Hate Crimes and Everyday Discrimination: Influences of and on the Social Context

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HATE CRIME AND EVERYDAY DISCRIMINATION: INFLUENCES OF AND ON THE SOCIAL CONTEXT

Lu-in Wang

I. INTRODUCTION

I would like to discuss aspects of hate crime that make it somewhat unexceptional. By making these points, I do not in any way mean to imply that hate crime is not a problem worthy of attention in the law. To the contrary, I believe that to point out the unexceptional aspects of hate crimes is to highlight just how important a problem hate crime is, and may help us to develop more effective ways of addressing it. My points are based largely on lessons drawn from social science and historical research on the effects of and motivations behind bias-related violence. Specifically, that literature shows that the way we have tended to think about hate crime - as an extreme, deviant, and isolated phenomenon - greatly oversimplifies the problem. The social science and historical research shows instead that hate crimes are connected to the mainstream social context, for they are strongly influenced by the social environment and in turn exert an influence on that environment.

I also draw on points made by other legal scholars with regard to what might be considered more mundane or "everyday" forms of discrimination, such as racial profiling (particularly "Driving While Black"), consumer discrimina-

* Associate Professor of Law, University of Pittsburgh School of Law. I thank John Douard and the other members of the Rutgers Race & the Law Review for inviting me to participate in their excellent symposium. I also thank Matthew T. King and Allison Strupcowksi for their valuable assistance with the research for this article.

1. "Driving While Black" is the name that has been given to a specific form of racial profiling by law enforcement officers, the practice of "police officers stopping, questioning, and even searching black drivers who have committed no crime, based on the excuse of a traffic offense." David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 MINN. L. REV. 265, 265 (1999) (hereinafter Harris, Why "Driving While Black" Matters). See generally Symposium, Racial Profiling, 3 RUTGERS RACE & L. REV. 117 (2001).
tion, and street harassment of women. Each of these areas is a context in which, as with hate crimes, the law has tended to exceptionalize the motivations and conduct of perpetrators. It thereby overlooks the extent to which those acts are influenced by the mainstream social context and, in turn, reinforce mainstream society's message that certain social groups have been designated as suitable or appropriate targets for ill treatment.

This Article identifies and describes the reciprocal influences between the mainstream social environment and the perpetration of both extreme and everyday discrimination, as well as the reciprocal influences among various types of discrimination. The law seldom does but ought to take into account these relationships because, as this Article also discusses, to exceptionalize discrimination has the ironic effect of "normalizing" or rendering acceptable a range of discriminatory practices that continue to reinforce widespread beliefs, assumptions, and expectations concerning the value and place in society of vulnerable groups.

II. DECONTEXTUALIZING DISCRIMINATION: THE CONVENTIONAL VIEW OF HATE CRIMES

For all of the controversy surrounding penalty enhancement statutes and the differential treatment of hate or bias crimes generally, there seems to be widespread agreement on the


4. Most of the controversy concerning hate crime laws has centered on state penalty enhancement statutes that follow the "ethnic intimidation" model statute drafted by the Anti-Defamation League of B'nai B'rith. Under the model statute, punishment for conduct that already constitutes a crime would be increased if the perpetrator committed the crime "by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals." Anti-Defamation
motivations that drive the bias crime perpetrator or that should be present for an actor to be labeled a "bias criminal." This view is shared by commentators on both sides of the law and policy debate, as well as by professionals within the criminal justice system who decide what acts will be treated as hate crimes and whose decisions influence society's perceptions of hate crime. Yet, though this view is widely accepted as defining and explaining hate crime, it actually distorts understanding of bias crime - and hence, of the issues surrounding the differential legal treatment of it - by oversimplifying the factors that drive the perpetrator and by considering him in isolation from the social context. In particular, the conventional view overemphasizes the perpetrator's deviance or "bad character" and fails to recognize the importance of the social context in promoting the commission of bias crimes. It fails, in other words, to take account of both the ways in which the cultural ideology inspires and rewards bias crime perpetrators and the ways in which the crimes themselves perpetuate the context in which perpetrators can anticipate receiving those rewards.

The common understanding of the "true" hate crime perpetrator may be attributable to several factors. First, as has been important in other contexts, naming the problem as "hate"

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5. I elaborated in greater detail on the conventional understanding of hate crime perpetrators in Wang, Complexities of "Hate," supra note 4.

6. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 13 (1999) (discussing the importance of women naming their griev-
crime both raised public awareness of and drew the attention of the federal and state governments to the phenomenon of bias-motivated violence. At the same time, however, the label “hate crime” has contributed to the distortion and oversimplification of the problem that it seeks to describe. Second, the conventional understanding of hate crime seems to be based, in part, on the empirical attributes of the “prototypical” or “paradigmatic” bias crime. The prototypical case is a stranger-on-stranger crime, usually involving multiple perpetrators who target an individual victim who represents a hated social group, inflict on that person extreme, gratuitous violence, and appear to have no goal other than to terrorize, injure, or kill. This popular image is reinforced by the great publicity given to the most extreme and brutal cases, such as the 1998 murders of Matthew Shepard and James Byrd Jr.


8. For example, Professor Frederick M. Lawrence pointed out that use of the popular term “hate crime” to designate bias-motivated crime has given rise to a key misconception about the nature of the motivation in question. He explains that “[n]ot every crime that is motivated by hatred for the victim is a bias crime.” LAWRENCE, supra note 4, at 9. “Hate-based violence is a bias crime only when this hatred is connected with antipathy for a racial or ethnic group or for an individual because of his membership in that group.” Id. Professor Lawrence therefore prefers the term “bias crime.” Id.

9. See Wang, Transforming Power of “Hate,” supra note 4, at 49-51 (describing features of the prototype).

10. In 1998, Mr. Shepard, a young gay man, was severely beaten by two young men who then tied him to a fence in an isolated area and left him in near-freezing temperatures. Mr. Shepard was in a coma for almost a week before he died, his skull “too crushed for surgery.” Elaine Herscher, News Analysis: Wyoming Death Echoes Rising Anti-Gay Attacks, S.F. CHRON., Oct. 13, 1998, at A7; see also Gay Victim of Beating is Dead; Wyoming College Student Never Came Out of Coma, CHI. TRIB., Oct. 12, 1998, at 1.

Earlier that year, three men chained Mr. James Byrd Jr., a Black man, to the back of a pick-up truck and dragged him for two miles to his death. Mr. Byrd’s torso was found without his head or right arm; those body parts were
However, a prototypical example can provide a misleading basis for assessing an entire category, for prototypes often are drawn based upon the most "ideal" or "extreme" features of a category member, yet often do not represent the statistical norm. Further, the conventional understanding of the motivations behind bias crime in particular is skewed in a way that is typical of how we tend to explain group-based discrimination - and, indeed, much of human behavior - in general. That is, it reflects the "most commonly documented bias in social perception": the tendency to attribute another person's behavior to his or her enduring dispositional qualities (such as prejudices or personality traits) and to overlook the influence of situational factors (such as situational constraints or social norms). This "fundamental attribution error" or "correspondence bias" causes us to see a person's behavior as being determined by his or her character, beliefs, or feelings even when that behavior also or primarily is the result of constraints or expectations introduced by the social context. This Article will show how this bias distorts our understanding of the motivations for committing and the effects of hate crime. It will then elaborate on the reciprocal situational influences that the law ought to take into account.

The common understanding of bias crime incorporates three interrelated assumptions concerning the motivations of the "true" bias crime perpetrator: that his bias is based in his personal hostility toward or "distaste" for the target group; that his bias is deviant, irrational, and not shared by mainstream

found a mile away. 3 Whites held in black man's dragging death, CHI. TRIB., June 10, 1998, at 12; Patty Reinert & Allan Turner, Jasper killer gets death penalty: A smirking King shows no remorse, Hous. CHRON., Feb. 26, 1999, at 1 (reporting on the sentencing of one of Byrd's killers).
11. Wang, Complexities of "Hate," supra note 4, at 803-04 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 106-07 (2d ed. 1991)).
12. See Wang, Complexities of "Hate," supra note 4, at 804.
13. See FISKE & TAYLOR, supra note 11, at 67.
14. Id.
15. Some social psychologists prefer the term "correspondence bias." See, e.g., Daniel T. Gilbert and Patrick S. Malone, The Correspondence Bias, 117 PSYCHOL. BULL. 21 (1995) (describing the correspondence bias as "one of the most fundamental phenomena in social psychology").
16. See FISKE & TAYLOR, supra note 11, at 67.
society; and that his exclusive purpose is to harm a member of the hated target group, rather than being more self-serving - for example, to obtain personal gain. 17

The first assumption locates the source of the perpetrator’s bias within the perpetrator himself. The “true” bias crime perpetrator is assumed to act not, in response to situational factors or the prejudices of others, but out of his own pre-existing beliefs, predisposition, or attitude toward the target group. 18 He does not just discriminate in selecting his victim, but instead seeks to further his strong feelings of hatred or hostility toward the target group. 19

The second assumption is that the perpetrator’s hostile views are not shared by members of mainstream society. 20 Perpetrators are often marginalized by viewed as “deviant or freakish,” 21 and have been described as a “bewildering menace” 22 and as “‘predators’ with a ‘pack mentality’ who ‘feed off each others’ hatred and lunacy.’” 23 Perpetrators are viewed as being controlled, “‘driven’ or ‘blinded’ by their hatred toward the target group.” 24 Accordingly, this assumption discounts the possibility that a perpetrator might choose his victim from a particular social group upon cool-headed reflection or calculation – for example, because he considers members of that group to be “easier” or “more financially rewarding” targets. 25

The third assumption brings together the first two and has the greatest practical effect on how “hate” crimes are defined and handled within the legal system. 26 This assumption holds that the perpetrator’s hostility toward the target group is so powerful and irrational that it overwhelms all other possible

17. These three assumptions are discussed more fully in Wang, Complexities of “Hate,” supra note 4, at 816-30.
18. See id. at 817.
19. See id.
20. See id. at 816.
21. Id. at 822.
22. Id.
23. Id.
24. Id. at 823.
25. Id. at 822.
26. See id. at 825.
reasons for committing a crime. The perpetrator's hatred is assumed to be unable to coexist, for example, with more self-interested motivations such as the desire for material gain or other personal benefits. Thus, although most bias crime statutes require that the defendant's bias be a "substantial" or "significant" motivation — and therefore allow for mixed motive bias crimes — a "true" bias crime is assumed to occur only when the perpetrator's hatred for the target group serves as his exclusive motivation.

Together, these assumptions influence thinking about all of the "big" issues concerning bias crime. They guide the decisions of law enforcement professionals who must determine which cases qualify for treatment as "hate" crime cases and how to handle those cases that do. One major consequence of the three assumptions is that such professionals tend to apply a very narrow definition of bias crime. They tend to pursue only cases that fit the prototype, overlooking cases that are not sensational, do not involve extreme brutality, or do involve mixed motives such as bias coupled with a desire for pecuniary gain. These law enforcement decisions in turn have the cumulative effect of defining bias crime in the public's mind and thereby of shaping society's perceptions of the nature of the problem itself, as being both easily recognizable and rare. The assumptions also strongly influence the identification of the law and policy issues the problem raises, as well as the terms in which those issues should be debated, for the common understanding of the forces that propel bias crimes determines the assessment of whether the law can or should address bias crime as a special problem and what, if anything, law and

27. See Wang, supra note 4, at 10-24, 10-25 (discussing cases construing statutory basis requirement).
28. See Wang, Complexities of "Hate," supra note 4, at 825.
29. See generally id. at 815-30 (discussing ways in which both supporters and critics of bias crime legislation use the three assumptions to support their opposing positions).
30. See id. at 814-15, 825-29.
31. See id. at 827.
32. Id. at 814, 825-28 (citing examples of law enforcement guidelines and decision making practices).
33. See id. at 814, 827.
policy can do to address that problem.\textsuperscript{34} Obviously, supporters of the laws maintain that the law \textit{does} have a role to play in regulating bias crimes, but they tend to view the problem as one that is narrow in scope, with contours that follow the three assumptions.\textsuperscript{35}

Critics, on the other hand, cite the three assumptions to support the following arguments: that hate crimes legislation is unconstitutional because it punishes thoughts or beliefs, in violation of the First Amendment;\textsuperscript{36} that the laws will be ineffective in addressing hate crime because criminals cannot be forced to treat all social groups equally;\textsuperscript{37} and that the laws will even exacerbate intergroup tensions because they highlight divisions among various social groups.\textsuperscript{38} The following section questions the crucial assumptions underlying these arguments.

III. "SUITABLE VICTIMS" AND FEEDBACK LOOPS: RECIPROCAL INFLUENCES BETWEEN HATE CRIME AND THE SOCIAL CONTEXT

What the three assumptions and hence the conventional understanding of hate crime fail to take into account is that hate crimes are not just deviant and isolated acts committed by individuals at the fringe of society. Instead, hate crimes often are committed by individuals who seek to conform to social norms and whose acts reflect mainstream views of the targeted group.\textsuperscript{39} Two themes describe the reciprocal influences between both social context and hate crimes and elucidate how these reciprocal influences are connected to more mundane forms of discrimination. The first theme explains the influence

\begin{itemize}
\item \textsuperscript{34} See generally id. at 815-30.
\item \textsuperscript{35} See generally id. at 819-20, 823-24, 829-30 (discussing ways in which supporters of bias crime legislation rely on the three assumptions in making their arguments).
\item \textsuperscript{36} Id. at 820-21, 830 (summarizing these arguments).
\item \textsuperscript{37} See id. at 821.
\item \textsuperscript{38} Id. (describing critics' argument that, "[e]ven worse, the message that the laws send may actually hinder the crusade for tolerance and equality, for the implication that some victims are ‘worth’ more than others or ‘need more protection’ than others can itself create resentment among groups or aggravate already existing divisions.") (footnotes omitted). Id.
\item \textsuperscript{39} See id. at 893.
\end{itemize}
of the social context on the perpetration of hate crimes by illuminating the ways in which the social environment marks members of certain groups as "suitable victims," thereby enabling perpetrators to use violence against them as a means to a variety of goals. The second theme points out the social and cultural "feedback loop" by which the perpetration of hate crimes itself exerts influence on the social context that marks particular groups as "suitable victims."

A. "Suitable Victims": Influence Of The Social Context

To assume that hate crimes are perpetrated only by those who are deviant, isolated from mainstream society, and driven by strongly-felt prejudice against a particular group is to overlook a large body of evidence to the contrary. Social scientists and historians have demonstrated that hate crimes often are committed by individuals who seek to conform to social norms, to obtain personal gain, or both, and who, furthermore, often deny feelings of personal prejudice against the groups that they target. Even in the context of two "prototypical" hate crimes - anti-gay violence and lynching - these researchers have explained that a perpetrator need not personally "hate" a particular group in order to find reasons to target members of that group for violence. In our society, other motivations can be sufficient because bias-motivated violence can fulfill a wide range of functions for perpetrators. As social psychologist Gregory M. Herek has observed about anti-gay violence in particular, "the primary cause...is not always the attacker's own personal prejudice against lesbians and gay men." Instead, researchers have found that committing anti-gay violence can serve a variety of functions for perpetrators, and

40. Id. at 897-98.
41. Id. at 898-99.
42. This section draws heavily from Wang, Complexities of "Hate," supra note 4.
43. Id. at 866-67.
44. Id. (discussing lynching); id. at 893-94 (discussing anti-gay violence).
often brings them psychological, social and material rewards.\textsuperscript{46} They are able to reap these rewards because the cultural and social environment has identified gay men as suitable vehicles for achieving these goals.\textsuperscript{47}

Some perpetrators - particularly young males who commit anti-gay violence in groups - view gay bashing as a "kind of sport."\textsuperscript{48} Their participation feels risky and exciting, draws them closer to other members of their group, and enhances their self-esteem by bringing the group recognition and respect from peers.\textsuperscript{49} These perpetrators may give little thought to the effects of their acts on the victim,\textsuperscript{50} and often disclaim any feelings of hostility or disapproval toward gays.\textsuperscript{51} Instead, they see the gay victim as "fundamentally a dramatic prop,"\textsuperscript{52} to be used in an almost "recreational" fashion.\textsuperscript{53} These young men do not seriously consider the harm they cause, for they regard gay bashing as socially acceptable and gay men as "suitable targets" for their violence.\textsuperscript{54} The idea that anti-gay violence is socially acceptable is confirmed when perpetrators receive

\textsuperscript{46} Id. at 159-64 (discussing multiple motivations for anti-gay crimes).
\textsuperscript{47} See id.
\textsuperscript{48} GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 76 (1990) (quoting observations of police officers familiar with teenage perpetrators).
\textsuperscript{49} See Wang, Complexities of "Hate," supra note 4, at 880-81.
\textsuperscript{50} See COMSTOCK, supra note 48, at 75-76. For example, Comstock described an incident in which three perpetrators killed a gay man by picking him up and throwing him off of a bridge, then shook hands and laughed "like when you tell a joke." Id. at 77 (quoting Judge Binds Bangor 3 Over for Murder Trial, WKLY. NEWS (Miami, Fla.), Aug. 29, 1984, at 3). Afterwards, one of the three said the group's intent had been only "to talk to him or scare him... I didn't want to kill him—all I did was try to scare him. It was just stupid, very stupid." Id. at 76 (footnote omitted).
\textsuperscript{51} See, e.g., id. at 75-76, 93-94 (describing anti-gay assailants' professed or apparent lack of hostility toward or even disapproval of gay men and lesbians); Karen Franklin, Unassuming Motivations: Contextualizing the Narratives of Antigay Assaults, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 1, 20 (Gregory M. Herek, ed., 1998) (reporting that "people who have assaulted homosexuals typically do not recognize themselves in the stereotyped image of the hate-filled extremist").
\textsuperscript{52} Franklin, supra note 51, at 12.
\textsuperscript{53} See COMSTOCK, supra note 48, at 76.
\textsuperscript{54} See Wang, Complexities of "Hate," supra note 4, at 876-78.
light sanctions or escape punishment altogether. Perpetrators
know that many in our society - including authority figures
such as parents, law enforcement officers, political and relig-
ious leaders - see anti-gay violence as a “rite of passage” for
young men, view gays as deserving of such treatment, and will
not treat the violence seriously. 55 School officials, for exam-
ple, often dismiss their antics as “boys being boys” and decline
to discipline them. 56 This attitude is also exhibited by judges
who impose light sentences, for anti-gay violence and even
murder, sometimes insinuating that the gay victims invited the
attack through their own inappropriate behavior. 57

In addition to “recreational” gay bashing, gay men are espe-
cially vulnerable to property crimes such as the “shakedown,”
blackmail, and robbery. 58 These are all crimes in which the
perpetrator extorts money or property from a gay man using
the threats of both violence and disclosure of the victim’s sex-
ual orientation or sexual practices. 59 Perpetrators of such
crimes may desire material or economic rewards instead of or
in addition to social rewards, but they also are able to use soci-
ety’s general disregard for gay men to their advantage and in a
way that is even more openly calculating. 60 These perpetrators
predict that gay men are likely to be fearful of how family
members, business associates, and even law enforcement offi-
cers would react to news of their sexual orientation and will
prefer to hand over their money or property rather than fight
back or report the crime and risk revealing that information. 61
Perpetrators also count on the likelihood that police, judges,

55. See id. at 877-78.
56. See, e.g., id. at 878-79 (discussing Nabozny v. Podlesny, 92 F.3d 446
(7th Cir. 1996)).
57. See id. at 879.
58. See id. at 883-85.
59. See id. at 885-92 (describing the “shakedown,” blackmail, assault, and
robbery as particular profit-seeking crimes against gay men, perpetrated by
strangers, police officers, acquaintances and even friends of the victim).
60. See id. at 883-84.
61. See id. at 885, 887-91.
juries, and others will not take seriously offenses against gays.\textsuperscript{62}

Even racial violence during this country's lynching era - 1880 to 1930 - could rationally have been practiced by individuals who did not personally harbor racial animus, despite its horrendous brutality and the apparent hysteria that it aroused among participants and observers.\textsuperscript{63} Certainly the racist ideology that prevailed in the South throughout the lynching era was a key factor in the frequency of racial violence during that period. However:

[L]ynching cannot be explained simply as the result of perpetrators' contempt or distaste for or desire to harm members of another race. Contemporary scholars generally agree that lynching was a response to white southerners' perception that freed blacks posed a threat to white dominance in social, political, and economic arenas.\textsuperscript{64}

In particular, an important body of recent historical sociological scholarship indicates that White southerners' desire to maintain their economic and social dominance over Blacks played a major role in driving the violence. Stewart E. Tolnay and E.M. Beck conducted sophisticated, quantitative studies of the historical data on lynching.\textsuperscript{65} Their studies support the view that White perpetrators used racial violence primarily as a means of obtaining economic benefits in the form of control over land and labor, the two key resources in that region at that time. Their studies also indicate that, not only were perpetrators often primarily focused on the benefits to themselves that they perceived might derive from racial violence, but they also controlled the level and timing of the violence as it suited

\begin{itemize}
  \item \textsuperscript{62} See id. at 892 (quoting interviews with convicted killers of gay men who explained their reasons for targeting gay men in these terms).
  \item \textsuperscript{63} See id. at 834 (describing lynching practice and quoting Herbert Shapiro, White Violence and Black Response: From Reconstruction to Montgomery 31 (1988)).
\end{itemize}
their interests, escalating the violence at times when and in places where it would help them to control land and labor, and moderating or even abandoning the violence when and where it was either not necessary or even harmful to White interests. Lynching also helped to maintain solidarity between Whites of different economic classes, a function that appears to have been encouraged by White, landowning employers as a means of maintaining their interests by discouraging interracial solidarity among workers, which might have promoted labor unrest.66

The widespread practice and utility of racial violence certainly depended upon a racially hostile climate. However, an important point that emerges from these studies is that, in such an environment, an individual perpetrator did not need to harbor racial animus in order to have reason to lynch. As Tolnay and Beck have explained, “given the Deep South’s racial caste structure, whites could harass and assault blacks with virtual impunity. Blacks were considered legitimate, and even deserving, objects for white wrath.”67 That is, one could both benefit from targeting members of that group for violence and get away with it.68

The work of social scientists who have studied anti-gay violence and lynching demonstrates the flaws in the conventional understanding of hate crimes. Rather than being driven by personal hostility toward the targeted group, many perpetrators engage in selective victimization in order to obtain a range of benefits for themselves by exploiting the group’s social vulnerability. In such cases the selective targeting of vulnerable social groups seems sensible or even rational, because the social environment supports, encourages, and even rewards such targeting.

66. See generally Wang, Complexities of “Hate,” supra note 4, at 833-67 for a discussion and description of Beck and Tolnay’s studies.
67. Id. at 866 (quoting Beck & Tolnay, The Killing Fields, supra note 64, at 537).
68. See Wang, Complexities of “Hate,” supra note 4, at 866.
Although hate crimes can be understood as being responsive to the pre-existing social environment, the influence of the social environment provides neither an excuse nor a justification for the discriminatory practice. Moreover, to fully understand the way in which hate crimes fit into the social context, it is important to recognize their role in contributing to and reinforcing that environment. Social scientists and legal scholars have explained that hate crimes have effects that are both different from and more harmful than those of their non-discriminatory counterparts. The individual victim may experience greater emotional and psychological harm and adopt more extreme defensive behavioral strategies to avoid similar encounters in the future. However, it is the effects that extend beyond the individual victim that most clearly distinguish hate crime from non-bias-motivated crime. In particular, the ways in which hate crime influences the perceptions of observers - both those who identify with the victim and those who are able to distinguish themselves from the victim - serve to reinforce the social context in which racial and other group-based targeting occur, by influencing expectations about how certain groups will be treated.

Members of the victim's social group who have not been targeted for hate crime will nevertheless understand themselves to be vulnerable to such violence due to their shared group status. They, too, may feel isolated or fearful and adopt defensive behavioral strategies in order to avoid becoming targets themselves. These avoidance strategies may require them to suffer substantial burdens and inconveniences,
as well as to forgo significant benefits and opportunities.\textsuperscript{75} For example, they may avoid going to places where they might "stick out" or decline to engage in activities that might draw attention to them.\textsuperscript{76} Some writers have described how their fear of hate crime has influenced their decisions about such seemingly mundane matters as what neighborhoods to drive or run through, what events to attend, and even what vacation spots to patronize.\textsuperscript{77} For some target group members, another way to avoid inviting attack may be to engage in behavior that is stereotypically "expected" of one's social group so as to avoid attracting unwanted attention.\textsuperscript{78}

Hate crimes also contribute to the general perception that some groups are expected targets for violence.\textsuperscript{79} Social psychologists have explained that bias-motivated violence creates the conditions for prejudice and discrimination because it defines the "safe" or expected targets for all manners of ill treatment.\textsuperscript{80} Even if non-target group observers condemn the acts and would never engage in such conduct themselves, they may derive some comfort from their ability to differentiate themselves from the victim and target group and thereby to feel comparatively less vulnerable and more in control of their circumstances.\textsuperscript{81} Further, even if observers do not believe that the victim's social group status justified the attack, they will recognize that the status prompted the attack, and may attribute responsibility to the victim for having invited the crime by making that status visible.\textsuperscript{82} The gay bias crime victim may be blamed for making his sexual orientation "obvious" by

\textsuperscript{75} See id. at 123-24.
\textsuperscript{76} See id.
\textsuperscript{78} See Wang, Transforming Power of "Hate," supra note 4, at 124.
\textsuperscript{79} See id. at 125.
\textsuperscript{80} See, e.g., id. at 95 (citing Thomas Ashby Wills, Downward Comparison Principles in Social Psychology, 90 Psychol. Bull. 245, 246, 257 (1981)).
\textsuperscript{81} See id. at 96.
\textsuperscript{82} See id. at 127-28.
wearing certain clothes or behaving in a certain way.\textsuperscript{83} Similarly, the African American victim of a racially motivated assault may be blamed for having appeared on the streets of a White neighborhood.\textsuperscript{84} Observers recognize the "script" or pattern of bias-motivated violence and understand that members of vulnerable groups are "persons whom the dominant culture considers acceptable to derogate."\textsuperscript{85}

IV. RECIPROCAL INFLUENCES BETWEEN HATE CRIME AND "EVERYDAY" DISCRIMINATION

These themes - of particular groups being marked as expected or appropriate recipients of ill treatment and of the cultural and social feedback loop that reinforces the designation and perpetuates such treatment - have implications beyond the debate over the constitutionality, desirability, and proper application of hate crimes legislation. First, a feedback loop runs between hate crimes and everyday discrimination. As described above, hate crimes contribute to an environment that promotes other, often less noticeable, forms of inferior treatment of certain groups.\textsuperscript{86} Conversely, those more commonplace experiences also contribute to hate crimes, for it is not just violent crime against certain groups that marks them as suitable victims. As this section elaborates, the less dramatic and less noticed ways in which groups are treated on a daily basis also promote the perception that mistreatment of certain groups is acceptable and contributes to the view that they are suitable targets for violence. For example, African Americans were viewed as suitable targets for racial violence during the lynching era in part because of the bad treatment that they

\textsuperscript{83} See id. at 128 (citing Linda Garnets, Gregory M. Herek & Barrie Levy, Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences, 5 J. INTERPERSONAL VIOLENCE 366, 374 (1990)).

\textsuperscript{84} See, e.g., id. (citing Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism, 42 U. MIAMI L. REV. 127, 136 (1987)).

\textsuperscript{85} See id. at 125-28.

\textsuperscript{86} See supra note 70 and accompanying text.
routinely suffered in employment and other everyday settings.\textsuperscript{87}

Second, there are striking parallels between hate crime and everyday discrimination, both in the conventional assumptions about the motivations behind them and in reciprocal influences that are evident between the social context and various forms of discrimination. As with hate crimes, everyday discrimination cannot be attributed entirely to deliberate discrimination or group-based animus, but is the result of dynamics that parallel those I have discussed in the hate crimes context.

The same sort of extreme and simplistic assumptions that are evident in discussions of hate crime also strongly influence the way the law addresses discriminatory treatment that is less violent, more subtle, and more commonplace. As several legal scholars have demonstrated in contexts ranging from government action to employment decisions to police practices to the treatment of customers in retail settings - in other words, sites of "everyday" discrimination - the law tends to understand "true" or actionable discrimination as being deliberate, conscious, and motivated by ill will or animus.\textsuperscript{88} The "fundamental attribution error" applies here, as well.\textsuperscript{89} As with hate crimes, the actor who discriminates is examined in isolation from the context surrounding the questioned decision or action and is viewed as deviant or malicious.\textsuperscript{90} The conse-

\textsuperscript{87} Cf. Tolnay \& Beck, supra note 65, at 70 (describing mistreatment of black laborers during the lynching era).


\textsuperscript{89} See supra notes 11-19 and accompanying text for a discussion of the fundamental attribution error.

\textsuperscript{90} See, e.g., Carter, supra note 88, at 421; Krieger, supra note 88, at 1168-69; Thompson, supra note 88, at 972.
quences of applying these assumptions are also similar in that they lead the law to miss many cases of discrimination,\textsuperscript{91} to overlook the social, behavioral, and cognitive dynamics that contribute to discrimination,\textsuperscript{92} and to actually further discrimination by perpetuating biased perceptions of what constitutes “appropriate” treatment of different social groups\textsuperscript{93} and biased explanations for why certain groups are treated differently.\textsuperscript{94}

A. “Driving While Black”\textsuperscript{95}

Recently, the federal and state governments, as well as the general public, have become more aware of, and concerned about, a problem that is faced routinely by people of color in the United States, particularly African American males.\textsuperscript{96} This problem, “driving while Black,” is a form of racial profiling in which “police officers stop\textsuperscript{,} question\textsuperscript{,} and even search\textsuperscript{] } black drivers who have committed no crime, based on

\textsuperscript{91} See, e.g., Carter, supra note 88, at 429; Kennedy, supra note 88, at 1418; Lawrence, supra note 88, at 324-25.

\textsuperscript{92} See, e.g., Krieger, supra note 88, at 1186-1217 (discussing cognitive biases in intergroup judgment and decision making and questioning the assumptions underlying disparate treatment jurisprudence in employment discrimination law); Lawrence, supra note 88, at 328-44 (discussing theories of unconscious racism); Thompson, supra note 88, at 983-87 (discussing unconscious racism based in categorization, schemas, and stereotyping).

\textsuperscript{93} See infra notes 95-97 and accompanying text.

\textsuperscript{94} Professor Charles R. Lawrence III has pointed out that, “by insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged,” the law not only fails to recognize cases in which discrimination has occurred, but also serves to justify racial discrimination on “moral” grounds: “If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position.” Lawrence, supra note 88, at 324-25.


\textsuperscript{96} See David A. Harris, When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies, 6 Mich. J. Race & L. 237, 237-43 (2001) (hereinafter Harris, When Success Breeds Attack) (discussing the increasing public awareness and steps that legislatures and law enforcement departments have been taking to address this problem).
the excuse of a traffic offense." 97 Like hate crimes, the practice of racial profiling strongly reflects the influence of a social environment in which members of certain racial and ethnic groups are viewed as suitable targets for abusive treatment. 98 More specifically, it reflects the "myth of criminal propensity" that stereotypes members of certain racial groups as being prone to deviant or criminal behavior. 99

The influence of these stereotypes is evident in the commonly expressed view that selective detention or investigation of minority groups in routine cases is simply good police practice. 100 As Professor David A. Harris has explained, "the most common justification offered for the disproportionate numbers of traffic stops of African Americans" is that "Blacks commit a disproportionate share of certain crimes," so "it only makes sense for police to focus their efforts on African Americans." 101 Professor Harris and other legal "scholars have pointed out the faulty reasoning underlying this argument," 102 the wide acceptance of which only emphasizes its racist bent. 103 Nevertheless, the appearance of rationality in discrim-

97. Harris, Why "Driving While Black" Matters, supra note 1, at 265.
98. See id. at 268.
100. Harris, Why "Driving While Black" Matters, supra note 1, at 267.
101. Id. at 294.
102. They have noted, inter alia, that it rests upon dubious interpretations of crime statistics; that it fails to recognize that the vast majority of Blacks do not commit crimes; and that similar reasoning is not applied to Whites for the crimes they commit in disproportionate numbers. Scholars also have pointed out that, even if the practice were "rational" in a statistical sense, the use of racial profiling would be neither justified nor desirable, given the costs it imposes upon both minority group members and society at large. Wang, "Suitable Targets," supra note 95, at 218-19 (citations omitted).
103. Cf. Wang, Complexities of "Hate," supra note 4, at 835 (noting that most lynchings were initiated by false accusations of criminal conduct, most commonly rape, against the target, and pointing out that these accusations rested on the most malicious of racial stereotypes and that the ease with which they were accepted underscored the racist ideology to which perpetrators adhered).
inatory police practices is supported by a social environment in which race alone can be used as a "surrogate indicator" or "proxy" for criminality.\textsuperscript{104}

As Professor Dorothy Roberts has explained, racial profiling reflects cultural stereotypes that divide people into two categories, "law-abiding" and "law-breaking," assumes that police can tell the difference between them on sight, and thereby justifies minimizing the rights of the "visibly lawless."\textsuperscript{105} This view is so deeply embedded in our culture that it may not be recognized by the law enforcement officer who engages in racial profiling nor even by those - including courts - who might review her decisions.\textsuperscript{106}

Also like hate crimes, racial profiling results in "multi-layered effects" on targets, members of the suspect group, and society at large that perpetuate the conduct and beliefs that promote the discriminatory practice.\textsuperscript{107} First, for the individual target the experience can be extremely frightening and embarrassing and result in defensive behavioral strategies similar to those seen in victims of hate crime.\textsuperscript{108} Some drivers who are stopped suffer depression, try to hide their experience from others, and withdraw from their normal activities.\textsuperscript{109} The Black motorist's sense of fear is heightened by the awareness that such encounters can turn, and often have turned, deadly.\textsuperscript{110} Moreover, the frequency with which many Blacks

\textsuperscript{104} See Wang, supra note 95, at 225-26 (citing Russell, supra note 99).


\textsuperscript{106} See Thompson, supra note 88, at 983, 987-91.

\textsuperscript{107} See Wang, supra note 95, at 231.

\textsuperscript{108} See generally id. at 231-32.

\textsuperscript{109} See id. (citing Harris, Why "Driving While Black" Matters, supra note 1).

\textsuperscript{110} See, e.g., Russell, supra note 99, at 34, 36-37 (discussing Blacks' experiences with and awareness of police brutality and describing the case of Jonny Gammage); Harris, Why "Driving While Black" Matters, supra note 1, at 275, n.56 (citing cases in which traffic stops have resulted in the Black motorist's death).
are stopped for traffic violations leads many to feel angry, powerless, and distrustful of the police.\textsuperscript{111}

Members of the "target" group for racial profiling respond similarly to those who feel vulnerable to hate crimes. That is, they adopt defensive behavioral strategies, adjusting numerous aspects of their daily lives in order to minimize their chances of being noticed and stopped, or to decrease the likelihood that they will be treated abusively if they are stopped:

These adjustments may include driving cars that are bland and not "flashy," dressing in drab clothing or avoiding accessories that might make them noticeable, sitting erect at all times while driving, obtaining "vanity" license plates that advertise their educational degrees or professional status, keeping the radio tuned to a classical music station, and scheduling extra time for car trips to allow for the delay involved in a traffic stop. These lessons are passed from one generation to the next when young Black males receive "The Lesson": instructions from their elders on "how to behave when - not if - they are stopped by police."\textsuperscript{112}

Another common avoidance tactic is to stay out of areas where Black people would "stand out" - a strategy that further distorts the social world by carving out entire areas where Blacks are perceived as "not belonging."\textsuperscript{113}

The distorting effect of racial profiling extends beyond its influence on the behavior of the target group, for the practice also affects societal perceptions of the target group and expectations for how they will (and should) be treated. First, and especially when it faces no legal sanction, racial profiling furthers the myth that certain groups are prone to criminality by allowing police to use skin color as a proxy for criminal propensity. The message that Blackness is equivalent to criminality is transmitted to the general public as the public becomes accustomed to seeing disproportionate numbers of Black motorists being detained by police.\textsuperscript{114} This image makes even

\textsuperscript{111.} See, e.g., Russell, supra note 99, at 34-36; Harris, Why "Driving While Black" Matters, supra note 1, at 298-300.

\textsuperscript{112.} Wang, "Suitable Targets," supra note 95, at 232 (citations omitted).

\textsuperscript{113.} See Harris, Why "Driving While Black" Matters, supra note 1, at 298-99.

\textsuperscript{114.} See Roberts, supra note 105, at 813.
those who are not consciously racist more likely to see the behavior of a Black person as suspicious,\(^{115}\) especially when that Black person appears in a neighborhood where he or she is viewed as "not belonging."\(^{116}\) These stereotypes are then "confirmed" through a process of "self-fulfilling prophecy," as police officers look for - and find - criminal conduct disproportionately among Black drivers, on whom they have focused their attention and resources.\(^{117}\)

Furthermore, racial profiling operates similarly to hate crimes in the way it promotes discrimination by contributing to the devaluation of members of vulnerable groups. As Professor Roberts has explained, racial profiling contributes to an environment in which both the infringement of constitutional rights and the imposition of physical suffering on members of certain groups become minimized and expected. First, discriminatory targeting by law enforcement officers reinforces the perception that some groups are "second-class citizens" for whom police surveillance and even arrest are "perfectly natural."\(^{118}\) In turn, this belief promotes the view that those groups are entitled to fewer liberties and that their rights are "mere 'amenities' that may be sacrificed to protect law-abiding people."\(^{119}\) Acceptance of this view results in an environment in which a pattern of discriminatory targeting seems benign, for, "when social understandings are so uncontested that they become invisible, the social meanings that arise from them appear natural."\(^{120}\)

B. Consumer Discrimination

Another common form of racial profiling is practiced by private entities. "Consumer racism" or "consumer discrimination" is "the practice of differential surveillance and treatment

115. See Thompson, supra note 88, at 988.
117. See Harris, Why "Driving While Black" Matters, supra note 1, at 297.
118. Roberts, supra note 105, at 811, 813.
119. Id. at 811-12.
120. Id. at 812.
of African American shoppers.\textsuperscript{121} African Americans of all social and economic classes encounter this practice on a daily basis,\textsuperscript{122} and, as with its law enforcement-perpetrated counterpart, it sometimes results in violence against, and even the deaths of, its targets.\textsuperscript{123} Consumer discrimination primarily takes the form of differential security measures against members of minority racial groups,\textsuperscript{124} but it also includes the provision of inferior or abusive service and charging Blacks higher prices than Whites for the same and sometimes inferior goods and services.\textsuperscript{125}

Consumer discrimination reflects influences of the social environment similar to those that promote discriminatory police practices, for consumer discrimination often rests on the stereotype of Blacks as being prone to deviant or criminal behavior: specifically, shoplifting.\textsuperscript{126} Moreover, consumer discrimination

\begin{itemize}
  \item \textsuperscript{121} Kennedy, supra note 2, at 276; see id. at 288, 297-98 (comparing consumer discrimination to racial profiling by law enforcement); see also Amanda G. Main, Note, Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief, 39 BRANDEIS L.J. 289, 289-90 (2000) (comparing “racial profiling in the retail setting” to racial profiling in various law enforcement contexts).
  \item \textsuperscript{122} See Kennedy, supra note 2, at 290, 294.
  \item \textsuperscript{123} See, e.g., id. at 296-97 (recounting one case in which an African American male, who accompanied an eleven-year-old girl accused of stealing a four-dollar bracelet, was placed in a choke hold by Lord & Taylor security guards and killed by asphyxiation, and another case in which a shopkeeper shot and killed a young Black girl whom the shopkeeper accused of trying to steal a bottle of orange juice).
  \item \textsuperscript{124} As Professor Kennedy elaborates:
    \begin{quote}
    Black customers are followed, stopped, searched, and threatened for looking suspicious, displaying nervous behavior, avoiding sales help, and shopping in darkened, deserted areas of the store. Race becomes a predominant concern in deciding whether to watch customers, and retail store personnel place African Americans under heightened surveillance noting aspects of their dress and behavior that go unnoticed in non-black customers.
    \end{quote}
    \textit{Id.} at 287-88.
  \item \textsuperscript{126} See Kennedy, supra note 2, at 288-89, 297-99. Professor Kennedy also notes that other non-white groups, such as Latinos, are also stereotyped as shoplifters. \textit{Id.} at 299.
\end{itemize}
also reveals additional dimensions of societal stereotypes and devaluation of African Americans. As Professor Deserieee A. Kennedy has explained, consumer discrimination is based on a historical and cultural heritage that includes "the legal and de facto use of segregation in places of public accommodations and retail stores." Historically, segregation rested on "a complex set of beliefs about race" that Professor Charles R. Lawrence III has described as including the belief that Blacks and other non-whites were inferior to Whites and posed a threat to society, and therefore did not deserve full status and participation in American society. By segregating retail spaces, selling goods and services on inferior terms, or even denying Blacks their purchase, Whites were able to distance themselves from Blacks and maintain their position in the racial hierarchy. Though contemporary forms of consumer racism may be less extreme or well institutionalized, and are nominally unlawful, the boundary-policing practices continue today. As Professor Regina Austin has pointed out, Black consumption (and selling) is still regarded as deviant activity to which White store-owners continue to present obstacles.

The similarity between consumer discrimination and racial profiling extends to the effects of the practices on individual victims and society at large, creating a "feedback loop" that further entrenches the practice. Like discriminatory policing, discriminatory treatment of shoppers results in heavy emotional and psychological burdens on its targets, causing them to feel angry, humiliated, frightened, and powerless. Also

127. Id. at 282.
128. See id. at 282 (quoting Lawrence, supra note 88, at 322).
129. See Kennedy, supra note 2, at 284.
130. See, e.g., id., at 304-339 (discussing federal and state statutory and common law claims that may be raised in consumer discrimination cases, but noting obstacles plaintiffs face).
131. See, e.g. at 285. Boundary-policing practices refers to the practice of policing the boundaries of racial hierarchy.
132. See Austin, supra note 125, at 147-48, 151; see also Kennedy, supra note 2, at 291.
133. For discussion of the "feedback loop" theme, see supra Part III. B.
134. See id.
like racial profiling, consumer discrimination results in daily inconveniences for and limits the freedom of members of the targeted group, for it leads Blacks to develop burdensome strategies for avoiding or navigating racist encounters. Further, consumer discrimination similarly insinuates itself into our expectations of how Blacks should be treated. As Professor Kennedy has explained, "Everyday racism perpetuates itself - it becomes integrated into everyday situations and becomes 'part of the expected, of the unquestionable, and of what is seen as normal by the dominant group.'"  

Again, however, consumer discrimination has additional implications, because it also promotes and perpetuates the idea that Blacks are not full or legitimate participants in the economic (as well as the political and social) life of American society. Consumption is not just utilitarian; as Professor Kennedy points out, it also has symbolic importance in establishing social identity and class alliances. Furthermore, consumer discrimination is but one manifestation of economic discrimination in a society that also practices race-based discrimination in services, lending, advertising, and other commercial activities. These forms of "economic exploitation" of Blacks all have the effect of increasing the costs and narrowing the choices of Blacks who want to participate in what, for Whites, are routine activities to which they need not give a second thought. Consumer discrimination thus is not just a minor inconvenience nor a rare and isolated experience for African Americans, but a historically based and systematic means by which a group is denied access to the ben-

135. See Austin, supra note 125, at 154 (discussing the tendency for the author to tip generously in an effort to debunk the complaint the blacks did not tip); see also Kennedy, supra note 2, at 297 (discussing how the fear of being accused of wrongdoing creates a psychological stress and burden on Blacks).

136. Kennedy, supra note 2, at 303 (quoting PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM 50 (1991)).

137. See id. at 286.

138. See id. at 299-302 (providing examples).

139. Austin, supra note 125, at 150.

140. See id. at 147, 150-54.
benefits available to other members of society, and by which the dominant group comes to accept and expect that state of affairs.

C. Street Harassment Of Women

Women comprise another large social group that are denied their full rights and privileges as members of society through a routine, often unnoticed, and frequently accepted form of discrimination: street harassment. As Professor Cynthia Grant Bowman has defined it, street harassment of women is the "harassment of women in public places by men who are strangers to them... It encompasses a wide range of verbal and nonverbal behavior aimed at an individual woman (though the perpetrator often intends that it be overheard or observed by others) that is "objectively degrading, objectifying, humiliating, and frequently threatening in nature." Like hate crimes, racial profiling, and consumer discrimination, street harassment of women is not solely a contemporary


142. See Austin, supra note 125, at 151-53 (noting that "perception that there is something wrong with blacks' pursuit of consumption impedes their ability to obtain legal redress for discriminatory treatment," and contributes to the view that "[v]iolations of blacks' right to shop or consume are ... isolated social problems" that are "not considered amendable to the law's policing"); Kennedy, supra note 2, at 303 (noting that "[t]he routinization of racist practices in everyday life makes them particularly difficult to eliminate").

143. See Bowman, supra note 3, at 520-21 (discussing the ways in which street harassment of women deprives them of "even the most primary goods of a liberal democratic society," which include "the right of an individual to go where she chooses in spaces that are public").

144. Id. at 519.

145. Id. at 524 (providing examples). Professor Bowman lists as the "defining characteristics" of street harassment:

(1) the targets are female; (2) the harassers are male; (3) the harassers are unacquainted with their targets; (4) the encounter is face to face; (5) the forum is a public one, such as a street, sidewalk, bus, bus station, taxi, or other place to which the public generally has access; but (6) the content of the speech, if any, is not intended as public discourse.

Id. at 523-24 (footnotes omitted).
phenomenon. However, it does seem to have increased in frequency and severity since the 1970's and 1980's, probably at least in part due to the changes in women's lives that have increased the occasions on which they appear in public unaccompanied by men or children.

The context in which street harassment tends to occur, as well as perpetrators' motivations for engaging in the practice, exhibit striking similarities to the "recreational" form of anti-gay violence discussed above, and likewise reflect a societal view that the vulnerable group is a suitable or appropriate target for such abuse. That is, for many men the harassment of women is a group activity - one that they would not choose to engage in alone, and one that provides a way to "bond" with other males, by "demonstrating solidarity and mutual power." Men who have harassed women on the street have told interviewers "that harassment alleviated boredom, was 'fun,' and gave them a feeling of camaraderie with other men; many added, defensively, that it didn't hurt anybody. Some said it was intended as a compliment." These accounts demonstrate that the harassment of women in public spaces is regarded by many perpetrators as socially acceptable and harmless, and reflect the view that women who appear in public have made themselves available for abuse by invading men's "turf."

The effects on the individual victim of street harassment are much like the effects of the other forms of discrimination dis-

146. See id. at 527-28.
147. Id. at 528 (discussing changes that have led a greater number of women into the workforce and public spaces following the "Second Wave" of the women's movement).
148. See supra notes 44-62 and accompanying text.
150. Id. at 542-43 (citing Benard & Schlaffer, supra note 149, at 71 (footnote omitted)).
151. Id. at 541 (pointing out that some men's remarks carry the message that women do not belong in public).
cussed above. That is, victims suffer “feelings of invasion, anger, humiliation, and fear” as well as “emotional distress and feelings of disempowerment.”

Victims of street harassment also respond similarly to victims of hate crime, racial profiling, and consumer discrimination by avoiding activities or places where they expect to be more vulnerable to harassment. This avoidance strategy imposes great costs on women by severely limiting their physical and geographical mobility “in a way that substantially offsets the gains women have made in other spheres.” Moreover, women’s fear and feelings of disempowerment in response to street harassment have an added dimension, for their apprehension is connected directly to fear of another, specific form of violence against women: rape. (As Professor Bowman notes, this fear is not unrealistic, for street harassment sometimes is a precursor to rape). In addition, women’s fear and humiliation often are connected with a sense of shame about their bodies, for the harassment “reduces women to sexual objects.” Street harassment thus “is a way of ensuring that women will not feel at ease, that they will remember their role as sexual beings available to men and not consider themselves equal citizens participating in public life.”

As is true with hate crimes, racial profiling, and consumer discrimination, street harassment does not just impose harms on its targets, but also distorts the social world in a way that reinforces the acceptability of and thereby promotes the public harassment of women. Professor Bowman points out that street harassment distorts relationships between women and men by, on the one hand, increasing women’s dependence on men to “protect” them from harassment by other men and, on

152. Id. at 537.
153. See id. at 539.
154. Id. at 535.
155. Id. at 535-36 (describing how potential rapists sometimes select their victims by using a woman’s reaction to harassment and intimidation as a “test” of her likely reaction to rape).
156. Id. at 537.
157. Id. at 542 (quoting Benard & Schlaffer, supra note 149, at 72).
158. Harris, Why “Driving While Black” Matters, supra note 1, at 305. (referring to the effect on society of the practice of “Driving While Black”).
the other hand, contributing to distrust and hostility between men and women who view even the well-intentioned among them with suspicion and fear.\textsuperscript{159} Further, just as hate crimes, racial profiling, and consumer discrimination reinforce the racial hierarchy in American society, so does street harassment of women strengthen the rigid gender hierarchy from which it draws inspiration, by conveying the message that women belong in the private sphere (at home), and not in public.\textsuperscript{160} Especially when street harassment is - as it often is - dismissed as trivial, unavoidable, and acceptable,\textsuperscript{161} the harassment itself reinforces the expectations and assumptions that promote its continued practice.

V. CONCLUSION

As Professor Randall Kennedy has observed, "One of the great achievements of social reform in American history has involved the stigmatization of overt racial prejudice."\textsuperscript{162} Other forms of prejudice, as well - including sexism, ethnocentrism, and anti-gay prejudice - have in contemporary times been subject to searching examination and strong condemnation. Supporting the social ideal of equality are explicit constitutional and legislative protections against racial and other types of discrimination in a wide range of contexts from government action to private contracting\textsuperscript{163} (though, to be sure, these express protections are not equally comprehensive for all social groups that are vulnerable to discrimination).\textsuperscript{164} Yet

\begin{itemize}
\item \textsuperscript{159} Bowman, \emph{supra} note 3, at 540-41.
\item \textsuperscript{160} See \emph{id.} at 541.
\item \textsuperscript{161} See \emph{id.} at 558, 565 (noting ways in which society in general and courts in particular convey this message).
\item \textsuperscript{162} Kennedy, \emph{supra} note 88, at 1418.
\item \textsuperscript{164} See, \textit{e.g.}, \textbf{National Lawyers Guild Lesbian, Gay, Bisexual Rights Committee, Sexual Orientation and the Law} Intro. 1 (Roberta Achtenberg, ed., 2000) (noting that "lesbians and gay males as a group are often not protected by the kinds of laws that protect other disenfranchised groups").
\end{itemize}
the legal reforms have not been as expansive as the letter of the law might suggest. As Professor Martha Chamallas has noted, “The limits of contemporary anti-discrimination law are exceedingly narrow.” 165 Professor Chamallas explains that the legal protections do mandate formal or facial equality — for example, prohibiting explicit racial classifications in legislation and formal policies by private entities that expressly provide different standards for traditionally disfavored groups — but do not extend to less explicit disparate treatment, including many updated and more subtle forms of discrimination. 166

As this Article has pointed out, one cause of this deficiency in coverage is the law’s need to find a “villain” before it can acknowledge that discrimination has occurred. The dominant view, in other words, is that “real” discrimination is perpetrated only by individuals who are motivated by hostility and seek to do harm to disfavored groups. However, as this Article also has shown, this view is not entirely accurate, for even extreme and brutal acts of discrimination sometimes are motivated more by the perpetrator’s desire to “fit in” or to obtain personal benefits than they are by his or her desire to do harm to the targeted group. The perpetrator’s ability to achieve these goals through discriminatory acts in such situations depends upon the existence of a social environment that has marked members of certain social groups as appropriate or acceptable vehicles for the perpetrator’s use. In turn, the continuing and accepted targeting of socially vulnerable groups itself reinforces the “suitable target” designation.

Moreover, to ignore the reciprocal and reinforcing relationships between discriminatory acts and the mainstream social context is to construct many common forms of discrimination (when the discrimination is recognized at all, rather than being rendered invisible as it often is) as being rational and even desirable or as regrettable but inevitable. Even worse, it serves to justify discrimination on “moral” grounds. As Professor Charles R. Lawrence III has explained, “If there is no discrimination, there is no need for a remedy; if blacks are being

165. Chamallas, supra note 88, at 747.
166. See id. at 747-48.
treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position." In combination, these constructions perpetuate discrimination, for they institute the notion that the differential treatment of certain social groups is appropriate; it becomes, in the words of Professor Deseriee Kennedy, "justified and normalized."