23.

⁵⁴ Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 1 (quoting the ADL Charter).

⁵⁵ *Id.*

institutional vandalism and ethnic intimidation; a civil enforcement mechanism for either of the former offenses; and a reporting provision.⁵⁶ In drafting the intimidation provision, ADL lawyers specifically borrowed language from various state and federal antidiscrimination laws, assuming that because those laws had withstood constitutional attack, the intimidation statute would as well.⁵⁷

B. State Hate Crimes Statutes

The penalty enhancement statute that doubled Todd Mitchell's sentence is not unique to Wisconsin.⁵⁸ The legislatures of twenty-six states and the District of Columbia have enacted similar statutes.⁵⁹ Legislatures in twenty additional states have criminalized hate crimes in other ways, and Congress is poised to follow.⁶⁰ There is, perhaps, no more clear evidence of the popularity of hate crimes legislation than the submissions to the United States Supreme Court when the Court granted *certiorari* in *Wisconsin v. Mitchell*.⁶¹ Of twenty-six *amicus curiae* briefs filed, sixteen supported the State of Wisconsin and its statute.⁶² With the

⁵⁶ See ADL STATUS REPORT, *supra* note 22, at 4.

⁵⁷ Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 14 n.12; see *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (upholding antidiscrimination laws). The intimidation provision of the ADL Model Legislation is as follows:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

See ADL STATUS REPORT, *supra* note 22, at 4. Compare the above language to that in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000(h)(6) (1988).

⁵⁸ See ADL STATUS REPORT, *supra* note 22, at 22-23 (providing a list of other states which use penalty enhancement statutes).

⁵⁹ See Coyle, *supra* note 2, at 1 (referring to the *amicus curiae* brief of the Anti-Defamation League in *Wisconsin v. Mitchell*).

⁶⁰ *Id.*; see also *Recent Case: First Amendment—Bias-Motivated Crimes*, 106 HARV. L. REV. 957, 957 n.1 (1993) (discussing the likelihood of the passage of hate crimes legislation by Congress).

⁶¹ *Wisconsin v. Mitchell*, 113 S. Ct. 810 (1992) (granting *certiorari*).

⁶² *Id.*

Supreme Court's ruling in favor of the State of Wisconsin, more states are likely to join in the frenzy of penalty enhancement statutes.⁶³

C. Federal Hate Crimes Statutes

The federal government has also become involved in the hate crimes issue. In 1990, Congress enacted, and President George Bush signed, the Hate Crimes Statistics Act.⁶⁴ The Act is devoid of any substantive proscription on behavior; rather, it requires that the Attorney General gather data on hate crimes for the calendar year 1990 and the succeeding four calendar years.⁶⁵ As such, the Hate Crimes Statistics Act might well be seen as a precursor to an actual criminal prohibition, assuming that the first step toward passing a criminal law is to document a problem.⁶⁶

⁶³ In an oddly related incident, the president of the California State Bar called for consideration of state legislation to enhance penalties for crimes committed against attorneys, much as penalties are stiffer for crimes against police, judges, and certain political figures. HARRISBURG PATRIOT-NEWS, July 8, 1993, at B6, col. 1; *see also* 42 PA. CONS. STAT. ANN. § 9711(d)(1) (1982 & Supp. 1993) (criminal statute dealing with murder of police officers). The bar president's remarks came in the wake of a shooting spree at the offices of a San Francisco law firm, Pettit & Martin, in which eight people were killed. *See* HARRISBURG PATRIOT-NEWS, *supra*.

⁶⁴ 28 U.S.C. § 534 (1990).

⁶⁵ *Id.* at § 534(a)(1).

⁶⁶ It is interesting to note that, in a political compromise, section 2 of the Act provides:

(b) Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality.

28 U.S.C. § 534(2)(b). The long route the Act took through Congress is ably documented in Joseph M. Fernandez, *Bringing Hate Crimes Into Focus—The Hate Crime Statistics Act of 1990*, *Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261 (1991). Fernandez describes how North Carolina Senator Jesse Helms called the bill "this statistical nonsense" and worried that the bill gave "undue protection and respectability to gays and lesbians." *Id.* at 276-281 & n.102. In an effort to dull the impact he feared, Helms offered a "Sense of the Senate" amendment:

It is the sense of the Senate that—

(1) the homosexual movement threatens the strength and the survival of the American family as the basic unit of society;

(2) State sodomy laws should be enforced because they are in the best interest of public health;

(3) the Federal government should not provide discrimination protection on the basis of sexual orientation; and

(4) school curriculums should not condone homosexuality as an acceptable lifestyle in American society.

Id. at 278 (quoting 136 CONG. REC. S1169 (daily ed. Feb. 8, 1990)). There was enough sense in the Senate for that body to reject Helms' Sense of the Senate amendment and

At this writing, Congress is considering a substantive measure that closely resembles the ADL statute and the statutes of several states. The Hate Crimes Sentencing Enhancement Act of 1993 ("HCSEA")⁶⁷ is a penalty-enhancement statute applicable where the underlying crime was "motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals."⁶⁸

Sentencing in the federal courts is governed by a complex set of rules known as the Sentencing Commission Guidelines ("Guidelines").⁶⁹ Each federal crime is accorded a base level offense.⁷⁰ Various factors may increase or decrease that initial number, including a finding that the crime involved more than minimal planning⁷¹ or that the defendant has accepted responsibility for his crime.⁷² After a judge calculates all of the possible variables, he arrives at a final number. The judge then refers to a table in the Guidelines, cross-references the offense level with the defendant's criminal history category, and finds the assigned sentence range.⁷³

approve the Hate Crimes Statistics Act by a vote of 92-4. 136 CONG. REC. S1092 (daily ed. Feb. 8, 1990). The Senate did, however, pass the "promote or encourage homosexuality" language, offered as an amendment by Illinois Democratic Senator Paul Simon and Utah Republican Senator Orrin Hatch to appease Helms and those in sympathy with him. 136 CONG. REC. S1067, S1083 (daily ed. Feb. 8, 1990). Given the reaction of Senator Helms and his supporters, the prospects for unadulterated passage of the Hate Crimes Sentencing Enhancement Act of 1993, *see infra* note 67, seem dubious as the bill includes among the proscribed motives "sexual orientation." On September 21, 1993, the House of Representatives passed the HCSEA and sent it to the Senate for consideration. *See ADL Hails House Passage of Federal Hate Crime Measure*, U.S. NEWSWIRE, Sept. 21, 1993. As this Article goes to press, the measure is under consideration by the Senate Committee on the Judiciary.

⁶⁷ H.R. 1152, 103d Cong., 1st Sess., 139 CONG. REC. H911 (1993).

⁶⁸ *Id.* at § 2(b).

⁶⁹ The Sentencing Reform Act of 1984, 28 U.S.C. § 994(a) (1984), provides for the United States Sentencing Commission to develop guidelines for federal courts to follow in sentencing. The first set of guidelines was completed and presented to Congress on April 13, 1987, and took effect November 1, 1987. The Guidelines have been amended three times at this writing. U.S.S.G. at 1-10 (1992).

⁷⁰ For example, under the Guidelines, aggravated assault is assigned a base level offense of fifteen. U.S.S.G. § 2A2.2(a).

⁷¹ *See* U.S.S.G. § 2A2.2(b)(1). A judge applying an enhancement for more than minimal planning would ordinarily add two points to the offense level.

⁷² *See* U.S.S.G. § 3E1.1(a). A judge allowing an adjustment for acceptance of responsibility would ordinarily subtract two points from the offense level, although the exact number may vary.

⁷³ *See* U.S.S.G. Sentencing Table (1992).

The HCSEA requires that, where a crime is motivated by hatred, bias, or prejudice, as defined in the statute, the base offense level be increased by no fewer than three levels.⁷⁴ In concrete terms, such an enhancement can be substantial. For example, assume a jury finds Defendant guilty of the aggravated assault of Victim. The federal probation office prepares a pre-sentencing investigation report and informs Judge that Defendant has little or no criminal history and that no adjustments apply. Judge should then apply a final offense level of fifteen, which would allow him to impose a sentence of between eighteen and twenty-four months.⁷⁵ Assume that the jury additionally finds that Defendant assaulted Victim because Victim is of a different race. Now, the final offense level is eighteen, and Judge must sentence Defendant to between twenty-seven and thirty-three months.⁷⁶

Although the legislative history of the Hate Crimes Statistics Act suggests that some of the HCSA's provisions will most likely create controversy,⁷⁷ the holding of the U.S. Supreme Court in *Mitchell* has given impetus to efforts to enact the federal legislation.

III. THE JUDICIAL APPROACH

A. *The United States Supreme Court*

Although the issue of the constitutionality of hate crimes statutes had generated a major schism in the liberal community,⁷⁸ it unified an often contentious Supreme Court.⁷⁹ In a unanimous and brief opinion, the *Mitchell* Court dispatched the arguments proffered against the statute.⁸⁰

Chief Justice William Rehnquist wrote the opinion and began his analysis with Todd Mitchell's contention that the Court was bound by the Wisconsin Supreme Court's interpretation of the statute as punishing "bigoted thought and not conduct."⁸¹ The Chief Justice agreed that the

⁷⁴ H.R. 1152, *supra* note 67, 103d Cong., 1st Sess., 139 CONG. REC. 8792 (1993).

⁷⁵ See *supra* note 70 and U.S.S.G. Sentencing Table (1992).

⁷⁶ U.S.S.G. Sentencing Table.

⁷⁷ See *supra* note 66. If the mere gathering of statistics concerning assaults on homosexuals angered some conservatives, an actual criminal proscription of assaults on homosexuals is sure to engender emotional debate.

⁷⁸ See *infra* notes 123-29.

⁷⁹ *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

⁸⁰ *Id.* The opinion fills only nine pages in the West Publishing Company's Supreme Court Reporter.

⁸¹ *Id.* at 2198.

Court must defer to a state court's construction of a state statute,⁸² but concluded that the Wisconsin court had not merely interpreted a word or a phrase but characterized the "practical effect" of the statute.⁸³ As such, the interpretation was not binding on the Court.⁸⁴

The Court next addressed the central issue: whether the First Amendment proscribes penalty enhancement statutes. The Court recognized that the State of Wisconsin was on poor footing in asserting that the penalty-enhancing statute punished only conduct.⁸⁵

... [T]he fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted belief.⁸⁶

Chief Justice Rehnquist then described several cases in which the Court had hinted that a sentencing judge could consider an offender's racial animus.⁸⁷

Rehnquist invoked the Court's 1992 opinion in *Dawson v. Delaware*⁸⁸ and its 1983 opinion in *Barclay v. Florida*⁸⁹ to support his proposition that a defendant's abstract beliefs, even though offensive to the community, may not be considered during sentencing. In *Barclay*, the

⁸² See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

⁸³ *Mitchell*, 113 S. Ct. at 2198.

⁸⁴ *Id.* at 2199.

⁸⁵ *Id.*; see also Brief of Petitioner, *supra* note 23, at 36 (trying to distinguish a general belief from the hateful "motive" that led to selecting the victim).

⁸⁶ *Mitchell*, 113 S. Ct. at 2199.

⁸⁷ One of the first cases that the Chief Justice cited was *Tison v. Arizona*, 481 U.S. 137 (1987), in which the Court held that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." *Id.* at 156. Rehnquist's reference to *Tison* and its "purposeful" language suggests that the Court failed to appreciate the distinction between *intent* and *motive*. See *infra* notes 169-73.

⁸⁸ 112 S. Ct. 1093 (1992).

⁸⁹ 463 U.S. 939 (1983).

Court held that a judge had properly taken note of the offender's membership in the Black Liberation Army in sentencing the man for the apparently race-based murder of a white man.⁹⁰ In *Dawson*, the Court considered the introduction, at sentencing, of the defendant's membership in the "Aryan Brotherhood," a racist prison group. The Court, per Chief Justice Rehnquist, concluded that the defendant's abstract beliefs were not proper considerations at sentencing because there was no demonstrated connection between the defendant's crime—a murder—and his racist beliefs.⁹¹ In dictum, however, the Chief Justice wrote that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."⁹²

The *Mitchell* Court next pointed out that the Wisconsin hate crimes statute, like most, used almost the same language as Title VII of the Civil Rights Act of 1964.⁹³ Noting that it had upheld both federal and state discrimination laws,⁹⁴ the Court determined that there was no meaningful distinction between those laws and hate crimes laws.⁹⁵

Many opponents of hate crimes laws had argued that the fate of those statutes was effectively doomed by the Court's holding in *R.A.V. v. St. Paul*.⁹⁶ In *R.A.V.*, the Court rejected a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"⁹⁷ The fatal flaw in the *R.A.V.* statute was that it singled out certain speech or expressive conduct as offensive. The Court found such a content-based regulation offensive to

⁹⁰ *Barclay*, 463 U.S. at 949-50. Supporters of hate crimes statutes have pointed out that the Court in *Barclay* held that "[t]he United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder" when sentencing. *Id.* at 949. *Barclay*, however, is not proper precedent for the First Amendment considerations of *Mitchell*, as the Supreme Court's holding in *Barclay* was predicated on other grounds. *Id.* at 940 (holding that the trial court had wrongly considered aggravating circumstances not included in the statute, but characterizing the error as harmless).

⁹¹ *Dawson*, 112 S. Ct. at 1097-98.

⁹² *Id.* at 1097. It is important to note that the quoted passage, when read in the context of the entire decision, is little more than *dictum*.

⁹³ 42 U.S.C. § 2000e-2008(h)(6) (1989). Title VII proscribes employment discrimination "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

⁹⁴ See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), and *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

⁹⁵ *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2200 (1993).

⁹⁶ 112 S. Ct. 2538 (1992).

⁹⁷ *Mitchell*, 113 S. Ct. at 2200 (quoting *R.A.V.*, 112 S. Ct. at 2547 (citing *St. Paul Bias-Motivated Crime Ordinance*, *St. Paul, Minn.*, Legis. Code § 292.02 (1990))).

the First Amendment.⁹⁸ By distinction, Chief Justice Rehnquist argued in *Mitchell* that the conduct proscribed by the Wisconsin hate crimes legislation is not expressive and therefore not protected.⁹⁹

For his penultimate rationale in *Mitchell*, the Chief Justice pointed to the particularly harmful effects of hate crimes,¹⁰⁰ justifying the Wisconsin statute as being aimed primarily at preventing these harms rather than stifling disagreeable beliefs or biases.¹⁰¹

Finally, the Court addressed *Mitchell*'s claim that the statute was unconstitutionally overbroad and would therefore engender a "chilling effect" on free speech.¹⁰² The Court almost summarily dismissed this contention as "too speculative a hypothesis."¹⁰³ Further, the Court identified precedent that permitted the "evidentiary use of speech to establish the elements of a crime or to prove motive or intent."¹⁰⁴ Thus, with a short, unified declaration, the Supreme Court reversed the Wisconsin Supreme Court's rejection of the hate crimes law.¹⁰⁵

B. *The Wisconsin Supreme Court*

The Wisconsin Supreme Court opinion that was reversed by the U.S. Supreme Court had itself reversed a decision of the Wisconsin Court of Appeals upholding *Mitchell*'s conviction.¹⁰⁶ The lower state court had determined that the statute punished conduct rather than words or beliefs and that the statute was neither vague nor overbroad.¹⁰⁷ The Wisconsin Supreme Court, however, disagreed. Speaking through Chief Justice

⁹⁸ *R.A.V.*, 112 S. Ct. at 2547-48.

⁹⁹ *Mitchell*, 113 S. Ct. at 2201.

¹⁰⁰ See *supra* notes 34-36 and accompanying text.

¹⁰¹ *Mitchell*, 113 S. Ct. at 2201. Rehnquist quoted Blackstone, who wrote that "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. BLACKSTONE, COMMENTARIES 16.

¹⁰² *Mitchell*, 113 S. Ct. at 2201; see also Brief of Respondent, *supra* note 4, at 31-37.

¹⁰³ *Mitchell*, 113 S. Ct. at 2201.

¹⁰⁴ *Id.*

¹⁰⁵ To Supreme Court observers, the unanimity and decisiveness of the opinion was not a surprise. Indeed, at oral arguments on April 21, 1993, Justices Anthony Kennedy, Antonin Scalia, Byron White, and Chief Justice Rehnquist evinced at least some sympathy for the statute. See 61 U.S.L.W. 3725, 3725-27 (April 27, 1993).

¹⁰⁶ See *Wisconsin v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991), *rev'd*, 485 N.W.2d 807 (Wis. 1992).

¹⁰⁷ 473 N.W.2d at 1.

Nathan Stewart Heffernan, a split court found both that the statute violated the First Amendment and that it was overbroad.¹⁰⁸

Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought. . . . The hate crimes statute is also unconstitutionally overbroad. A statute is overbroad when it intrudes upon a substantial amount of constitutionally protected activity. Aside from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect upon free speech.¹⁰⁹

Two justices dissented. Justice William Bablitch argued that hate crimes laws are indistinguishable from employment discrimination and civil rights laws.¹¹⁰ He argued that the statute does not, in fact, punish thought; rather, what it "does punish is acting upon those thoughts."¹¹¹ In her dissent, Justice Shirley Abrahamson began by noting that, had she been in the legislature, she would likely not have voted for the hate crimes law "because I do not think [it] will accomplish its goal."¹¹² Admitting to "much vacillation," Justice Abrahamson concluded, like Justice Bablitch, that the statute in reality regulated conduct and not speech.¹¹³

C. Other State Cases

While other state courts have split on the constitutionality of hate crimes statutes, with more siding in favor of the statutes,¹¹⁴ there are recurring themes in the decisions. In *State v. Wyant*,¹¹⁵ for example, the Ohio Supreme Court struck down Ohio's hate crimes statute. The court,

¹⁰⁸ 485 N.W.2d at 807.

¹⁰⁹ *Id.* at 815.

¹¹⁰ *Id.* at 819 (Bablitch, J., dissenting).

¹¹¹ *Id.* at 820.

¹¹² *Id.* at 818 (Abrahamson, J., dissenting).

¹¹³ *Id.* at 818-19.

¹¹⁴ See *People v. Joshua H.*, 17 Cal. Rptr. 2d 291 (Ct. App. 1993) (upholding California statute); *Dobbins v. State*, 605 So. 2d 922 (Fla. Ct. App. 1992) (upholding Florida statute); *People v. Grupe*, 532 N.Y.S.2d 815 (City Crim. Ct. 1988) (upholding New York statute); *State v. Plowman*, 838 P.2d 558 (Or. 1992) (upholding Oregon statute); *State v. Hendrix*, 813 P.2d 1115 (Or. Ct. App. 1991) (upholding Oregon statute). But see *Mitchell* (rejecting Wisconsin statute) and *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992) (rejecting Ohio statute).

¹¹⁵ 597 N.E.2d 450 (Ohio 1992).

in an opinion by Justice Herbert Brown, concluded that the statute impermissibly targeted the perpetrator's thoughts and was thus inimical to the First Amendment.¹¹⁶ The Oregon Supreme Court, in contrast, upheld Oregon's bias crimes statute in *State v. Plowman*.¹¹⁷ The court found that the Oregon statute was not vague and that rather than proscribing expression, the statute proscribed an impermissible effect.¹¹⁸

The California Court of Appeals also had occasion to consider its state's hate crimes law. In *People v. Joshua H.*,¹¹⁹ the court disagreed with the Ohio and Wisconsin Supreme Courts, and concluded that the California hate crimes law targeted an act, not the underlying bigotry.¹²⁰ Finally, the Florida District Court of Appeals ruled on Florida's hate crimes law, holding that the law did not punish the defendant's opinion but, rather, the act that flowed from it.¹²¹ The three-judge panel concluded, among other things, that the statute was indistinguishable from employment discrimination prohibitions that have been repeatedly upheld.¹²²

D. Liberal Confusion

The debate about ethnic intimidation laws is a difficult one for liberals,¹²³ who find themselves between Scylla and Charybdis.¹²⁴ Traditionally, liberals have been thought to be the strongest proponents of free speech and free expression.¹²⁵ Likewise, they have urged societal

¹¹⁶ *Id.* at 457.

¹¹⁷ 838 P.2d 558 (Or. 1992).

¹¹⁸ *Id.* at 565-66.

¹¹⁹ 17 Cal. Rptr. 2d 291 (1993).

¹²⁰ *Id.* at 299-301.

¹²¹ *Dobbins v. State*, 605 So. 2d 922 (Fla. Ct. App. 1992).

¹²² *Id.* at 925.

¹²³ In using the term "liberal," I mean those individuals and groups traditionally associated with liberal ideas, realizing full well that such a label ignores important nuances.

¹²⁴ In Homer's ODYSSEY, the hero, Odysseus, travels home from war. He and his crew face many obstacles. As they travel through the Strait of Messina, they are confronted on one side by the monster, Scylla, and on the other by the whirlpool, Charybdis. Steering too close to either will bring disaster. *Id.*

¹²⁵ For example, well-known liberal attorney William M. Kunstler argued against the Texas flag desecration statute at issue in *Texas v. Johnson*, 491 U.S. 397 (1989); see also Brief of *Amicus Curiae*, the American Civil Liberties Union of Ohio in Support of Respondent at 1, *Mitchell* (No. 92-515) (arguing in opposition to hate crimes statutes out of concern for free speech and expression).

tolerance and struggled to abolish hate.¹²⁶ When the two goals clash, liberal groups find themselves in a quandary, not knowing whether to steer toward the Scylla of hatred or the Charybdis of First Amendment restriction.

Two noteworthy examples of this dilemma are evident in the *amicus curiae* briefs submitted to the Supreme Court in *Wisconsin v. Mitchell*. In a move that surprised many,¹²⁷ the American Civil Liberties Union ("ACLU") sided with the State of Wisconsin, filing a brief that argued that the real issue is not whether to allow discrimination or stifle free expression but, rather, whether there is any expression at all in hate crimes or simply harmful conduct.¹²⁸ One chapter that dissented from the national organization's position, however, was the Ohio ACLU.¹²⁹ The Ohio chapter's board of directors voted to part with the national ACLU, concluding that the latter had "accorded insufficient weight to First Amendment values."¹³⁰

The ACLU's commitment to free speech has always stood side-by-side with a commitment to equal protection of the laws. Thus, throughout their history, the Ohio and National ACLUs consistently have argued in this and other courts in favor of antidiscrimination laws. However, there are times when the reconciliation of conflicting values of freedom of expression and equal protection is very difficult—and individuals and organizations may, in good faith, differ on that resolution.¹³¹

Similarly, constitutional law scholars who normally stand on the same side of the lectern find themselves in disagreement about hate crimes laws. In their brief to the Court in *Mitchell*, a group of seven constitutional law professors and writers, including Alan Dershowitz and Gerald Gunther,¹³² argued vehemently against the hate crimes statute, con-

¹²⁶ Brief of *Amicus Curiae*, the American Civil Liberties Union in Support of Petitioner at 1, *Mitchell* (No. 92-515).

¹²⁷ See Cauchon, *Civil Dispute Within the ACLU: Debate Over Competing Principles*, USA TODAY, March 31, 1993, at 1A.

¹²⁸ Brief of *Amicus Curiae*, the American Civil Liberties Union, *supra* note 126, at 4.

¹²⁹ Brief of *Amicus Curiae*, the American Civil Liberties Union of Ohio, *supra* note 125, at 1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Brief of *Amicus Curiae*, Larry Alexander, Ralph Brown, Alan Dershowitz, David Goldberger, Gerald Gunther, Nat Hentoff and Diane Zimmerman in Support of Respondent, *Mitchell* (No. 92-515).

cluding that “[a]s dangerous and offensive as any expression of racism or bigotry may be, considerably more dangerous is any attempt by the government to control the minds of its citizens.”¹³³ Conversely, Harvard Law Professor Laurence Tribe told the congressional subcommittee considering the Hate Crimes Sentencing Enhancement Act¹³⁴ that “[t]here is nothing in the Constitution that prevents government from enhancing the sentences on crimes against people or property based on race, religion or other factors.”¹³⁵

This split among those who are ordinarily allies underscores the difficulty of the issue. It also illuminates the difficulty that opponents of hate crimes statutes face when the measures are before state or federal legislatures: whatever political power liberal groups might hold is split, with the majority apparently supporting the statutes.¹³⁶

IV. ANALYSIS

A. *Conduct Plus: The O'Brien*¹³⁷ *Analysis*

A number of state courts, in upholding hate crimes legislation, have suggested that the First Amendment offers freedom to hold an opinion, but not to act on it.¹³⁸ Indeed, Judge Charles Harris of the Florida District Court of Appeal for the Fifth District borrowed (perhaps unwittingly) from John Stuart Mill's *On Liberty* to “bolster” his court's holding.

Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hinderance,

¹³³ *Id.* at 13.

¹³⁴ *See supra* note 67 and accompanying text.

¹³⁵ *States News Service, Congress Considers Hate Crime Punishment*, July 29, 1992.

¹³⁶ *See supra* notes 123-31 and accompanying text.

¹³⁷ *United States v. O'Brien*, 391 U.S. 367 (1968).

¹³⁸ *See, e.g., Dobbins v. State*, 605 So. 2d 922, 924 (Fla. Ct. App. 1992); *People v. Joshua H.*, 17 Cal. Rptr. 2d 291 (Ct. App. 1993).

either physical or moral, from their fellow men, so long as it is at their own risk and peril.¹³⁹

Mill's eloquence, however, does not offer succor to proponents of hate crimes statutes; rather, it illustrates a distinction already present in most of the criminal law between opinion and conduct. Hate crimes laws unnecessarily blur the distinction.

The proper starting place for an analysis of hate crimes laws is *United States v. O'Brien*.¹⁴⁰ In 1966, David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse. Several FBI agents in the audience arrested him and charged him with violating the Universal Military Training and Service Act of 1948,¹⁴¹ which levelled punishment at anyone who "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate."¹⁴² O'Brien was convicted in the United States District Court, but the United States Court of Appeals for the First Circuit reversed the conviction upon finding the Act to be an unconstitutional encroachment on the First Amendment.¹⁴³

On *certiorari*, the U.S. Supreme Court reversed the decision of the First Circuit.¹⁴⁴ The Court, per Chief Justice Earl Warren, first indicated that a different analysis would apply in cases in which a person claims First Amendment protection for conduct, rather than speech. Warren then described a dichotomy between "content-neutral" laws and "content-based" laws.¹⁴⁵ A content-neutral law criminalizes an act because the conduct itself is inimical to society's interests, without reference to the expressive component of the conduct.¹⁴⁶ A content-based law, on the other hand, proscribes conduct

¹³⁹ *Dobbins*, 605 So. 2d at 924 (quoting JOHN STUART MILL, ON LIBERTY (1859)). Benjamin Franklin offered a similar thought more than 125 years before Mill (when Franklin was but sixteen years old).

Without freedom of thought there can be no such thing as wisdom, and no such thing as public liberty without freedom of speech; which is the right of every man as far as by it he does not hurt and control the right of another: and this is the only check it ought to suffer, and the only bounds it ought to know.

Randy Lewis, *A Few Words About Censorship vs. the Freedom of Speech*, L.A. TIMES, June 17, 1990, at 46D.

¹⁴⁰ 391 U.S. 367 (1968).

¹⁴¹ 50 U.S.C. § 462 (1965) (the 1965 statute was in effect when O'Brien destroyed his draft card).

¹⁴² *Id.*

¹⁴³ *United States v. O'Brien*, 376 F.2d 538 (1st Cir. 1967), *rev'd*, 391 U.S. 367 (1968).

¹⁴⁴ 391 U.S. 367 (1968).

¹⁴⁵ *Id.* at 377. Warren did not actually use the terms "content-neutral" and "content-based"; they were coined by later commentators discussing *O'Brien*. See David R Fine, Comment, *Symbolic Expression and the Rehnquist Court*, 22 U. TOL. L. REV. 777, 783 n.30 (1991) (describing development of terminology).

¹⁴⁶ 391 U.S. at 377.

specifically because of the message.¹⁴⁷ The Court concluded that content-based statutes should be reviewed under a strict scrutiny standard, while content-neutral laws would receive a deferential balancing of interests, or means-ends, review.¹⁴⁸ Chief Justice Warren set forth a four-part test to determine if a statute proscribing conduct could survive a First Amendment challenge, asking (1) if the statute is within the constitutional power of the state, (2) if it relates to an important or substantial government interest, (3) if the statute does not seek to suppress free expression, and (4) if any incidental restrictions on First Amendment freedoms are no greater than required to meet the important governmental interest.¹⁴⁹ The content-neutral/content-based dichotomy essentially focuses on the third inquiry.

Many of those who support hate crimes statutes argue that they are content-neutral statutes.¹⁵⁰ In a 1993 note in the *Columbia Law Review*,¹⁵¹ the author suggests:

A typical penalty-enhancement statute punishes crimes committed "against a person or a person's property because of such person's race [etc.]" On its face, such a statute addresses the defendant's motive for committing the crime. The Wisconsin statute concerns crimes in which the perpetrator "intentionally selects the [victim] because of the race . . . of that person." That statute addresses the reason for selecting the individual. Neither of these types of penalty-enhancement statutes on its face prohibits conduct on the basis of its expressive content.¹⁵²

This ignores a reality of penalty-enhancement statutes.¹⁵³ Universally, they seek not merely to protect certain persons in our society; rather, they seek to

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Brief of Amicus Curiae The Anti-Defamation League, *et al.*, *supra* note 31, at 26.

¹⁵¹ Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993).

¹⁵² *Id.* at 214.

¹⁵³ In his brief to the U.S. Supreme Court, Mitchell compared the facts of *O'Brien* with those of his case.

David O'Brien could not have received additional penalties for having violated the statute "because of" his opposition to the Vietnam War. For this reason, Wisconsin's attempt to analogize its hate crime enhancement law to the draft card destruction law in *O'Brien* is flawed. The proper analogy would compare hate crime enhancement to a law which punished draft card destruction but increased the penalties when the burning was motivated by opposition to government policies.

Brief of Respondent, *supra* note 4, at 14-15 (citations and footnote omitted).

protect certain people *when they are targeted because of a distinguishing characteristic*. The former, aiming only to protect particular citizens regardless of what motivates the perpetrator, would be content-neutral. The federal law punishing presidential assassins is an example of an existing content-neutral law.¹⁵⁴ The President is deemed so important a citizen that an assassin, regardless of motive, will be punished more severely than another murderer. Theoretically, a person could be prosecuted for robbing and killing the President on a Washington street corner even if the mugger did not know the victim to be the President. Thus, the statute is content-neutral, the motive—be it greed, desperation, or dementia—is unimportant.

The same can not be said of hate crimes statutes. Their *raison d'être* is to select out for greater punishment certain impermissible motives. Thus, a white man robbing and killing a black man merely because the victim was the only person on the street when the perpetrator chose to act would not be subject to penalty enhancement. If, however, he chose the black victim from a crowd because of the man's race, he would receive a greater punishment. The statutes, unlike the presidential assassination law, do not aim to protect certain people; they aim to protect all people from crimes based on certain thoughts and motives. In this way, they are content-based and should be reviewed under a strict scrutiny analysis.¹⁵⁵ When viewed under strict scrutiny, hate crimes laws cannot survive,¹⁵⁶ for hate crimes laws inherently fail to meet the *O'Brien* requirement that they be narrowly tailored to meet a compelling state interest.¹⁵⁷

B. Categorization

It is important to note that not all speech or expression has been afforded First Amendment protection. The U.S. Supreme Court has carved out exceptions for certain types of speech that do not fall under the ambit of the First Amendment.¹⁵⁸ These include "fighting words,"¹⁵⁹

¹⁵⁴ See 18 U.S.C. § 1751 (1988); see also 42 PA. CONS. STAT. ANN. § 9711 (1982 & Supp. 1993) (sentencing procedure for first degree murder that enhances the penalty at sentencing if victim was a fireman, peace officer, or public servant working in detention, who was killed in the line of duty).

¹⁵⁵ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁵⁶ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning statute could not survive strict scrutiny analysis).

¹⁵⁷ See *supra* notes 146-48 and accompanying text.

¹⁵⁸ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹⁵⁹ *Id.* at 572 (holding that "fighting words" are not protected).

obscenity,¹⁶⁰ speech inciting imminent lawlessness,¹⁶¹ speech inciting imminent and violent overthrow of the government,¹⁶² and libelous speech.¹⁶³ There are those who argue that a new category should be created for hate speech.¹⁶⁴ For example, Professor Mari Matsuda suggests a tripartite test for determining when speech should not be protected by the First Amendment, advocating an exemption when "(1) the message is of racial inferiority, (2) the message is directed against a historically oppressed group, [and] (3) the message is persecutorial, hateful, and degrading."¹⁶⁵

Although it is largely outside the scope of this Article, Professor Matsuda's suggestion begs some response. First, it would undoubtedly be difficult, in many instances, to discern when a message is one of racial inferiority; words are subject to different interpretations depending upon the context in which they are uttered. Second, limiting the exception to messages directed at historically oppressed groups would be under-inclusive in that it assumes that a hateful message is more damaging to some people than others.¹⁶⁶ Third, messages that are persecutorial in some situations are not so in others; context can be crucial.¹⁶⁷ Finally,

¹⁶⁰ *Roth v. United States*, 354 U.S. 476, 481 (1957) (holding that obscenity is not protected). While there has always been a majority of Justices on the U.S. Supreme Court who assume obscenity to be unprotected, the assumption is not unanimous. *See infra* note 241 (describing Justice Hugo Black's belief in an absolute application of the First Amendment).

¹⁶¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (holding that speech inciting imminent lawless action is not protected).

¹⁶² *Dennis v. United States*, 341 U.S. 494, 508-11 (1951) (holding that speech inciting imminent, violent overthrow of the government is not protected).

¹⁶³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964).

¹⁶⁴ *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Professor Matsuda argues alternatively that hate speech should be considered "fighting words" so that it falls within the *Chaplinsky* exception. *Id.* at 2357.

¹⁶⁵ Matsuda, *supra* note 164, at 2357.

¹⁶⁶ Matsuda answers this concern by noting that the harm inflicted upon a member of the "dominant group" by a racist message is of a "different degree." *Id.* at 2362. She notes that "[s]hould history change course, placing former victim groups in a dominant or equalized position, the newly equalized group will lose the special protection suggested here for expression of nationalist anger." *Id.* In essence, then, Professor Matsuda advocates a society that must constantly reassess the dominance of its subgroups and adjust its laws accordingly. Her statement suggests that hate is chameleon-like, virulent and censorable when uttered by one person and nationalistic and acceptable when uttered by another.

¹⁶⁷ Some things or comments are simply out of place, like "a pig in the parlor instead

of course, is the overarching criticism that there is nothing in hate speech that suggests that it should be excepted from First Amendment protection (assuming, for the moment, that any speech should be unprotected).¹⁶⁸ Many words have strong effects on their recipients. That is part of the richness of the "marketplace of ideas." Censoring hate speech does not extinguish the hate itself, it merely drives it underground; as firefighters know, a smoldering fire is often the most destructive and difficult to combat.

C. *The Motive/Intent Distinction*

Proponents of hate crimes laws argue that the focus on motive inherent in hate crimes statutes is indistinguishable from the criminal law concern with intent. Because intent is an element of innumerable offenses, supporters assert that hate crimes laws are no more offensive to the First Amendment than most other criminal laws.¹⁶⁹

This assertion, however, ignores a noteworthy distinction. Intent refers to state of mind or, more precisely, to the magnitude of the actor's desire to bring about a consequence and his knowledge that a particular consequence is likely.¹⁷⁰ Motive, by distinction, is the purpose that compels an actor.¹⁷¹

of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *see also* *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 696 (1986) (Stevens, J., dissenting) ("Vulgar language, like vulgar animals, may be acceptable in some contexts and intolerable in others.").

¹⁶⁸ Although I am reluctant to refer to the fabled "slippery slope" (which after so much use has assuredly, by erosion, become the "slippery cliff"), the acceptance of exclusions to First Amendment protection surely invites proliferation of the sort advocated by Professors Matsuda and Delgado. Matsuda recognizes such a possibility:

In speaking on this topic, I've found the most serious objection raised by lawyers in the audiences is that of the slippery slope—that we must never censor because censorship, once allowed, is beyond control. In answer, I acknowledge that this is the central civil liberties concern, and argue that it is as well met by narrowly defining racist speech as it is by other first amendment exceptions.

Matsuda, *supra* note 164, at 2352 n.164. Hence, Matsuda argues that creating new exceptions to First Amendment protection is acceptable so long as it is accomplished by small incursions. The fallacy in this is the tacit assumption that there can be *small* incursions.

¹⁶⁹ *See, e.g.,* *People v. Joshua H.*, 17 Cal. Rptr. 2d 291, 295-96 (Ct. App. 1993); *see supra* notes 151-57 and accompanying text.

¹⁷⁰ *See* BLACK'S LAW DICTIONARY 727 (5th ed. 1979) ("The word 'intent' is used throughout the Restatement of Torts, 2nd, to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

¹⁷¹ *Id.* at 914 (defining "motive" as the "[c]ause or reason that moves the will and induces actions," and as "[a]n inducement, or that which leads, or tempts the mind to

Consider a man who kills his wife in the course of an argument. The law reasonably asks whether his act was premeditated and whether, in striking her, he intended to bring about her death. These inquiries define the crime and delineate between manslaughter and murder and, if the crime was murder, between degrees. His motive might be his having learned that she was unfaithful to him, her having learned that he was unfaithful to her, or his finding supper distasteful. The law does not inquire into motive *qua* motive. Questions regarding his motive might be asked in order to elicit information about his intent (e.g., "When you decided the rice was overcooked, did you go out and buy a baseball bat?" is probative on the issue of premeditation), but motive standing by itself is irrelevant.

In the same sense, at Todd Mitchell's trial for inciting an assault, it was reasonable to ascertain whether he intended an assault to occur.¹⁷² Mitchell's motive—to harm a white person—is irrelevant outside the context of the hate crimes statute.¹⁷³

D. *The Employment Discrimination Statutes*

1. *The Dilemma*

Supporters of hate crimes legislation point to antidiscrimination laws, noting that they have repeatedly been upheld¹⁷⁴ and claiming that they are constitutionally indistinguishable from hate crimes statutes.¹⁷⁵

At first blush, such a comparison to antidiscrimination statutes is compelling.

How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?¹⁷⁶

indulge a criminal act.").

¹⁷² See *supra* notes 1-5 and accompanying text.

¹⁷³ For a more exhaustive discussion of this issue, see Gellman, *supra* note 22, at 363-68.

¹⁷⁴ *Roberts v. Jaycees*, 468 U.S. 609, 628 (1984); see also *infra* notes 176-79 and accompanying text.

¹⁷⁵ See, e.g., Brief of *Amicus Curiae*, The United States, in Support of Petitioner at 16-23, *Mitchell* (No. 92-515) and Brief of *Amicus Curiae*, The American Civil Liberties Union, *supra* note 126, at 9-11.

¹⁷⁶ *Mitchell*, 485 N.W.2d at 820 (Bablitch, J., dissenting).

Many of the state hate crimes statutes, including Wisconsin's, are patterned after the ADL model law.¹⁷⁷ ADL lawyers, as previously noted,¹⁷⁸ used the same language in the ADL statute as Congress used in Title VII of the Civil Rights Act of 1964.¹⁷⁹ The model act provides:

A. A person commits the crime of intimidation if, *by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals*, he violates Section ____ of the Penal Code.¹⁸⁰

Title VII, similarly, declares:

- (a) It shall be an unlawful employment practice for an employer—
 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*.¹⁸¹

The language emphasized is clearly, and by design, similar.¹⁸² Opponents of hate crimes statutes are thus left with three options: (1) admit that there is no meaningful distinction, (2) find some meaningful distinction or (3) declare that antidiscrimination statutes are also unconstitutional.

2. Gellman's Resolution

In her influential article, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas*

¹⁷⁷ Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 14 n.12.

¹⁷⁸ *Supra* note 57 and accompanying text.

¹⁷⁹ 42 U.S.C. § 2000e(1)-(17) (1989); Brief of *Amicus Curiae* The Anti-Defamation League, *et al.*, *supra* note 31, at 14 n.12.

¹⁸⁰ See ADL STATUS REPORT, *supra* note 22, at 4 (emphasis added).

¹⁸¹ 42 U.S.C. § 2000e-2 (1989) (emphasis added); see *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes*, 106 HARV. L. REV. 1314 (1993).

¹⁸² See *supra* note 57 and accompanying text.

of *Ethnic Intimidation Laws*,¹⁸³ Susan Gellman, an adjunct professor at Capital University Law School, offered a potential distinction between antidiscrimination laws and hate crimes laws. Gellman wrote that the intent of Congress in enacting Title VII can best be divined by reference to the two principal theories that have arisen in litigation under the statute, disparate treatment and disparate impact.¹⁸⁴ A disparate treatment case involves a plaintiff's claim that he was the subject of intentional discrimination based on one of the enumerated characteristics.¹⁸⁵ In a typical disparate treatment in hiring case, the plaintiff must first raise an inference of discriminatory *motive* by making out a *prima facie* case that he was qualified for a job, that he was rejected for the job, and that the employer hired someone else not sharing the applicant's characteristic.¹⁸⁶ A disparate impact case, however, is concerned not with the motive but with the *result*. The central question in such a case is whether some employment practice has caused a disparate impact on a protected group.¹⁸⁷ In developing such an analysis, the Supreme Court determined that "Congress created the Act to address 'the *consequences* of employment practices,' not their motivation."¹⁸⁸ So noting, Gellman argued that Title VII is distinguishable from hate crimes laws in that there is no requirement that an improper motive be proven, only an improper effect.¹⁸⁹ Thus, she concludes:

Bias-motivated discrimination and non-bias-motivated discrimination are prohibited and penalized by the statute in exactly the same way, because it is the distinct act of discrimination in employment, irrespective of motive, that is proscribed, and not bigoted thinking. The ADL model statute does just the opposite: where the Civil Rights Act penalizes discrimination *equally* whether or not motivated by racial animus, the ethnic intimidation statute penalizes the prohibited conduct *more* severely when it is so motivated.¹⁹⁰

¹⁸³ Gellman, *supra* note 22, at 368. The article often provided fodder for state courts that struck down hate crimes legislation. *See, e.g.*, *State v. Mitchell*, 485 N.W.2d 807, 809 n.5 (Wis. 1992); *State v. Wyant*, 597 N.E.2d 450, 453 (Ohio 1992).

¹⁸⁴ *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

¹⁸⁵ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973).

¹⁸⁶ *Id.* at 802.

¹⁸⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

¹⁸⁸ Gellman, *supra* note 22, at 368 (quoting *Griggs*, 401 U.S. at 432).

¹⁸⁹ Gellman, *supra* note 22, at 368.

¹⁹⁰ *Id.* at n.165.

Critics of Gellman's reasoning, and they are legion, declare that hers is a false distinction.

. . . [T]he prohibition against factoring race into employment decisions is hardly a mere incidental result of anti-discrimination laws. Rather, the Supreme Court has written that "[d]isparate treatment' . . . is the most easily understood type of discrimination and [u]ndoubtedly . . . was the most obvious evil Congress had in mind when it enacted Title VII." By contrast, some have argued that prohibiting disparate impact was not intended by the statute. It is ironic, then, that critics of the constitutionality of penalty-enhancement statutes would pin their distinction between such statutes and anti-discrimination on the existence of disparate impact. The argument implies that if in fact anti-discrimination laws were limited to disparate treatment, they would then be unconstitutional. It would also imply the unlikely result that if penalty-enhancement statutes were broadened to permit a showing of disparate impact, and thus conformed to anti-discrimination laws, this would cure their constitutional infirmity.¹⁹¹

Thus, Gellman's thoughtful and influential¹⁹² analysis is subject to serious criticism. There remains, then, a need to adequately distinguish hate crimes statutes from employment discrimination laws.

3. *Inextricably Intertwined Motive and Conduct*

Hate crimes statutes, targeting as they do certain thoughts and motives, are content-based.¹⁹³ Because content-based statutes are subject to strict scrutiny,¹⁹⁴ a court should strike them down unless they are narrowly tailored to meet a compelling state interest.¹⁹⁵ Assuming,

¹⁹¹ Grannis, *supra* note 151, at 196 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citation omitted)).

¹⁹² See, e.g., *State v. Mitchell*, 485 N.W.2d 807, 810 (Wis. 1992) (citing Gellman with approval); *State v. Wyant*, 597 N.E.2d 450, 453 (Ohio 1992) (citing Gellman with approval); *In re Joshua H.*, 17 Cal. Rptr. 2d 291 (Ct. App. 1993) (citing Gellman with disapproval).

¹⁹³ See *supra* note 155 and accompanying text.

¹⁹⁴ See *supra* notes 145-48 and accompanying text.

¹⁹⁵ See *Texas v. Johnson*, 491 U.S. 397, 402 (1989) (holding that under the facts of the case, flag burning is protected speech).

arguendo, that the enumerated harms of hate crimes form a compelling state interest, there remains the requirement that the statutes be narrowly tailored to meet that interest without unduly suppressing free expression or thought. It is here, more than anywhere, that hate crimes laws are fatally flawed. In this line of analysis, a distinction becomes apparent between hate crimes statutes and employment discrimination statutes.

An analogy is illustrative. Imagine a patient suffering from cancer of the liver and a surgeon deliberating about the wisdom of operating to excise the tumor. In large measure, the surgeon's determination will be guided by the extent to which the tumor has metastasized; the more confined the tumor, the easier it will be to remove it without damaging healthy tissue. If the cancer has spread too much, surgery reaches a point of diminishing returns; the surgeon can remove the entire tumor, but so much healthy and necessary liver tissue will be damaged that there is no net benefit to the patient.¹⁹⁶

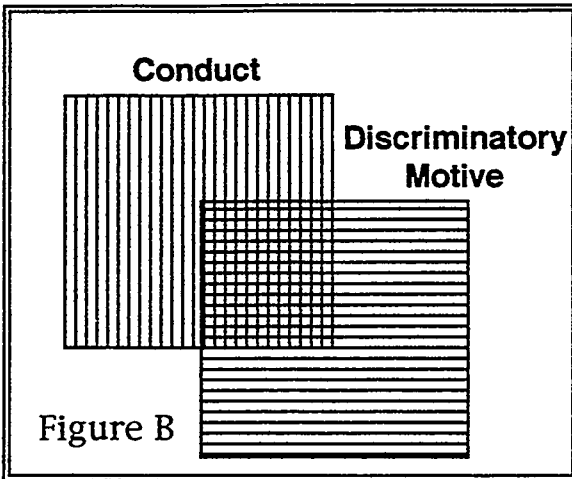
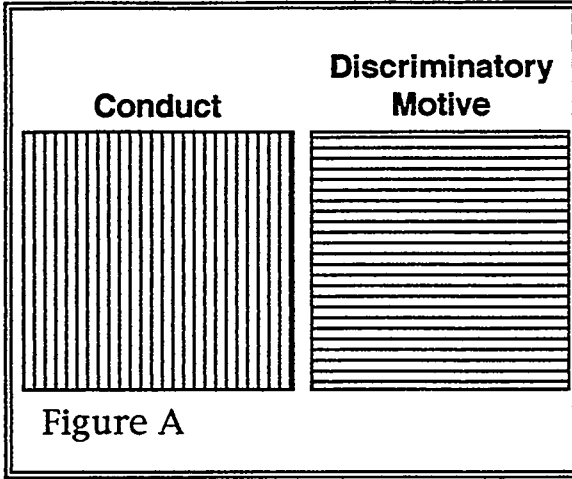
Now, consider the area of expressive conduct. *O'Brien*¹⁹⁷ teaches that, in a strict scrutiny setting, encroachment upon free expression is to be allowed only if supported by compelling state interests and minimal intrusion.¹⁹⁸ In this sense, the burden on free expression is akin to the tumor. Just as the surgeon will operate to remove a tumor if the benefit outweighs the damage to the healthy organ, so should a legal analyst seek to extract a burden on free thought if the extraction will not destroy the utility of the criminal law attempt to forestall the conduct.

In the case of hate crimes legislation, the extraction can be performed because the line of demarcation is pronounced: the underlying criminal prohibition, perhaps assault, is already a punishable offense. Thus, the offense to the First Amendment embodied in the enhanced penalty is easily separable and should be excised. In the model below, Figure A represents a hate crime. The bias motivation is distinct from the underlying conduct—a point highlighted by the fact that hate crimes laws *require* a predicate offense. The patterns in the boxes in Figure A are distinct. In the same sense, the components of hate crimes are distinct, forming almost a mathematical equation: Predicate Offense + Hate = Hate Crime.

¹⁹⁶ Recognizing that this description may be rather over-simplified, I offer it only for purposes of comparison to the theme of the Article.

¹⁹⁷ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁹⁸ *See supra* notes 155-57 and accompanying text.



The same cannot be said for employment discrimination statutes. There is no predicate offense required since hiring, promotion, and discharge decisions are not ordinarily legally proscribable acts.¹⁹⁹ Therefore, the underlying conduct is subject to legal review only when there is an illicit motive. In this way, in the context of employment discrimination statutes,

¹⁹⁹ In so saying, it is understood that not all employment situations are at-will and that contract breaches can bring civil penalties.

the conduct and the motive are inextricably intertwined, as illustrated above in Figure B. Just as the patterns in Figure B merge, so do the act and the motive in improper employment discrimination. The compelling societal interest in preventing employment discrimination can only be achieved by reference to the motive (or by a disparate impact claim).²⁰⁰ By contrast, hate crimes can be and have been constrained by the requisite legal prohibitions against the underlying offenses in hate crimes statutes.²⁰¹ Thus, the incursion into free expression is hardly "incidental," as required by *O'Brien*.²⁰²

Returning to the cancer surgery analogy, a surgeon most likely would elect to extract an easily removable, localized tumor because the surrounding healthy tissue would be unaffected. In the same sense, the First Amendment affront of hate crimes legislation can be removed while still leaving valid, enforceable criminal laws to prevent opprobrious conduct. The surgeon, confronted by a tumor that has metastasized through the organ, is less likely to operate because the healthy tissue would almost certainly be sacrificed. Similarly, the restriction of free expression could not be removed from employment discrimination statutes without rendering them impotent.

There is, then, a meaningful distinction between employment discrimination statutes and hate crimes laws. In sum, hate crimes laws are not narrowly tailored to meet a compelling state interest, and their

²⁰⁰ *Supra* note 191 and accompanying text.

²⁰¹ *See supra* note 5 and accompanying text.

²⁰² Several law professors and writers echoed this idea in their *amicus* brief in *Mitchell*.

In this sense, anti-discrimination laws are analogous to the law upheld by this Court in [*O'Brien*]. There this Court held that a law making it a crime to destroy one's draft card is constitutional, despite the fact that such destruction had been employed as part of a political protest. This was because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important or substantial governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The same cannot be said, however, of hate crime sentence enhancement laws. In the case of hate crimes, the government's legitimate interest in regulating the non-speech element is satisfied by punishing an individual's criminal acts. No further need—short of the illegitimate desire to punish objectionable beliefs—therefore justifies sentence enhancement on the basis of the defendant's political motivation.

Brief of *Amicus Curiae*, Larry Alexander, Ralph Brown, Alan Dershowitz, David Goldberger, Gerald Gunther, Nat Hentoff and Diane Zimmerman, *supra* note 132, at 12.

rejection on that basis need not endanger the constitutional underpinnings of employment discrimination laws.

E. An Alternative Approach: The New Judicial Federalism

In 1977, Associate Justice William Brennan suggested that state courts, many of them chafing under the increasingly conservative jurisprudence of the United States Supreme Court, pay heed to their own state constitutions.²⁰³ In the later years of the Burger Court, and through the present tenure of the Rehnquist Court, state courts have increasingly followed Brennan's admonition,²⁰⁴ the result being what has been termed "The New Judicial Federalism" ("NJF").²⁰⁵ Because state courts considering challenges to state hate crimes statutes are not limited to federal constitutional considerations, the determination of the U.S. Supreme Court in *Wisconsin v. Mitchell* does not end the inquiry.

State courts have long relied almost exclusively on the Federal Constitution in examining constitutional questions.²⁰⁶ This reliance is due, principally, to the Supremacy Clause²⁰⁷ and the abundance of precedent on almost all federal constitutional questions. The Supremacy Clause mandates, *inter alia*, that no state law may run counter to the Federal Constitution or federal laws.²⁰⁸ The Clause does not, of course, forbid states from offering their citizens more rights or *more extensive* rights than the Federal Constitution offers—the existence and extent of federal rights being subject to judicial interpretation.²⁰⁹ The NJF has been an oasis of sorts for liberals, as it provides a mechanism for recognizing rights that the U.S. Supreme Court has increasingly ques-

²⁰³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

²⁰⁴ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780 (1992) (surveying state cases utilizing state constitutions).

²⁰⁵ See Donald E. Batterson, Comment, *A Trend Ephemeral? Eternal? Neither?: A Durational Look at the New Judicial Federalism*, 42 EMORY L.J. 209 (1993).

²⁰⁶ See, e.g., *Commonwealth v. Allen*, 549 N.E.2d 430 (Mass. 1990) (evaluating the case under the U.S. Supreme Court's *Aquilar-Spinelli* test for free speech cases).

²⁰⁷ This Constitution, and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, § 2.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

tioned.²¹⁰ However, while state courts are looking to state constitutions more frequently, the practice is not without its critics.²¹¹

State hate crimes statutes provide appropriate cases for application of the New Judicial Federalism. Although proponents of the NJF have most frequently applied it in the context of criminal procedure,²¹² this is presumably because of the U.S. Supreme Court's increasing refusal to recognize and enforce even long-standing rights in that arena.²¹³ There

²¹⁰ For example, in 1992, the Pennsylvania Supreme Court relied on the Pennsylvania Constitution to reverse a well-known murder conviction because of prosecutorial misconduct. *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) (In 1979, high school principal Jay Smith was convicted of murdering a teacher and her two children. *Id.*). The court determined that Pennsylvania's double jeopardy provision barred retrial of the defendant and, consequently, discharged the defendant. *Id.* at 325. Because the court expressly relied on the state constitution, the Commonwealth could not seek federal review of the decision. *See infra* notes 230-34.

²¹¹ *See, e.g.*, Gardner, *supra* note 204; Ralph Adam Fine, "New Federalism" in the Post-Brennan Era, *LEGAL TIMES*, Aug. 13, 1990, at 31. Fine, a judge of the Wisconsin Court of Appeals, argues that the New Judicial Federalism is essentially an unjustifiable form of judicial activism aimed at initiating social change without legislative action. *Id.* The argument is much like that leveled at the U.S. Supreme Court during the tenure of Chief Justice Earl Warren. *See, e.g.*, Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B. U. L. REV. 747 (1992).

²¹² *See, e.g.*, *Commonwealth v. Smith*, 615 A.2d 321, 324 (Pa. 1992); *State v. Gonzalez*, 853 P.2d 526, 529 (Alaska 1993).

²¹³ Two noteworthy examples are the recent cases in the areas of the Fifth Amendment privilege against compelled self-incrimination and the area of the Fourth Amendment Exclusionary Rule. In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court held that an arrested person may not be subjected to custodial interrogation without being advised of his right to counsel. *Id.* In the quarter century since *Miranda*, however, the Court has virtually allowed the exceptions to swallow the rule. *See, e.g.*, *Oregon v. Elstad*, 470 U.S. 298 (1985) (fact that earlier confession was gained without *Miranda* warnings does not taint later, post-*Miranda* confession); *Harris v. New York*, 401 U.S. 222, 224 (1971) (statements obtained in violation of *Miranda* may be used to impeach a defendant's testimony).

The Exclusionary Rule is a judicially created rule that, at its inception, required the suppression of evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments. *Weeks v. United States*, 232 U.S. 383 (1914) (applying the Exclusionary Rule in the federal courts); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the Exclusionary Rule to state courts). Again, the Court has created numerous exceptions to the rule such that its continuing vitality remains in jeopardy. *See, e.g.*, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (rule not proven to deter police misconduct and in need of narrowing); *United States v. Leon*, 468 U.S. 897 (1984) (product of an improper search not suppressed if police acted in good-faith reliance on a defective search warrant); *United States v. Janis*, 428 U.S. 433 (1976) (evidence seized in violation of the Fourth Amendment admissible in federal civil trial). As it dies a "death by a thousand cuts," the Exclusionary Rule will not be mourned by all. *See, e.g.*, RALPH

is, however, no reason for state courts to restrict the federalism analysis to the criminal procedure arena, and many have not.²¹⁴ The U.S. Supreme Court's determination that the hate crimes statutes are not offensive to the Federal Constitution in no way restricts the power of a state court to find a particular statute forbidden under the state constitution. Again, a state is always free to provide *more* rights than the Federal Constitution, but not fewer.²¹⁵

There have been a number of notable recent cases employing the NJF. For example, in *Kentucky v. Wasson*,²¹⁶ the Kentucky Supreme Court applied the state constitution to the case of a man who solicited an undercover police officer to engage in "deviate sexual intercourse," as defined in a Kentucky statute.²¹⁷ In essence, the case presented a question of whether a state could proscribe homosexual conduct.²¹⁸ Six years earlier, the United States Supreme Court upheld Georgia's sodomy statute in *Bowers v. Hardwick*,²¹⁹ refusing to extend substantive due process protection to homosexual conduct.²²⁰ In *Wasson*, however, the Kentucky court looked not at the Federal Constitution, but at the Kentucky Constitution.

§ 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Third: The right of seeking and pursuing their safety and happiness. . . .

§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.²²¹

The court concluded that homosexuals should be regarded as a protected class for purposes of equal protection analysis under the state constitution.²²²

ADAM FINE, *THE ESCAPE OF THE GUILTY* (1986) (arguing that the rule is all too often employed in cases in which a defendant is clearly guilty). *But see* Kathleen M. Ghreichi, Note, *James v. Illinois: An Unexpected Departure from the Steady Erosion of the Fourth Amendment Exclusionary Rule*, 22 U. TOL. L. REV. 839, 840 (1991).

²¹⁴ See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that classifications by sex are suspect for equal protection purposes); see also *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 938 (N.Y. 1992) (holding that statements made by defendants at a public hearing were constitutionally protected).

²¹⁵ See *supra* note 209 and accompanying text.

²¹⁶ 842 S.W.2d 487 (Ky. 1992), *reh'g denied* (1993).

²¹⁷ See KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1991).

²¹⁸ *Wasson*, 842 S.W.2d 487.

²¹⁹ 478 U.S. 186 (1986).

²²⁰ *Id.* at 190-96.

²²¹ KY. BILL OF RIGHTS, KY. CONST. art. I, § 1-2.

²²² *Wasson*, 842 S.W.2d at 501.

With that categorization, the statute had to pass a substantial governmental interest/rational basis test.

We need not speculate as to whether male and/or female homosexuals will be allowed status as a protected class for equal protection purposes if and when the U.S. Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution.²²³

The Hawaii Supreme Court followed an analysis similar to that of the Kentucky Supreme Court in concluding that a state statute forbidding same-sex marriage may violate that state's equal protection provision.²²⁴ The Hawaii court held that the Hawaii Constitution required that sex be regarded as a suspect classification for purposes of equal protection. Finding that a statute prohibiting marriage because of gender is subject to strict scrutiny, the Hawaii court remanded the case for a determination of whether the statute could withstand the heightened scrutiny.²²⁵

In the free expression area, few decisions have been based on state constitutional law.²²⁶ There are, however, a number of provisions in state constitutions that implicate freedom of thought. The Pennsylvania Constitution, for example, begins with a Declaration of Rights:

Sec. 7. Freedom of press and speech; libels

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of

²²³ *Id.*

²²⁴ *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993).

²²⁵ *Id.* at 62; *see also* HAW. CONST. art. I, § 3. More recent state cases relying on state constitutions include *In re E.D.J.*, 502 N.W.2d 779 (Minn. 1993) (holding that the Minnesota Constitution grants greater protection than that recognized by the United States Supreme Court in *California v. Hodari D.*, 111 S. Ct. 1547 (1991)) and *In re J.W.T.*, No. D-1742; 36 Tex. Sup. J. 1126 (Texas June 30, 1993) (holding that putative father has a right under the Texas Constitution to rebut presumption of legitimacy because Texas "due course of law" provision is broader than federal due process guarantee).

²²⁶ *But see* *State v. Plowman*, 838 P.2d 558, 560 (Or. 1992). The idea of applying state constitutional law to federal First Amendment questions is not novel. *See* Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951) (concluding that reference to state constitutions by courts was disappointing); *see also* Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long-Term Prospects*, 19 FLA. ST. U. L. REV. 1053, 1054 (1992); Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984).

government, and no law shall ever be made to restrain the right thereof. *The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.*²²⁷

Similarly, the Indiana Constitution holds:

Sec. 9. Free speech and writing

*No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.*²²⁸

It is beyond the scope of this Article to suggest specific doctrinal arguments for application of state constitutions to hate crimes statutes.²²⁹ However, many of the provisions are sufficiently broad to support interpretations and analyses of hate crimes legislation that are less deferential than that of the U.S. Supreme Court.

The U.S. Supreme Court has the power to review a decision of a state's highest court, provided that the opinion is based upon the U.S. Constitution or federal law.²³⁰ In *Michigan v. Long*,²³¹ the Court noted that it would not review a state case if the state court included a "plain statement" that the decision relied on "adequate and independent" state law grounds.²³²

²²⁷ PA. CONST. art. 1, § 7 (emphasis added).

²²⁸ IND. CONST. art. 1, § 9 (emphasis added). Indeed, the Wisconsin Constitution includes similar language:

Section 3. Free speech; libel

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.

WISC. CONST. art. I, § 3. Had the Wisconsin Supreme Court relied on this language in *Mitchell*, there would have been no basis for federal review and the rejection of the statute would have been final.

²²⁹ Proponents of the hate crimes statutes will likely point to language such as that found in the Pennsylvania provision: ". . . being responsible for the abuse of that liberty." PA. CONST. art. 1, § 7. Of note is the decision of the Oregon Supreme Court in *State v. Plowman*, 838 P.2d 558, 564 (Or. 1992), in which the court upheld the state hate crimes provision against both state and federal constitutional attack.

²³⁰ See *Herb v. Pitcaim*, 324 U.S. 117 (1945). The Court stated: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-26.

²³¹ 463 U.S. 1032 (1983).

²³² *Id.* at 1041-42.

Otherwise, the Court would presume that federal grounds underlay the state determination.²³³ Hence, *Long* provides a *caveat* to state judges who would be practitioners of the NJF: If you seek to avoid federal review, expressly state that your holding arises from the state constitution.²³⁴

There are those who will see this call to the NJF as advocating judicial defiance of legislative will.²³⁵ To an extent, it is just that—as is almost any determination that a duly enacted statute offends the federal or state Constitution. The importance of legislatures to democracy is that they reflect most directly the will of the majority. Often, such responsiveness is a virtue.²³⁶ There are times, however, when it is a detriment.²³⁷ Statutes that purport to stem the rising tide of hate crimes are attractive *a priori*. There are few in our society who would champion the content of hate speech or the commission of crime based on hate, just as there are few who would support flag burning.²³⁸ Those legislators who might raise some of the many arguments against such statutes on constitutional grounds are likely put off by visions of the inevitable newspaper headlines: “Senator Dogma Opposes Hate Crimes Measure.” First Amendment arguments are often the most difficult and unpopular to make.²³⁹ That being the case, the will of the legislature is not always a well-reasoned will. The *raison d’etre* of a constitution is to set forth immutable guidelines that will withstand the vagaries of time and popular whim.²⁴⁰ Utilizing state constitutions to strike down hate crimes laws, then, is not so much an act of judicial activism as an effort to remedy

²³³ *Id.*

²³⁴ See, e.g., *American Trucking Associations v. Smith*, 496 U.S. 167, 177 (1990); *In re E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993).

²³⁵ See Fine, *supra* note 211, at 31.

²³⁶ The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000(h)(6) (1988).

²³⁷ For example, the Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. 1990) sought to reverse the Supreme Court opinion in *Texas v. Johnson*, 491 U.S. 397 (1989), which invalidated Texas’ flag desecration statute. The federal legislation, ill-advised and constitutionally doomed, was the result of public outcry. See Fine, *supra* note 145, at 777-79 (describing the public outcry over the *Johnson* decision). A year later, the Supreme Court struck down the federal enactment. *United States v. Eichman*, 496 U.S. 310 (1990).

²³⁸ See *Texas v. Johnson*, 491 U.S. at 421 (Kennedy, J., concurring); Fine, *supra* note 145, at 802.

²³⁹ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1200 (7th Cir. 1978) (regarding a Nazi march in Skokie, Illinois), *cert. denied sub nom.*, 439 U.S. 916 (1978).

²⁴⁰ See *In re Yamashita*, 327 U.S. 1, 26-27 (1946) (Murphy, J., dissenting); *Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 69 (1803).

unconstitutional, poorly considered legislative action. Justice Hugo Black, a former senator, aptly wrote in 1952:

The motives behind the state laws may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."²⁴¹

It is, of course, important to note that passage of a federal hate crimes law would render much of the foregoing New Judicial Federalism discussion moot, at least in the context of the federal law and its enforcement. NJF adherents utilize *state* constitutions to strike down *state* laws.²⁴² A federal statute, however, could not be found invalid by reference to a state constitution—the Supremacy Clause so guarantees.²⁴³

CONCLUSION

There is a danger in voicing criticism of hate crimes statutes. In a society of sound bites and limited concentration, the public—including academics—all too often simplifies issues so as to obscure an important nuance.²⁴⁴ We append labels where fuller description, although neces-

²⁴¹ *Beauharnais v. Illinois*, 343 U.S. 250, 274 (Black, J., dissenting). Black held an absolutist view of First Amendment rights, believing that the words "Congress shall make no law . . . abridging the freedom of speech or of the press" mean that Congress shall make *no* law, virtually without exception. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 148 (1979). During the 1970s, when the Burger Court struggled to agree on an appropriate standard for what was obscene and, therefore, not constitutionally protected, the Justices would gather in the basement of the Supreme Court building to view challenged films. Justices Black and William O. Douglas declined to attend, asserting that no matter what the content, the films merited protection. *Id.* at 234. "If I want to go see that film," Black said, "I should pay my money." *Id.* See also *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (holding that a city ordinance making mere possession of an obscene book a crime, even in the absence of any knowledge of the obscenity, was a violation of the First Amendment).

²⁴² See *supra* notes 215-29.

²⁴³ See *supra* note 207.

²⁴⁴ The debate about abortion rights provides a good illustration. The issue in *Roe v. Wade*, 410 U.S. 113 (1973), was not whether abortion was moral but whether a state could constitutionally deprive a woman of the option to abort a pregnancy. Oversimplification of the issue has made murky that distinction, so that many who count themselves as "pro-life" are, in reality, "pro-choice." They believe abortion is wrong but they also believe it is for each woman to choose. Many who oppose abortion rights are quick to label their opponents "pro-abortion," when, in fact, many are not in favor of

sary to proper understanding, would be burdensome.²⁴⁵ In the hate crimes context, those who oppose legislation must bear the risk of being labelled as somehow in favor of hate crimes.²⁴⁶ In truth, hate crimes legislation opponents recognize the egregious harm of ethnic and racial intimidation but fear more the slow—or not so slow—erosion of critical constitutional rights.²⁴⁷

abortion but are instead opposed to state intervention in the decision.

²⁴⁵ I must accept some small measure of responsibility as, at one time, I worked as a television news anchor and reporter.

²⁴⁶ In arguing against hate crimes laws, I recognize that codified penalties are only part of the issue. When they impose sentences, judges necessarily consider a wide range of issues. See *supra* note 88 and accompanying text. Given that it is impossible to read a judge's mind, it is likely that a range of impermissible considerations form the bases for sentences. Beyond that, juries, even if not so instructed, may discern certain facts from the evidence and use those facts to decide guilt where otherwise they might not. It is not a new prospect. See Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 7217 (1992) (describing Justice Marshall's stories of defending black criminal defendants in the South in the 1940s when conviction by white juries was all but certain); see also ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993) (giving fictional account of young black man who was found guilty of capital murder almost immediately after the jury began its deliberations).

²⁴⁷ It is reminiscent of Brutus' proclamation in *Julius Caesar*: "Not that I loved Caesar less but that I loved Rome more." WILLIAM SHAKESPEARE, *JULIUS CAESAR*, Act III, Scene 2. Further, regardless of judicial approval, as Wisconsin Justice Shirley Abrahamson noted, the statutes are not likely to be effective. Hate can hardly be legislated out of existence. 485 N.W.2d 807, 818-19 (Wis. 1992) (Abrahamson, J., dissenting).