Rocks and hard places:

The politics of hate crime

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Watching from the UK, it is remarkable how pressure groups in the USA mobilized successfully during the past two decades to persuade Congress and many state legislatures to recognize 'hate crime' as a serious social problem and a distinct category of criminal law. High-profile task forces were created to identify, investigate, and prosecute perpetrators of 'hate crime' as well as to collate statistics. High-profile cases such as the crimes against Matthew Sheppard, Brandon Lee and James Byrd Jr. fuelled demands for legislation that penalizes crimes motivated by bias or prejudice, provides civil redress for victims of hate crime and requires state agencies to collect data on the prevalence of hate crime. The 'No Hate at Penn State' sit-in and rally was organized to draw national attention to racial intolerance and harassment on college campuses throughout the USA. By comparison, in the UK, the term 'hate crime' only achieved common currency post 1999 in the aftermath of the publication of the Macpherson report about the racist murder of black teenager Stephen Lawrence and the neo-Nazi nail-bombing campaign which targeted symbolic locations across London in April of that year.[1] At the time of writing, the term has been popularized by the work of the Racial and Violent Crimes Task Force of the Metropolitan Police through leaflets informing the public that 'Racist crime, domestic violence, hate mail, homophobic crime are hate crimes. They hurt. They're illegal. They can be stopped.'

The emergence of 'hate crime' has generated considerable public commentary, much of it focusing on definitional issues, on which forms of criminal behaviour should be embraced by the term and on methods of data collection. For example, it took intensive campaigning before sexual orientation, gender and disability were recognized in state hate crime statutes. Much of the academic literature in the area mirrors the concerns of campaign groups, providing case studies of why the government and the

criminal justice system should commit itself to tackling such crime as a matter of urgency. That there has been little serious academic discussion of the origins and development of what we might call the 'hate crime' juggernaut may explain the positive reception given the publication of James B. Jacobs and Kimberly Potter's provocative 1998 text *Hate Crime: Criminal Law and Identity Politics*. Jacobs and Potter throw down the gauntlet by presenting the case for the abolition of 'hate crime' legislation. For these authors, the emergence of 'hate crime' signifies a profound shift in how America responds to crime. Extremely loose definitions of 'hate crime' have been accepted by lawmakers, as has the privileging of some motivational states over others. There is no hard evidence to support the claim of campaign groups that there has been an explosion of 'hate crime' in the USA. On the contrary, Jacobs and Potter are adamant that across a range of indicators, the nation is more free of prejudice and bias than at any time in the 20th century. The majority of reported hate crimes are deemed to be 'low level' offences such as graffiti, vandalism and harassment carried out by juveniles and young offenders, rather than the 'wave' of high-profile serious assaults and murders highlighted by the news media and campaign groups. In addition, hate crime legislation focuses on the borderline between expressions of opinion and prejudice and criminal acts. Nor, as far as Jacobs and Potter are concerned, is there evidence that the criminal justice system is incapable of dealing with the offences and offenders considered under hate crime legislation.

Jacobs and Potter's core thesis is that the development of a national anti-hate crime climate in the USA is the result of heightened public sensitivity to prejudice and more significantly the extension of what they define as 'identity politics' to the domain of criminal justice. Minority groups stand accused in this book of having constructed and dramatized the idea of a 'hate crime' epidemic in order to command public attention and demand remedial action in the form of resources and reparations. Jacobs and Potter also criticize key sections of the news media for accepting the image of a nation besieged by 'hate crime' in order to sell newspapers, and they fault politicians for allowing special interest groups to intimidate them into championing 'hate crime' legislation.

Jacobs and Potter vehemently disagree with the reasons put forward for increased penalties for crime motivated by bias or prejudice, asking why only particular groups are able to claim special protection. It is not clear why hate crimes are deemed to be more socially divisive or destabilizing than, for example, black-on-white street crime. They are also concerned by what they see as the willingness of liberals and radicals to support measures such as penalty enhancement for these crimes because this inevitably feeds into the nation's ever-tougher approach to crime and punishment. According to Jacobs and Potter, however well intentioned, overzealous advocacy and enforcement of hate crime legislation will do more social harm than good for the following reasons. First, campaigning for the eradication of discrimination in public life is quite different than transforming the average

unthinking criminal into an 'equal opportunities' offender. Second, the latest extension of the civil rights and affirmative action agenda will politicize the crime problem, corrupt the core principles of criminal law and undermine constitutional values. Lastly, the fragmentation of criminal law into various offender/victim configurations such as race, gender, religion and sexual orientation will inevitably heighten tensions and reinforce prejudices and mutual suspicions. Hence, at a deeper level, this legislation will contribute to the further 'Balkanization' of American society because every conceivable minority group will be encouraged to lobby for recognition as victims of hate crime. Their main conclusion is that hate crime legislation should be repealed and generic criminal laws enforced impartially and without reference to the race, sex or sexual orientation of offenders and victims. This would ensure that American society returns to a situation where crime is a social problem that unites all law-abiding citizens and the fight against crime enhances social solidarity.

Many of their points are well made and deserve to be taken seriously by campaign groups, legislators and criminologists. The term 'hate crime' can indeed mask or flatten the specificities of racism and homophobia. In addition, those concerned with defending civil liberties and human rights should always be willing to cast a critical gaze on legislation that tampers with constitutional guarantees and safeguards, and empowers the state and the criminal justice system to evaluate not only actions, but speech and thought. Permitting the police to determine what constitutes 'hate crime' creates the potential for arbitrariness and manipulation. In March 2001, Londoners were matter-of-factly informed that the Metropolitan Police had arrested more than 100 people during a series of dawn raids aimed at tackling hate crime in London. The alleged offences ranged from racially aggravated threats to kill, homophobic harassment, publication of racist and homophobic material, assault and rape. What should we make of this? On the one hand, we might express relief that the police are finally taking action and removing some very nasty individuals from the streets. On the other, we still have to be concerned about the potential for miscarriages of justice resultant from a high-profile, anti-hate, dragnet approach that springs as much from the Metropolitan Police desperately trying to assuage its most vociferous critics as from the collection of hard evidence.

There is also the possibility of unintended consequences of anti-hate measures. In the UK, in the aftermath of the publication of the Macpherson report, police officers now accept that 'a racist incident is any incident which is perceived to be racist by the victim or any other person'. There is evidence that police officers and white residents in certain neighbourhoods, as part of a backlash, are interpreting virtually any conflictual encounter with non-whites as a 'race hate' act and reporting it as such. Hence, we are witnessing, through the mobilization of white resentments, a determined effort to subvert the meaning and purpose of the new policy on racial incidents.

But the real danger of Jacobs and Potter's political analysis of hate crime legislation is that for all its explicit commitment to a fair and tolerant society, it ends up undercutting the experience of historically subordinated groups who have endured prejudice, harassment and violence as a result of their race, ethnicity, sexuality, gender and religion.

First, Jacobs and Potter underrepresent the struggle that has had to be mounted by advocacy groups to make these crimes visible and to persuade politicians, the police and the media to take their concerns seriously. In the UK, for example, the extent and seriousness of racist violence was systematically downplayed or given lukewarm coverage. A succession of reports published from the 1970s onward documented dramatic increases in levels of racist harassment and violence in certain parts of the UK and expressed concern about the inadequate response of the police. However, the harrowing evidence presented in various official reports was not reflected in significant sections of news media coverage. Right-wing newspapers tended to: report only the most conspicuous and horrific cases; view incidents of racial violence as random in nature; reject the classification of incidents as racially motivated unless there was evidence of organized involvement by racist and fascist groups; deplore, but view as 'natural' and inevitable, white resentment that their neighbourhoods were being 'invaded' or 'swamped' by ethnic minorities; emphasize the traditions of tolerance that are the hallmark of British society; blame misguided race relations policies for fostering, rather than ameliorating, racial tensions; invoke the idea that 'mugging' could be defined as a form of black-on-white racist violence; and highlight the involvement of anti-racist groups who were exploiting incidents and manipulating victims to ferment racial conflict and discontent.

Second, Jacobs and Potter's tendency to dismiss the seriousness of hate crimes is disturbing. I can agree that 'hate crime' may manufacture crude one-dimensional stereotypes of particular perpetrators. For example, in the case of racist hate crime there seems to be a media obsession with detailing the 'race war' activities of neo-nazi skinhead groups in various jurisdictions. However, we have to be careful not to ignore the significance of 'low level' aggravation and 'petty' sub-criminal racist incidents that are a routine, largely unreported part of everyday life in certain localities. They can create a climate of racial intolerance, prejudice and hostility within which the organized ideologies of 'white power' extremists can take hold and minority ethnic groups are forced to live in a state of endemic fear and terror.

In addition, the political framework underpinning Jacobs and Potter's critique of 'hate crime' legislation deserves close attention. Their book is best viewed as a criminological contribution to the heated debate that has been taking place in American society over the nature of civic culture. They reiterate the views of those 'open society' political commentators who highlight the threat to social cohesion and national unity posed by the emergence of 'identity politics'. Defenders of the 'American way of life' complain that the nation's traditional values of 'consensus', 'commonality', 'unity' and fundamental rights such as the freedom of expression are under

assault from powerful special interest groups marching under the banners of 'multiculturalism' and 'affirmative action' and pushing an agenda that will codify political correctness.

Jacobs and Potter make the critical error of defining movements struggling around issues of race, gender, and sexuality as inherently particularistic, antagonistic and divisive. Rather, these social movements are not just inevitable, but indispensable to multicultural, pluralistic societies fragmented by race, ethnicity, class, and gender. Transcending these divisions requires the forging of a new form of democratized civil society that recognizes and respects differences as well as commonalties. Of course, calling upon the law to alter society is a complex and difficult task. There is the very real threat of the over-legalisation of everyday life and social relations, and the possibility of raising expectations that cannot be met. Nevertheless, law is first and foremost a field of struggle and an important constitutive force moulding social relations and citizen identities. This is why it remains a critical strategy for social reformers. Law provides the ideological and material resources for social transformation in the form of concepts and an imaginary that can be used to articulate and advance claims to citizenship, equal treatment and justice. Supporters of hate crime legislation have a case when they argue that law can send a message to wider society about what will not be tolerated in a heterogeneous society and to previously subordinated or marginalized groups that their rights, interests and needs will be recognized.

In conclusion, I would argue that for all the problems and issues highlighted by Jacobs and Potter, hate crime legislation must be seen as an important part of the ongoing process of identifying and articulating the values, sensibilities and ground rules of vibrant, multicultural societies, including the public recognition and affirmation of the right to be different. Hate crime, in all its many manifestations, strikes at the diversity upon which multicultural societies thrive, denying the right to self-identity and self-determination and imposing a subordinate, inferior or less-than-human status on the victim and her or his community or group. Arguing the case for a 'return' to the Durkheimian ideal of a society where the fight against all forms of crime should be the glue for social solidarity is politically inadequate. In the USA, fighting crime has long played a leading cultural role. Rather than leading to a 'strong centre', this 'fight' has created a fearful, suspicious environment wherein zero-tolerance policing, racial profiling, mass incarceration, the death penalty and gated communities have flourished.

Note

1. Stephen Lawrence was murdered in a racist attack in south London in April 1993. After years of campaigning by his family, the government in 1997 established an inquiry into the Metropolitan Police investigation of the

murder. The inquiry was chaired by Sir William Macpherson of Cluny and when its report was published in February 1999, it was hailed as a landmark in the history of British race relations. The government accepted the finding that institutional racism and professional incompetence had marred the Metropolitan Police investigation of the murder. As the nation was still coming to terms with the wide-ranging implications of the Macpherson report, a series of no-warning nail-bomb attacks took place in Brixton, Brick Lane and Soho in London in April 1999. These localities seem to have been targeted by David Copeland, a young neo-nazi, because they are in many respects the most visible manifestations of multicultural London.

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