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REFRAMING HATE

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The concept and naming of "hate crime," and the adoption of special laws to address it, provoked controversy and raised fundamental questions when they were introduced in the 1980s. In the decades since, neither hate crime itself nor those hotly debated questions have abated. To the contrary, hate crime has increased in recent years—although the prominent target groups have shifted over time—and the debate over hate crime laws has reignited as well. The still-open questions range from the philosophical to the doctrinal to the pragmatic: What justifies the enhanced punishment that hate crime laws impose based on the perpetrator's motivation? Does that enhanced punishment infringe on the perpetrator's rights to freedom of belief and expression? How can we know or prove a perpetrator's motivation? And, most practical of all: Do hate crime laws work?

This Essay proposes that we reframe our understanding of what we label as hate crimes. It argues that those crimes are not necessarily the acts of hate-filled extremists motivated by deeply held, fringe beliefs, but instead often reflect the broader, even mainstream, social environment that has marked some social groups as the expected or even acceptable targets for crime and violence. In turn, hate crimes themselves influence the social environment by reinforcing recognizable patterns of discrimination. The Essay maintains that we should broaden our understanding of the motivations for and effects of hate crimes and draws connections between hate crimes and seemingly disparate phenomena that have recently captured the nation's attention.

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INTRODUCTION

With the rise of anti-Asian violence during the COVID-19 pandemic,[1] renewed attention has focused on hate crimes and hate crimes legislation. The concept and naming of "hate crime" as a distinct problem in the United States is itself relatively new. The term "hate crime" likely originated in 1985 with the bill that became the Hate Crimes Statistics Act,[2] while the criminal

[1] *See, e.g.*, Weiyi Cai, Audra D. S. Burch & Jugal K. Patel, *Swelling Anti-Asian Violence: Who Is Being Attacked Where*, N.Y. TIMES (Apr. 3, 2021), https://www.nytimes.com/interactive/2021/04/03/us/anti-asian-attacks.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/G9F5-KWH8]; David Nakamura, *Hate Crimes Rise to Highest Level in 12 Years amid Increasing Attacks on Black and Asian People, FBI Says*, WASH. POST (Aug. 30, 2021, 5:40 PM), https://www.washingtonpost.com/national-security/hate-crimes-fbi-2020-asian-black/2021/08/30/28bede00-09a7-11ec-9781-07796ffb56fe_story.html [https://perma.cc/3HQ9-MJQD]; *see also* ASIAN AM. BAR ASS'N OF N.Y., ENDLESS TIDE: THE CONTINUING STRUGGLE TO OVERCOME ANTI-ASIAN HATE IN NEW YORK 14–30 (2022), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless_Tide_Report_2022_FIN.pdf [https://perma.cc/E867-HS8J] (providing empirical analysis of 233 anti-Asian incidents reported in New York City over the first three quarters of 2021); STOP AAPI HATE, https://stopaapihate.org [https://perma.cc/9KK7-WJBQ] (July 19, 2022) (collecting and reporting incidents of hate against Asian and Pacific Islander communities). Obtaining accurate data on the incidence of hate crime is difficult for many reasons, including differences in collection methods across government agencies and advocacy organizations. *See, e.g.*, Angela R. Gover, Shannon B. Harper & Lynn Langton, *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 AM. J. CRIM. JUST. 647, 655–59 (2020). Further, hate crimes are most likely underreported because law enforcement agencies are not required to report hate crime data to the FBI, law enforcement officers may find it hard to determine whether a particular incident is a hate crime, and victims may fail to report hate crimes for various reasons. *See id.*

[2] The term has been traced to U.S. Representatives John Conyers, Barbara Kennelly, and Mario Biaggi, who in 1985 cosponsored the bill that became the federal Hate Crime Statistics Act, Pub. L. No. 101–275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534). *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998). Clara S. Lewis, however, provides a fuller account of the etymology of the phrase and identifies the first apparent use of the term in a 1960 article published in the *Chicago Daily*

offense that has come to be labeled "hate crime" was introduced in the Anti-Defamation League's (ADL's) 1981 model legislation to criminalize ethnic intimidation.[3] Many of the issues that were debated in the 1980s and 1990s remain alive today and have received renewed attention in the last couple of years. These issues include concerns about the legitimacy, justifiability, constitutionality, practicality, and effectiveness of hate crime laws.

Most states have enacted some form of a hate crime statute that follows the ADL ethnic intimidation model, and federal law incorporates some features of the ADL model as well.[4] The most widely adopted feature of the ADL model is also the focus of the most controversy.[5] That feature is its penalty enhancement approach, under which punishment for conduct that already constitutes a crime, such as assault or arson, may be increased if the perpetrator committed the crime because of the victim's—or, under some statutes, another individual's or group's[6]—actual or perceived race, color, religion, or other enumerated personal characteristic or social group membership.[7] The Department of Justice explains the crime in plainer terms through a simple graphic on its website:[8]

Defender. CLARA S. LEWIS, TOUGH ON HATE? THE CULTURAL POLITICS OF HATE CRIMES 8–10 (2013) (citing *Urges Laws on Hate Crimes*, CHI. DAILY DEFENDER, Apr. 5, 1960, at A2).

[3] *See* ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE 1–4 (1994); ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS: THE ADL APPROACH 3 (2019) [hereinafter THE ADL APPROACH], https://www.adl.org/sites/default/files/hate-crime-laws-the-adl-approach.pdf [https://perma.cc/6W6V-WV2L].

[4] As the ADL report explains, a variety of state and federal criminal statutes can apply to hate crimes, including civil rights, institutional vandalism, cross-burning, and anti-mask statutes. *See* THE ADL APPROACH, *supra* note 3, at 3–8, 14–16. The newest federal statute is the Emmett Till Antilynching Act, which President Biden signed into law on March 29, 2022. Emmett Till Antilynching Act, Pub. L. No. 117-107, 136 Stat. 1125 (2022) (amending 18 U.S.C. § 249(a) (2018)).

[5] For a recent, brief overview of the debate, see Spencer Bokat-Lindell, Opinion, *Are Hate Crime Laws Really the Answer to Anti-Asian Violence?*, N.Y. TIMES (Mar. 23, 2021), https://www.nytimes.com/2021/03/23/opinion/asian-hate-crimes.html [https://perma.cc/UUY6-62CV]; *see also infra* text accompanying notes 9–29.

[6] *E.g.*, 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 2022) ("by reason of the actual or perceived [protected status] . . . of another individual or group of individuals"); MINN. STAT. ANN. § 609.2231 (West 2016) ("because of the victim's or another's actual or perceived" protected status); NEB. REV. STAT. ANN. § 28-111 (West 2009) (because of "the person's" protected status or because of "the person's association with a person of" a protected status).

[7] *See* THE ADL APPROACH, *supra* note 3, at 3.

[8] What is a Hate Crime? (illustration), *in Hate Crimes*, U.S. DEP'T JUST., (Aug. 18, 2022) https://www.justice.gov/hatecrimes [https://perma.cc/9AE7-9LE9].

If this depiction was used to illustrate the penalty enhancement approach, the "hate crime," which includes the "motivation for committing the crime based on bias," would be punished more severely than the underlying "crime."[9]

This deceptively simple concept—increased punishment for a biased motivation—is central to the debate between supporters and critics of hate crime legislation. For supporters, to punish someone more severely based on their biased motivation is both logical and justified: Hate crime perpetrators are thought to have greater moral culpability because of their biased motives[10] and because their crimes inflict greater psychic and social harm on the immediate victims, targeted groups, and broader community.[11] Further, increasing punishment for a biased motive is thought to deter future acts of bigotry[12] and express society's condemnation of such acts and its commitment to equality and social justice.[13]

For critics, however, to punish someone more harshly because of their bias against a particular social group raises questions about the message the law conveys, as well as its constitutionality and effects. To some critics, hate crime laws send two different but equally troubling messages: Some crime victims are either "worth" more[14] or should receive more protection than

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[9] *See supra* notes 6–8 and accompanying text.

[10] *See, e.g.*, THE ADL APPROACH, *supra* note 3, at 10; FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 58–63 (1999).

[11] *See, e.g.*, THE ADL APPROACH, *supra* note 3, at 9; LAWRENCE, *supra* note 10, at 58–63. For a fuller discussion of the harms caused by hate crimes, see Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 108–28 (1997) (discussing the psychological and social consequences of bias-related crime for the immediate victim, the target group, and non-target group members).

[12] *See, e.g.*, THE ADL APPROACH, *supra* note 3, at 2.

[13] *See, e.g.*, LAWRENCE, *supra* note 10, at 167–69.

[14] *See, e.g.*, Nat Hentoff, Opinion, *Beware Stiffer Sentences for Thought Crimes*, WASH. POST (June 19, 1993), https://www.washingtonpost.com/archive/opinions/1993/06/19/

others.[15] The latter argument has been framed, unsuccessfully, as an equal protection issue.[16] The contention that animated the most prominent controversy of the 1990s is that hate crime laws create a "thought crime" and violate the First Amendment by punishing the perpetrator's bigoted beliefs or expressions.[17] That issue was seemingly put to rest by the Supreme Court

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beware-stiffer-sentences-for-thought-crimes/26a2f851-b0fb-4cd7-a5f4-4b7d632d0bbe/ [https://perma.cc/45NG-LPS2].

[15] *See, e.g.*, 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 UCLA L. REV. 333, 385–86 (1991) ("[Hate crime laws] carry an implicit patronizing and paternalistic message: these people are incapable of holding their own without special protection . . . [and] suggest[] that members of the protected group are weaker than everyone else."); James B. Jacobs, *Should Hate Be a Crime?*, 113 PUB. INTEREST 3, 10 (Fall 1993) ("[Under h]ate crime legislation . . . [s]ome groups are defined as needing special protection against discriminatory treatment.").

[16] *See, e.g.*, State v. Beebe, 680 P.2d 11, 13 (Or. Ct. App. 1984) (finding that the state's racial intimidation statute, OR. REV. STAT. § 166.155(1), "does not offer more protection to any class of victims" and holding that it does not violate either the federal or the state guarantee of equal protection because the legislature had a rational basis for distinguishing between bias- and nonbias-motivated harassment and assault due to the "far more serious potential consequence" of the former).

It is important to note that, while hate crime laws identify prohibited biases such as race, national origin, or religion, they draw no distinction between victims based on the particular groups with which they are identified. In other words, they apply equally to biases against majority and minority groups. *See supra* text accompanying notes 6-7.

[17] Susan Gellman first raised this issue in her influential article, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, Gellman, *supra* note 15, at 362–63, and it was debated at length in the early 1990s. *See generally, e.g.*, Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 676 (1993) ("[T]he apparent paradox of seeking to punish the perpetrators of racially motivated violence while being committed to protecting the bigot's rights to express racism is a false paradox."); Foreword, 1992 ANN. SURV. AM. L. 483, 483 (1992) (introducing symposium where legal scholars and practitioners discussed issues surrounding "burgeoning hate crime statutes," including their constitutionality); Symposium, *Penalty Enhancement for Hate Crimes*, 11 CRIM. JUST. ETHICS 3, 3 (1992) (introducing symposium on issues raised by penalty enhancement statutes, including their constitutionality under the First Amendment); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1315 (1993) ("This Note responds to First Amendment-based criticisms of penalty-enhancement statutes and argues that such statutes are constitutional.").

The argument that the enhanced punishment targets a perpetrator's beliefs or opinions has been presented "as a matter of basic arithmetic" that appears to incorporate "a kind of subtractive fallacy" by reasoning that "the difference in punishment *necessarily* amounts to separate punishment for the offender's hatred or prejudice." Gabriel S. Mendlow, *Thoughts*,

with its 1993 decision upholding a state hate crime statute in *Wisconsin v. Mitchell*,[18] but it still resonates in present day debates.[19]

Critics also contend that hate crime laws are ineffective and counterproductive for a number of reasons. They argue that the laws fail to address the systemic causes of racist violence, instead offering a diversionary, feel-good alternative that makes scapegoats of individual perpetrators.[20] This point may be juxtaposed with the concern that hate crime laws potentially "fight[] injustice through unjust systems."[21] That is, the laws take a carceral approach to protecting the very communities that have suffered disproportionately from law enforcement surveillance, prosecution, and imprisonment,[22] and offer the state yet another means by which to impose

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Crimes, and Thought Crimes, 118 MICH. L. REV. 841, 871–72 (2020). This arithmetical way of thinking about hate crime laws might be promoted by the kind of visual explanation of the law that we see in the Department of Justice graphic reproduced in the text accompanying note 8.

[18] *Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993); s*ee also* THE ADL APPROACH, *supra* note 3, at 13 ("The Court's resounding endorsement of hate crimes laws in the Mitchell case reflected a reaffirmation of several key concepts of criminal law."); Sherry F. Colb, Opinion, *Hate Crimes and Free Speech*, VERDICT (Aug. 26, 2021), https://verdict.justia.com/2021/08/26/hate-crimes-and-free-speech [https://perma.cc/J9HU-JGLY] ("*Wisconsin v. Mitchell* was so plainly correct that it could not reasonably have come out the other way.").

[19] *See, e.g.*, Bokat-Lindell, *supra* note 5 (identifying "infringement of free speech" as among the issues in the debate over hate crime laws); Colb, *supra* note 18 ("I aim to explain why the view that hate crime legislation violates the freedom of speech is incorrect and has radical and undesirable logical implications.").

[20] *See, e.g.*, Claudia Card, *Is Penalty Enhancement a Sound Idea?*, 20 L. & PHIL. 195, 213 (2001) ("Perhaps we should ask whether penalty enhancement treats hate crime perpetrators as scapegoats, making them pay the penalty for behavior that profits others, who often share (and may be a significant source of) their biased and bigoted attitudes but simply lack their taste or aptitude for violence.").

[21] Kai Wiggins, *The Dangers of Prosecuting Hate Crimes in an Unjust System*, AM. CONST. SOC. EXPERT F. (Aug. 5, 2019), https://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system/ [https://perma.cc/5N8W-M6S9].

[22] *See, e.g.*, *id.* (pointing out the "obvious tension" between "hate crime penalty enhancement" provisions and "aggressive sentencing [that] has contributed to soaring incarceration rates with severe and disproportionate consequences for people of color"); STAN. L. SCH. L. & POL'Y LAB & BRENNAN CTR. FOR JUST., EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES 4, 11 (2021) (noting the mistrust that marginalized communities have of law enforcement due to past and present experiences of mistreatment).

those burdens on members of these same communities through differential enforcement.[23]

A related concern is that hate crime laws do little to protect marginalized communities in light of widespread distrust of law enforcement, which often dissuades members of these communities from reporting hate crime incidents.[24] Critics further argue that hate crime laws exacerbate rather than ameliorate tensions among social groups by drawing attention to their differences.[25] The penalty enhancement approach also seems to be misaligned with its own justification, because increasing punishment does little to address the greater harms the crime inflicted on the victim and community.[26] Alternative approaches focused on restorative justice and social support for targeted individuals and communities, for example, would be more responsive to those harms.[27]

Furthermore, empirical and practical questions raise doubts about the efficacy of hate crime legislation to reduce the perpetration of violence against socially vulnerable groups. Some question whether the prospect of increased punishment would actually deter someone from committing a hate crime.[28] In addition, the prosecutorial decision whether to designate an act as a hate crime can be both practically difficult and politically charged when the

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[23] STAN. L. SCH. L. & POL'Y LAB & BRENNAN CTR. FOR JUST., *supra* note 22, at 13. This concern seems to be borne out by high profile cases in which the defendant is a person of color and the victim is white, and by "hate crimes offender data [that] show a statistical overrepresentation of Black people." *Id.* at 13–14; *see also* Wiggins, *supra* note 21 (noting the "potential discriminatory impact of hate crime penalty enhancement" and that annual hate crime statistics published by the FBI, albeit incomplete, "suggest that African Americans are more likely than white people to commit hate crime[s]" that are reported).

[24] *See, e.g.*, STAN. L. SCH. L. & POL'Y LAB & BRENNAN CTR. FOR JUST., *supra* note 22, at 11 ("Community distrust of law enforcement is a structural barrier to reporting hate crimes, such that the current system does not address a large number of hate crimes.").

[25] *See, e.g.*, JACOBS & POTTER, *supra* note 2, at 130–44 (making this argument in a chapter entitled, "Identity Politics and Hate Crimes").

[26] *See, e.g.*, STAN. L. SCH. L. & POL'Y LAB & BRENNAN CTR. FOR JUST., *supra* note 22, at 14–15 ("Traditional hate crime[] laws focus on prosecuting and punishing perpetrators rather than repairing the harm to victims or the communities that share the victims' identities. Hate crime[] laws are premised on the recognition that hate crimes inflict especially serious harm on direct victims and groups that share the victim's identity, including trauma.").

[27] See *id.* at 16–34 for a full discussion of these alternatives to the law enforcement approach.

[28] *See, e.g.*, *id.* at 12–13 ("Penalty enhancement has, at best, an inconclusive deterrent effect").

perpetrator's motivation is unclear. The penalty enhancement model for hate crimes can actually serve as a disincentive to bring hate crime charges because proving a bias motive is often "immensely difficult"[29] and might not result in an appreciably greater sentence, especially in cases involving the most serious underlying crimes.[30] Declining to prosecute a case as a hate crime, on the other hand, can be demoralizing to and provoke outrage from the targeted community.[31]

The purpose of this Essay is not to engage these questions directly, but to identify misapprehensions in the popular understanding of hate crimes upon which these debates often rest. It also seeks to draw connections among high profile hate crimes and other, more mundane forms of bias-motivated crime and everyday discrimination—connections that the prevailing narrative about hate crimes can obscure and thereby, perhaps ironically, strengthen. The discussion begins by describing a set of common assumptions about hate crimes. These assumptions are based in popular or prototypical images of hate crime, its perpetrators, and its victims. The images and assumptions are understandable given the naming[32] and most salient examples of the problem, which have tended to be "spectacular, not typical, cases."[33] As the Essay will then explain, this popular view emphasizes the deviance of perpetrators[34] and minimizes the differences of victims.[35] In so doing, it overlooks the extent to which hate crimes both are influenced by and reinforce mainstream society's message that certain

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[29] Avlana Eisenberg, *Hate-Crime Laws Don't Work as Their Supporters Intended*, ATL. (June 22, 2021), https://www.theatlantic.com/ideas/archive/2021/06/hate-crimes-not-used-prosecutors/619179/ [https://perma.cc/H7WS-AZXY].

[30] *Id.*

[31] *See id.*; STAN. L. SCH. L. & POL'Y LAB & BRENNAN CTR. FOR JUST., *supra* note 22, at 33.

[32] *See, e.g.*, LAWRENCE, *supra* note 10, at 9 (explaining that the use of "hate crime" to designate bias-motivated crime has given rise to "a key misconception about the nature of" the motivation in question and that "[n]ot every crime that is motivated by hatred for a victim is a bias crime"); LEWIS, *supra* note 2, at 10 (stating "the word 'hate,' while emotionally evocative, can be misleading," and pointing out that, while the "rhetorical maneuvering" associated with the popularization of the term "helped make hate crimes into a well-known phenomenon[,] . . . it also burdened the concept with a host of new contradictions").

[33] LEWIS, *supra* note 2, at 41. Lewis provides a thorough account of the "mass cultural production of hate crimes in the late 1990s." *Id.* at 42.

[34] *See infra* notes 44–54, 64–65 and accompanying text.

[35] *See infra* notes 55–64, 66 and accompanying text.

groups are appropriate targets for ill treatment.[36] This exceptional understanding of hate crimes has the (perhaps counterintuitive) effect of normalizing ill treatment of the usual target groups.[37] That normalization in turn causes the *expected* targets to become the *suitable* targets, whose victimization we come to accept—or fail to notice.

I. PROTOTYPICAL PERPETRATORS AND SUITABLE VICTIMS

Certain images come readily to mind when we think about hate crimes: the racial violence of this country's lynching era,[38] along with more recent cases that followed a similar pattern;[39] "gay bashing" by packs of juvenile or young adult males who set upon and beat a gay man as a "kind of sport";[40] assaults on Arab or Muslim, or Arab- or Muslim-appearing individuals following 9/11;[41] and, especially during the COVID-19 pandemic, violent attacks and vandalism against Asian Americans and Pacific Islanders and

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[36] To be clear, I do not mean to suggest that the underlying criminal behavior itself is any more or less socially mainstream than any other criminal behavior, but instead seek to explain why hate crimes are less exceptional than we might think.

[37] *See infra* notes 82–91 and accompanying text; *cf.* LEWIS, *supra* note 2, at 108 (explaining how popular depictions of prominent hate crime victims "indirectly validate indifference toward real hate crimes victims and legitimate an individualized, criminal-justice-based approach to the problem").

[38] The "lynching era" in the United States covered the period "between the end of Reconstruction and the beginning of the Great Depression," 1880–1930. Lu-in Wang, *The Complexities of "Hate"*, 60 OHIO ST. L.J. 799, 833 (1999). During that period, "at least 2,462 African American men, women, and children died at the hands of [white,] southern mobs." *Id.*

[39] Among the most well-known cases was the 1998 murder of James Byrd, Jr., a Black man who was chained to the back of a pick-up truck by three white men and dragged for two miles to his death. *3 Whites Held in Black Man's Dragging Death*, CHI. TRIB., June 10, 1998, at 12.

[40] GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 76 (1990) (quoting observations of police officers familiar with teenage perpetrators). Probably the best-known anti-gay hate crime is the 1998 murder of Matthew Shepard, "a gay University of Wyoming student who was savagely bludgeoned and left lashed to a fence." *See, e.g.*, Elaine Herscher, *News Analysis / Wyoming Death Echoes Rising Anti-Gay Attacks*, S.F. CHRON. (Oct. 13, 1998), https://www.sfgate.com/news/article/NEWS-ANALYSIS-Wyoming-Death-Echoes-Rising-2984964.php [https://perma.cc/B64R-89Y3].

[41] *See generally, e.g.*, Cynthia Lee, *Hate Crimes and the War on Terror*, *in* 5 HATE CRIMES: RESPONDING TO HATE CRIME 139 (Barbara Perry gen. ed. & Frederick M. Lawrence vol. ed., 2009) (discussing hate crimes against Arab-Americans, Muslim-Americans, Sikh-Americans, and South Asian-Americans in the aftermath of the attacks of September 11, 2001).

their businesses.[42] These incidents gave rise to a prototype or paradigm that has shaped our understanding of hate crime:[43]

> 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.[44]

The prototypical hate crime is a murder, despite the fact that the vast majority of hate crimes are lower-level offenses, often property crimes such as vandalism.[45]

The prototypical perpetrator and victim have well-known profiles as well, as Clara S. Lewis elaborated in her exploration of the cultural politics of hate crimes.[46] The "[p]aradigmatic modern-day hater[]"[47] is cast as a "peripheral evildoer"[48] on the fringes of society—"a loser and a loner"[49] far removed from the mainstream. He[50] is "symbolically situate[d] . . . within the lowest possible economic class,"[51] painted as "white trash," with its associations with trailer parks, troubled childhoods, unemployment, and "failed performances of masculinity."[52] The paradigmatic perpetrator also is

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[42] *See, e.g.*, Alexandra E. Petri & Daniel E. Slotnik, *Attacks on Asian-Americans in New York Stoke Fear, Anxiety and Anger*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/nyregion/asian-hate-crimes-attacks-ny.html [https://perma.cc/27T3-EPS4].

[43] *Cf.* LEWIS, *supra* note 2, at 1, 4–8 (describing narratives that have shaped our expectations of what constitutes a hate crime).

[44] Lu-in Wang, *Hate Crime and Everyday Discrimination: Influences of and on the Social Context*, 4 RUTGERS RACE & L. REV. 1, 4 (2002).

[45] *See* LEWIS, *supra* note 2, at 13, 25–26, 39–43, 85. In a chapter titled "The Invention of Hate Crimes," Lewis analyzes how adoption of the term "hate crime" and cultural construction of hate crime as being "both more violent and less politically controversial than all empirical measures of the problem suggest," *id.* at 25, shifted attention from structural critiques that focused on social harm caused by mundane, everyday instances of lower-level bias-motivated offenses to more spectacular but less typical cases that fit with conservative, law and order narratives and replaced the earlier, social justice-focused framing with tough-on-crime rhetoric and approaches. *Id.* at 23–44.

[46] LEWIS, *supra* note 2. Lewis notes, however, that "perpetrators of anti-Arab and anti-Muslim hate crimes are largely missing" from these mainstream representations. *Id.* at 68.

[47] *Id.* at 66.

[48] *Id.*

[49] *Id.* at 76.

[50] *Id.* at 66 ("[A]nd it is almost always a *he*.").

[51] *Id.* at 68.

[52] *See id.* at 68–71, 74–76.

a monster, demon, or "'hard-core hater'" with ties to white supremacist hate groups.[53] Portrayals of hate crime perpetrators often fixate on mental illness as well, thereby "both amplifying the demonization of haters and medicalizing bigoted belief systems."[54] This focus on mental illness has been prominent in news accounts of anti-Asian violence, many of which reported on perpetrators' histories of erratic behavior, homelessness, and institutionalization.[55] A more bizarre example can be found in early reporting on the Atlanta "spa killer," who asserted that he was driven to murder his eight victims, six of whom were women of Asian descent, by his torment over a claimed "'sex[] addiction.'"[56]

In contrast, the "iconic"[57] or "paradigmatic"[58] hate crime victim—that is, the hate crime victim who garners sympathy and prompts public outcry against their victimization—is cast as innocent and sympathetic in a way that conforms to the expectations of "post-difference citizenship."[59] This image is created by downplaying or "covering" their difference from and

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[53] *See id.* at 76–81.

[54] *Id.* at 82; s*ee also* Jemma Tyson & Nathan Hall, *Medicalising 'Hatred': Exploring the Sense and Sensitivities of Classifying the Motivations for Hate Crime as Mental Disorder*, *in* MENTAL HEALTH, CRIME AND CRIMINAL JUSTICE: RESPONSES AND REFORMS 91 (Jane Winstone ed., 2016) (examining questions on the connections between "hatred" and mental illness).

[55] *See, e.g.*, Andy Newman, *Man Charged in Fatal Subway Push Deemed Unfit for Trial*, N.Y. TIMES (Apr. 19, 2022), https://www.nytimes.com/2022/04/19/nyregion/martial-simon-michelle-go-trial.html [https://perma.cc/8AZY-2ZCC]; Thomas Tracy, *Half of Suspects Arrested in NYC Anti-Asian Attacks are Mentally Ill: Officials*, N.Y. DAILY NEWS (May 15, 2021, 10:00 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-nyc-crimes-mental-illness-20210516-xqa4gvmjpnhsxbas7umw2irbni-story.html [https://perma.cc/C6UR-C3CR]; *NYC Police Official: Mental Illness a Factor in Recent Anti-Asian Attacks*, VOA NEWS (Apr. 2, 2021, 5:42 PM), https://www.voanews.com/a/usa_nyc-police-official-mental-illness-factor-recent-anti-asian-attacks/6204092.html [https://perma.cc/RW7V-AFUD].

[56] Richard Fausset, Campbell Robertson, Nicholas Bogel-Burroughs & Sean Keenan, *Suspect in Atlanta Spa Attacks Is Charged With 8 Counts of Murder*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/03/17/us/atlanta-shooting-spa.html [https://perma.cc/P3QU-W3VM] ("[The suspect] told the police that he had a 'sexual addiction' and saw the spas as an outlet for something 'that he shouldn't be doing . . . . He was attempting to take out that temptation . . . .'").

[57] LEWIS, *supra* note 22, at 96.

[58] *Id.* at 94.

[59] Lewis "define[s] 'post-difference citizenship' as the media process whereby members of historically marginalized groups and their allies are given access to public support by condoning post-difference ideology. Full citizenship rights to belonging and recognition are earned by disowning specific minority grievances." *Id.* at 91.

highlighting their conformance to mainstream social ideals.[60] For gay victims, this includes emphasizing their wholesome lifestyles, their roles as devoted children within heterosexual families, and their discreet, nonthreatening expression (or concealment) of their sexual orientation.[61] Victims of racist violence and their families or spokespeople "perform innocence" by "speak[ing] in color-blind terms."[62] They talk about racism as deviant and even surprising—that is, as part of the country's ugly past that we have overcome; express forgiveness rather than anger over their attack; and advocate for a color-blind worldview under which people come together and forget about racial differences.[63] Victims of anti-Arab and anti-Muslim hate crimes—who, like perpetrators of such crimes, tend to be "largely anonymous"—receive sympathetic attention when they are seen as "hardworking, fully assimilated, nonradical, loyal American patriots"[64] who "take action against terrorism through consumerism and consumption."[65]

Collectively, these popular images of the crimes, perpetrators, and victims frame hate crime as an aberration that is best addressed through criminalization and institutionalization rather than systemic change.[66] They construct perpetrators as deviant, irrational, and disconnected from mainstream society. Three key assumptions about the perpetrator underlie that prototypical image: that the perpetrator's bias is based on personal hostility or distaste for the target group; that the perpetrator's bias is deviant, irrational, and not shared by mainstream society; and that the perpetrator's

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[60] *Id.* at 90. Lewis adapts the term "covering," as used by sociologist Erving Goffman and legal scholar Kenji Yoshino, to refer to "a specific set of rhetorical tactics deployed by the mainstream news media in reports on hate crimes victims. In news segments and articles, cultural producers cover what they consider to be unfavorable aspects of hate crimes victims' identities, life histories, and political perspectives." *Id.*

[61] *See id.* at 93–99. For example, accounts of sympathetic gay victims note their mild effeminacy, love of musical theater, or interest in interior decorating rather than their sexuality or sexual activities. *See id.* at 95–98. In contrast, victims whose gender identity, sexuality, and behavior are more transgressive of social norms are regarded as "both victimized and victimizing," with "public debate over [their] cases equivocat[ing] between sympathy and blame." *Id.* at 99.

[62] *Id.* at 99–100.

[63] *See id.* at 99–102.

[64] *Id.* at 103

[65] *Id.* at 104. Lewis highlights the association drawn in these narratives between the sympathetic victims' pro-American/anti-terrorist expressions and their hard work and purchases of consumer goods. *Id.* at 104–06.

[66] *See id.* at 66–67, 81–85, 87, 107–08.

exclusive purpose is to harm a member of the target group rather than being self-serving or rational.[67] At the same time, popular portrayals of targets of hate crimes render invisible and even unsympathetic most victims of bias-motivated crimes, whose wounds may be less gruesome and whose difference might be more apparent than those of the paradigmatic victim.[68]

Historical and empirical evidence into even prototypical hate crimes, however, challenges these images and assumptions and provides an alternative conception of the perpetrator and the influence of the social context.[69] As I have elaborated elsewhere, social scientists and historians who have studied two of the most prototypical of hate crimes—racial violence during the lynching era and modern day anti-gay crime and violence—have demonstrated that even those crimes were and are not isolated acts committed by individuals at the fringe of society for the sole purpose of harming a member of the targeted group.[70] Instead, what we regard as "hate crimes" may be committed for a variety of more mundane reasons, because in our society, bias-motivated violence can fulfill a range of functions for perpetrators. Indeed, in some cases committing a hate crime can be a calculated or even a conformist act. Furthermore, perpetration of even prototypical hate crimes need not—although in some cases it might—reflect the perpetrator's own views of the targeted group.

Racial violence during the lynching era, for example, often served the economic interests of white southerners, who used it to maintain control over the two key resources of land and labor.[71] Perpetrators calibrated the level,

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[67] *See* Wang, *supra* note 38, at 815–30 (elaborating on these assumptions).

[68] As Lewis explains,

> The conditional, exclusive process of recognizing who constitutes a sympathetic hate crime victim . . . contributes to rendering victim status inaccessible to the majority of everyday hate crime victims—who show up at the scene of the crime and in life as politically complex, identity laden, visibly different, and perhaps even unangelically miffed, unforgiving, or traumatized.

LEWIS, *supra* note 2, at 106.

[69] *Cf. id.* at 85 ("[T]he hater is a cultural construct [whose] defining characteristics . . . barely resemble empirically observed profiles of known hate crime perpetrators . . . [who are] by and large, disturbingly conformist.").

[70] Wang, *supra* note 38, at 830–94.

[71] *See generally* STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930 (1995) (discussing their studies of the historical data on lynching); Wang, *supra* note 38, at 836–65 (discussing studies by Tolnay

timing, and placement of the violence to serve that interest, escalating it when and where it would enhance that control, and moderating or even abandoning violence at times when it was not needed or was harmful to their interests.[72] Certainly, a racially hostile environment enabled the practice to flourish and produce benefits for perpetrators, but an individual perpetrator did not need to harbor racial animus to have reason to carry out violence against a Black person. As historical sociologists E.M. Beck and Stewart E. Tolnay 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."[73] In other words, the racist views of southerners in general identified Black people as acceptable and therefore easy and attractive targets for violence, whether or not an individual perpetrator "hated" them, because a perpetrator could both obtain benefits from targeting Black people and get away with it.[74]

Modern day anti-gay violence, too, can be rewarding even for perpetrators who do not feel prejudice against lesbians and gay men.[75] Indeed, "[f]or some young males, . . . joining in such an attack is a way *to be accepted* by their peers and by society."[76] They may view it as a recreational activity that feels risky and exciting, builds bonds within their circle, and enhances their self-esteem by bringing recognition—and sometimes acclaim—to their group.[77] Authority figures from parents to school administrators to judges often reinforce the idea that anti-gay violence is socially acceptable when they treat it as a rite of passage–just "boys being boys."[78] Perpetrators of property crimes, too, can take advantage of societal attitudes toward gay men to increase the benefits relative to the costs (to themselves) of their offenses. Gay men are especially vulnerable to crimes

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and Beck finding that lynching served as an economic practice in the cotton-growing "Black Belt" region of the southern United States).

[72] *See* Wang, *supra* note 38, at 855–65 (discussing studies by Tolnay and Beck).

[73] E. M. Beck & Stewart E. Tolnay, *The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882–1930*, 55 AM. SOC. REV. 526, 537 (1990).

[74] *See* Wang, *supra* note 38, at 866.

[75] *See generally, e.g.*, Wang, *supra* note 38, at 871–76, 879–80 (describing accounts of the social rewards of anti-gay violence for young men who denied hatred for or an intent to harm gay men).

[76] LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 107 (2006) (emphasis in original).

[77] *See* Wang, *supra* note 38, at 871–76, 880–83.

[78] *See id.* at 876–79.

such as robbery and blackmail, in which the perpetrator uses threats of violence and disclosure of the victim's sexual orientation to extort money or property.[79] In these cases, perpetrators calculate, often correctly, that gay men would rather hand over their property than fight back or report the crime because they fear how family members, business associates, or law enforcement would react to news of their sexual orientation.[80] Perpetrators of these crimes also may factor in and benefit from the tendency of police, prosecutors, judges, and juries to minimize offenses against gay victims.[81]

As these examples demonstrate, perpetrators can benefit from committing hate crimes because the social environment marks members of particular groups as suitable targets, thereby enabling perpetrators to use violence against them as a means to achieve a variety of goals. Sometimes a group is explicitly designated as a suitable target by events and rhetorical campaigns, as we can see with the rise in crimes against particular groups following 9/11, Donald Trump's presidential campaign, and the coronavirus pandemic.[82] In those cases, authority figures or perceived leaders identified acceptable targets and provided justifications for crime and violence against them.[83] One recent study, for example, found not only that the inflammatory rhetoric of Donald Trump caused an increase in hate crimes, but also that his election as President served to validate that rhetoric by providing "a sort of permission structure" to act on bigoted beliefs.[84]

Further, hate crime does not just reflect, but also reinforces the designation of the targeted group as a suitable victim. That is, the influence that runs between hate crimes and the social environment is reciprocal.

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[79] *See id.* at 883–92 (describing anti-gay crimes that are committed for material or financial gain).

[80] *See id.* (describing profit-seeking crimes against gay men that might be perpetrated by strangers, police officers, acquaintances, and even friends of the victim).

[81] *See, e.g.*, *id.* at 892 (quoting interviews with convicted killers of gay men who explained their reasons for targeting gay men in these terms).

[82] *See, e.g.*, Lee, *supra* note 41, at 142–43 (discussing bias incidents following September 11, 2001); Griffin Edwards & Stephen Rushin, The Effect of President Trump's Election on Hate Crimes 2–3, 13–18 (Jan. 31, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [https://perma.cc/FPJ4-53GY] (discussing the relationship between Donald Trump's rise to power and the increase in hate crimes); Gover et. al, *supra* note 1, at 648–49, 653–63 (discussing anti-Asian hate crimes during the COVID-19 pandemic).

[83] *See, e.g.*, Gover et. al, *supra* note 1, at 653–55.

[84] Edwards & Rushin, *supra* note 82, at 20.

Certainly, members of frequently targeted social groups recognize that they have been so designated and—as we have seen in news coverage of Asian American communities in recent years—may feel isolated and afraid, and may adopt defensive behavioral strategies to avoid becoming victims themselves.[85] Avoidance strategies include staying away from places and events where they might be conspicuous,[86] or trying to obscure the features that mark their difference—for example, covering their black hair to hide their "Asian-ness."[87]

Hate crimes also contribute to the conditions for prejudice and discrimination among the broader community because they define the "safe" or expected targets for ill treatment.[88] Even observers who condemn an attack will recognize that the victim's social group status prompted it.[89] Some will even attribute responsibility to the victim for failing to conceal their status or for appearing in a space where that status made them vulnerable.[90] In other words, "[o]bservers recognize the 'script' or pattern of bias-motivated

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[85] *See, e.g.*, Jessica Chia, *Keys, Wallet, Pepper Spray: The New Reality for Asian-Americans*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/05/20/nyregion/asian-americans-attacks-nyc.html [https://perma.cc/A5QT-K9DC]; Min Jin Lee, *Asian Americans Have Always Lived With Fear*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/opinion/asian-american-violence-fear.html [https://perma.cc/B4HE-CV6G]; Marian Chia-Ming Liu, *A Year After the Atlanta Shootings, Asian Women Live in Fear: 'How Are We All Going to Stay Safe?'*, WASH. POST (Mar. 16, 2022, 6:00 AM), https://www.washingtonpost.com/lifestyle/2022/03/16/anti-asian-attacks-nyc-atlanta [https://perma.cc/2GTK-D6KU].

[86] *See, e.g.*, Wang, *supra* note 11, at 124–25 (describing these and other ways in which members of socially vulnerable groups try to reduce their visibility and therefore their susceptibility to harassment and violence). In addition, members of targeted groups might acquire arms and prepare to fight back. *See* Chia, *supra* note 85 (reporting increases in Asian Americans' purchases of pepper spray and guns and participation in self-defense training).

[87] Liu, *supra* note 85; *see also* Lee, *supra* note 85.

[88] *See, e.g.*, Gover et. al, *supra* note 1, at 649–50, 661–63 (discussing the "othering" effect of hate crimes); WANG, *supra* note 76, at 93–97 (describing a process by which particular groups become "expected targets for aggression and ill treatment").

[89] *See* Wang, *supra* note 11, at 125, 127–28.

[90] *See id.* at 128 (noting that "the gay bias crime victim may be blamed for having worn certain clothing or having gestured or behaved in a way that made his homosexuality 'obvious'" and that "the African-American victim of a racially motivated assault is susceptible to being blamed for having appeared on the streets of a white neighborhood"); *cf.* LEWIS, *supra* note 2, at 106–07 (discussing the "secondary victimization" that occurs when hate crime victims are ascribed blame for the harm that they suffered).

violence and understand that members of vulnerable groups are 'persons whom the dominant culture considers acceptable to derogate.'"[91]

Because hate crimes are influenced by and in turn influence the social environment, they also are connected to more mundane forms of discrimination. That is, hate crimes and everyday racism—what we might regard as extraordinary and ordinary forms of discrimination—are connected through a cultural and social feedback loop.[92] While they take on different forms and may have different legal consequences, they both stem from the social vulnerability of certain groups within an environment that marks those groups as suitable targets for mistreatment. We recognize the patterns in both extreme and routine discrimination, from hate crimes to racial profiling in law enforcement ("Driving While Black"), consumer discrimination ("Shopping" and "Dining While Black"), and discrimination in health care.[93] Because these "scripts, schemas, and prototypes of discrimination" are so familiar, we become accustomed to and take for granted the resulting inequitable outcomes.[94]

The following section and conclusion discuss several illustrative examples of the feedback loop between hate crimes and the social environment, including some notable events of the past two years that further illuminate this reciprocal, reinforcing relationship.

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[91] Wang, *supra* note 44, at 16 (quoting Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127–28 (1987)).

[92] *Id.* at 16–17 (noting the reciprocal influences between hate crime and "'[e]veryday' discrimination").

[93] *E.g.*, WANG, *supra* note 76, at 115–34 (discussing institutional practices and cognitive influences that establish racially disparate health outcomes as normal); Wang, *supra* note 44, at 16–29 (discussing reciprocal influences between hate crime and the social context and elaborating on the parallels between hate crimes and everyday discrimination in the cases of racial profiling in law enforcement, and consumer discrimination; noting a similar dynamic in the recognition and acceptance of street harassment of women); Lu-in Wang & Zachary W. Brewster, *Dignity Transacted: Emotional Labor and the Racialized Workplace*, 53 U. MICH. J. L. REFORM 531, 541, 558–62 (2020) (discussing race discrimination in restaurant service as an example of the ways in which some groups, here Black customers, come to be viewed as acceptable targets for mistreatment).

[94] WANG, *supra* note 76, at 96.

II. NO NEED FOR HATE: OPPORTUNISTIC BIAS CRIMES

Understanding the relationship between the social environment and the benefits to be gained from bias-motivated crime helps to explain why some perpetrators target members of socially vulnerable groups despite their apparent lack of animus against the group. It also explains why, as will be discussed below, an individual might benefit from committing a crime that targets their own group. Just as young men who seek acclaim and belonging through gay bashing might disclaim animus against gays,[95] so too can more profit-seeking criminals like the robbers and blackmailers described above[96] achieve their desired goals by targeting victims based on a cost-benefit analysis in which "hate" does not play a prominent role. In previous work I described such a person as a "Calculating Discriminator":[97] a "rational" actor who uses the victim's social group status as a proxy for information relevant to his criminal designs and who "'economize[s on his information costs] by using stereotypes and playing the odds.'"[98] In such cases, perpetrators focus on groups that are perceived as high value, easy marks based on stereotyped assumptions about them and due to their social vulnerability.

A striking example of one such criminal enterprise "'based on stereotype and opportunity'" was charged by the United States Attorney for New Jersey in May of 2021.[99] In that case, *United States v. Armour*,[100] eight defendants are alleged to have engaged in a "'brazen,'" "sophisticated" burglary scheme that targeted over 50 residences in New Jersey, New York, Pennsylvania, and Delaware.[101] A participant explained that the conspirators focused on the homes of business owners of Asian descent based on their

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[95] *See supra* notes 75–78 and accompanying text.

[96] *See* Wang, *supra* note 38, at 883–92 (describing anti-gay crimes that are committed for material or financial gain); *see also supra* text accompanying note 79–81.

[97] Wang, *supra* note 11, at 57–58.

[98] *Id.* (quoting JODY D. ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 45 (Richard Delgado & Joan Stefancic eds., 1997)).

[99] Press Release, U.S. Att'y Office D.N.J., U.S. Dep't of Just., Eight Individuals Charged in Connection with Residential Burglaries Targeting Homeowners of Asian Descent (May 25, 2021), https://www.justice.gov/usao-nj/pr/eight-individuals-charged-connection-residential-burglaries-targeting-homeowners-asian [https://perma.cc/CFJ5-6NZD].

[100] Criminal Complaint, United States v. Armour, Mag. No. 21-10198 (D.N.J. May 19, 2021); *see also* Tracey Tully, *Asian Homeowners Were Targeted in Burglary Ring, Prosecutors Say*, N.Y. TIMES (May 25, 2021), https://www.nytimes.com/2021/05/25/nyregion/asian-home-invasion-burglary-ring.html [https://perma.cc/JAY4-MFLH].

[101] Press Release, U.S. Att'y D.N.J., *supra* note 99.

belief "that the victims kept large sums of currency and jewelry in their residences."[102] They identified their targets by surveilling Asian family-owned cash businesses "with an emphasis on those owned by Chinese and Indian individuals,"[103] scouted neighborhoods with high concentrations of Asian residents looking for signs that particular homes were occupied by individuals of Asian descent,[104] and placed makeshift tracking devices on victims' vehicles to monitor their patterns and determine when they were not likely to be home.[105] Although these defendants were not charged with hate crimes,[106] a law enforcement search discovered a list of residential addresses with "derogatory descriptive terms to identify the ethnicity of each of [the] homeowners for the respective residences."[107] This last fact is not surprising, because stereotypes about the economic success of Asians often include negative assumptions about how they acquired their wealth, such as through unfair or unscrupulous means or at the expense of "real" Americans.[108] Notably, this case is just one of several similar burglary schemes across the United States that have targeted Asian, as well as Middle Eastern, business and homeowners in recent years[109]—including some perpetrated by rings of

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[102] Criminal Complaint, United States v. Armour, *supra* note 100, at attach. B para. 41.

[103] *Id.* at attach. B para. 3, 41.

[104] *Id.* at attach. B para. 3.

[105] Press Release, U.S. Att'y D.N.J., *supra* note 99.

[106] All the defendants were charged with conspiracy to commit interstate transportation of stolen property, 18 U.S.C. § 371; one was charged with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1); and two were charged with conspiracy to tamper with documents or proceedings, 18 U.S.C. § 1512(k). Criminal Complaint, United States v. Armour, *supra* note 100, at attach. A.

[107] *Id.* at attach. B para. 18.

[108] *See* Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1432–34 (2000).

[109] *See, e.g.*, Kim Schupp & Andrea Medina, *Asian Homeowners Targeted in Tri-State Burglary Ring, Police Say*, FOX19NOW (Feb. 14, 2022, 1:05 PM), https://www.fox19.com/2022/02/14/asian-homeowners-targeted-tri-state-burglary-ring-police-say/ [https://perma.cc/2RD3-QYM4]; James McClendon, *Burglary Ring Targets Up to 20 Asian American Homes Across CNY; 3 Arrested, 1 Wanted*, SYRACUSE.COM (Oct. 28, 2021, 7:27 PM), https://www.syracuse.com/crime/2021/10/burglary-ring-targets-up-to-20-asian-american-homes-across-cny-3-arrested-1-wanted.html [https://perma.cc/Y2U9-MQWS]; Adam Manno & Snejana Farberov, *California Burglars Pose as Landscapers and Target Asian-American Homes in Los Angeles as City is Hit with Spate of Smash-and-Grab Robberies with White House Blaming COVID as 'Root Cause'*, DAILY MAIL (Dec. 5, 2021, 4:06 PM), https://www.dailymail.co.uk/news/article-10277677/California-burglars-pose-landscapers-target-Asian-American-homes-Los-Angeles.html [https://perma.cc/N5FL-H5FD]; Sarah

"crime tourists" who enter the country for the specific purpose of carrying out "scores" of property crimes.[110]

The criminal scheme described above is notable for its intricacy[111] and longevity,[112] but it shares features with far less sophisticated, more mundane property crimes, such as street robberies, burglaries, and vandalism targeting Asian individuals and small businesses.[113] In these cases, just as we saw with anti-gay property crimes, perpetrators' stereotypes about group members' wealth and easily accessible manner of storing their valuables (the "benefit" side of the equation) often join with beliefs about the ease of getting away with the crime (the "cost" side). A common stereotype about Asians, especially recent immigrants, is that they will not fight back or report their

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Yukiko, *3 Suspects Accused of Targeting Up to 20 Asian Americans in New York Burglary Ring are Arrested*, NEXTSHARK (Oct. 29, 2021), https://nextshark.com/burglary-ring-three-suspects-arrested/ [https://perma.cc/F9YL-JHLC]; Meredith Yeomans, *3 Arrested, Suspected of Targeting Asian American Households*, NBCDFW (Nov. 13, 2019, 10:30 PM), https://www.nbcdfw.com/news/local/three-arrested-suspected-of-targeting-asian-households/2150888 [https://perma.cc/8ZMG-9GNF].

110 Justin Jouvenal, *'Crime Tourists': An International Spree Targets D.C. Area's Wealthy Asian Residents*, WASH. POST (Jan. 11, 2022, 4:18 PM), https://www.washingtonpost.com/dc-md-va/2022/01/11/burglaries-crime-tourists-target-asians/ [https://perma.cc/3B7D-J53R]. These "crime tourists" often are able to evade accountability through a "kind of criminal sweet spot." *See id.* ("Bail for nonviolent property offenses is often low, so an arrested burglar often quickly gets bond and skips town for the next job, experts said. The crimes often don't meet the threshold for the involvement of federal authorities. And they attract less attention at a time when U.S. authorities are contending with a rise in homicides."); *see also* Dara Bitler, *South America Crime Groups Identified in Ring Targeting 26 Asian Families in Colorado, Wyoming*, FOX31 DENVER (Apr. 27, 2021, 11:28 AM), https://kdvr.com/news/local/south-america-crime-groups-identified-in-ring-targeting-26-asian-families-in-colorado-wyoming/ [https://perma.cc/V2DD-U354].

111 *See* Tully, *supra* note 100 (describing the burglary ring as "intricate").

112 The scheme ran from late 2016 through the spring of 2019. Criminal Complaint, United States v. Armour, *supra* note 100, at attach. B para. 1.

113 *See, e.g.*, Jonathan Edwards, *Police Say 6 men Targeted and Robbed Elderly Asians in the Bay Area: 'Victims . . . Were Being Essentially Hunted'*, WASH. POST (Dec. 17, 2021, 7:03 AM), https://www.washingtonpost.com/nation/2021/12/17/robbery-crew-targets-asians-san-jose [https://perma.cc/3XMH-8V9T]; Summer Lin, *Stockton, Tracy Men Among 6 Arrested in Massive Crime Spree Targeting Bay Area Asian Women*, SAN JOSE MERCURY NEWS (Dec. 15, 2021, 5:16 PM), https://www.recordnet.com/story/news/crime/2021/12/15/anti-asian-violence-stockton-tracy-men-among-6-arrested-in-spree-of-attacks-on-bay-area-asian-women/8918497002 [https://perma.cc/4DMP-BF22].

victimization to law enforcement because of language barriers or distrust of the government.[114]

This cost-benefit calculation can prove appealing even to members of a vulnerable social group themselves. A growing[115] and particularly dastardly profit-seeking bias crime, known as affinity fraud, enables a person to exploit their own group's feelings of vulnerability for financial gain. Affinity fraud is a form of securities or investment fraud that targets identifiable, often socially vulnerable, groups such as racial, ethnic, or religious minorities, and is perpetrated by individuals who are (or pretend to be) members of that group or claim they want to help members of that group.[116] The well-known securities scam perpetrated by Bernie Madoff is an example of affinity fraud that targeted Jewish investors.[117]

What makes affinity fraud particularly despicable is that the perpetrator wins the victim's trust by leveraging their shared identity and playing on their group's fear or skepticism of outsiders.[118] Like other Calculating Discriminators,[119] the perpetrator of affinity fraud engages in a "rational" assessment of the ease of defrauding (and getting away with defrauding) members of a particular group. They take into consideration factors like the tendency of people to trust and view favorably others who seem similar to

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[114] *See* Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1930 (1993) ("[C]riminals view Asian Americans as less costly targets [because they are] [r]egarded as physically weak and culturally averse to defending themselves . . . .").

[115] *See* Frank S. Perri & Richard G. Brody, *The Optics of Fraud: Affiliations That Enhance Offender Credibility*, 19 J. FIN. CRIME 305, 305 (2012) ("[There has been a] dramatic growth of affinity fraud, [which] since 1998 . . . has been ranked one of the top five investment [schemes]." (citation omitted)).

[116] *See, e.g.*, Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073, 1074 (2003) (defining affinity fraud as "securities and investment fraud that targets identifiable racial, ethnic, or religious groups perpetrated by members of the group or people claiming to want to assist members of the group"); Frank S. Perri & Richard G. Brody, *Birds of the Same Feather: The Dangers of Affinity Fraud*, 3 J. FORENSIC STUD. ACCT. & BUS. 33, 34 (2011) ("Affinity fraud refers to investment scams that prey upon members of identifiable groups, such as racial, religious and ethnic communities, the elderly, professional groups, or other types of identifiable groups. The fraudsters . . . frequently are—or pretend to be—members of the group.").

[117] *See* Perri & Brody, *supra* note 115, at 308–11.

[118] *See* Fairfax, *supra* note 116, at 1084, 1087–88.

[119] *See* Wang, *supra* note 11, at 57-58; *supra* text accompanying notes 97–98.

themselves,[120] the group's insularity or wariness of outsiders, and a person's reluctance to contact the police—whether to protect the perpetrator, whom they regard as one of their own, or because they fear law enforcement would not come to their aid.[121] Perpetrators see the sense of trust within the group as "a weakness to be taken advantage of."[122] Their crimes, like more commonly recognized bias crimes, both exploit and reinforce the social vulnerability or "suitable victim" status of particular groups.[123] Professor Lisa M. Fairfax has argued convincingly that affinity fraud should be treated as a hate or bias crime because of the increased harms the crime inflicts and the greater culpability of its perpetrators.[124]

Another way in which a perpetrator can exploit the designation of a particular social group as suitable victims without feeling animus toward the targeted group, and even as a member of the group, is the so-called "hate crime hoax" or "false hate crime."[125] In such cases, an apparent hate crime

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[120] *See* Perri & Brody, *supra* note 115, at 311–13 (discussing "projection bias" and perpetrators' persuasion and influence techniques).

[121] *See, e.g.*, Fairfax, *supra* note 116, at 1107–08; Perri & Brody, *supra* note 115, at 308–09.

[122] Perri & Brody, *supra* note 115, at 306–07.

[123] *See* Fairfax, *supra* note 116, at 1138–40 ("Affinity fraud may reflect an ideal example of this phenomenon.").

[124] *See id.* at 1120–43. Affinity fraud experts Frank S. Perri and Richard G. Brody have pointed out, moreover, that despite their more sophisticated methods, fraud offenders exhibit the same antisocial personality traits as "street-level offenders" who commit property or violent crimes. Perri & Brody, *supra* note 115, at 315–17. They also might resort to "brutal violence" to achieve their ends or avoid accountability for their crimes. *Id.* at 316.

[125] Here, I loosely follow the definition of a "false hate crime report" adopted by the Center for the Study of Hate and Extremism at California State University, San Bernardino, where my co-panelist Brian Levin serves as Director. According to the CSHE, a false hate crime report is:

1) an allegation or commission of a crime in the U.S.,
2) reported, generally by "target," to police or administrative authority (e.g. university administrators or campus police) as hate motivated crime,
3) but, discovered to either:
    - not have been committed as alleged, or
    - to have been committed by the reporting actor against his/her self, own immediate home/residential area, house of worship, workplace, or campus community, with one primary motive being false appearance as a hate crime.

BRIAN LEVIN & LISA NAKASHIMA, CAL. STATE UNIV., SAN BERNARDINO, CTR. FOR THE STUDY OF HATE & EXTREMISM, REPORT TO THE NATION: 2019: FACTBOOK ON HATE & EXTREMISM IN THE U.S. & INTERNATIONALLY 66 (Brian Levin, Kevin Grisham & Lisa Nakashima eds., 2019);

turns out to have been staged or falsely reported, sometimes by the alleged victim themself.[126] The most recent high profile false hate crime involved the actor Jussie Smollett, who was convicted of felony disorderly conduct in December 2021 for falsely reporting that he was the victim of a racist, anti-gay attack in Chicago in the wee hours of January 29, 2019.[127] The number of false hate crimes is tiny,[128] and I include discussion of this phenomenon, using Smollett's case as an example, to illustrate another way in which an opportunistic actor can be motivated to turn a group's—even their own group's—social vulnerability to the actor's advantage.

Smollett's simulated hate crime exhibits the characteristics of recognizable hate crimes and illustrates how perpetration of a hoax, like perpetration of an authentic hate crime, can be motivated by the desire for personal gain and takes advantage of a social environment in which certain groups are viewed as suitable targets. First, Smollett's hoax created a fact pattern that aligns with the prototypical hate crime.[129] Smollett reported to

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see also Peter Jamison & Marc Fisher, *Are Hate Crime Hoaxes on the Rise along with Real Hate Crimes?*, WASH. POST (Dec. 5, 2019, 9:55 AM), https://www.washingtonpost.com/local/are-hate-crime-hoaxes-on-the-rise-along-with-real-hate-crimes/2019/12/05/de339302-0a44-11ea-97ac-a7ccc8dd1ebc_story.html [https://perma.cc/DGM5-33JL] (contrasting Levin's definition, which "counts hate crimes that are reported to authorities—such as the police or college campus officials—and later shown to be deliberately falsified[,]" with a broader classification applied by political scientist Wilfred Reilly, author of HATE CRIME HOAX: HOW THE LEFT IS SELLING A FAKE RACE WAR, that would capture, for example, "various noncriminal incidents that initially generated speculation about hateful motives").

126 *See, e.g.*, LEVIN & NAKASHIMA, *supra* note 125, at 66.

127 *See, e.g.*, Nardine Saad, *Jussie Smollett Sentenced to Jail: Catch Up on the Long History of his Criminal Case*, L.A. TIMES (Mar. 11, 2022, 1:50 PM), https://www.latimes.com/entertainment-arts/tv/story/2021-11-30/jussie-smollett-case-trial-explained [https://perma.cc/8XQD-GSMN]; Diane Pathieu, Leah Hope, Eric Horng, Chuck Goudie & Liz Nagy, *Jussie Smollet Verdict: 'Empire' Actor Guilty on 5 Counts of Disorderly Conduct*, ABC7 CHICAGO (Dec. 9, 2021), https://abc7chicago.com/jussie-smollett-verdict-charges-latest-news/11315052 [https://perma.cc/32WP-KTJH]. A full account of this case is beyond the scope of this essay. For a timeline of its "twists and turns," see *Jussie Smollett: A Complete Timeline from Actor's 2019 Arrest to Jail Time*, BBC (Mar. 11, 2022), https://www.bbc.com/news/newsbeat-47317701 [https://perma.cc/A4BY-TQVY].

128 *See* LEVIN & NAKASHIMA, *supra* note 125 at 66–68 (reporting that, in 2018, 11 of 7,600 reported hate crimes, or 0.14%, were found to be false, and that "most were committed by college students and teenagers"); Jamison & Fisher, *supra* note 125 (reporting that Levin, applying the CSHE definition, "puts the hoax rate . . . at less than half of 1 percent" of the hate crimes reported to the FBI).

129 *See* Wang, *supra* note 44 and accompanying text.

police that he was attacked by two men who yelled racist and homophobic slurs and "'this is MAGA country'" (a reference to President Donald Trump's campaign slogan, "Make America Great Again"), hit him in the face, poured an "'unknown chemical substance'" on him, wrapped a rope around his neck, and then fled.[130] Second, Smollett allegedly exploited the social understanding of hate crimes to gain attention and escalate the sense of urgency that such crimes evoke. In the immediate aftermath of the alleged crime, numerous political leaders, activists, and celebrities condemned the attack and connected it to the country's political culture and hostility toward Smollett's social identity.[131] Third, in drawing upon that social understanding by perpetrating his false hate crime, Smollett allegedly sought personal gain in the form of greater prominence and financial benefit—specifically, to get attention and increase his compensation for performing in the television drama series, *Empire*.[132]

Of course, a false hate crime causes many of the same harms as an authentic hate crime if it is perceived to be real. If it is revealed to be false, moreover, the harm is arguably compounded. Smollet, for example, has been criticized for harming victims of true hate crimes by raising public doubt about the veracity of their accounts and the legitimacy of real acts of bigotry.[133] A separate question—and one that this essay does not address—

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[130] Sopan Deb, *Jussie Smollett, Star of 'Empire,' Attacked in What Police Call a Possible Hate Crime*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/arts/television/empire-jussie-smollett-attacked.html [https://perma.cc/RT2G-GYXF].

[131] *See, e.g.*, Noah Rothman, *Jussie Smollett and a Perfect Crime*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/opinion/jussie-smollett-attack.html [https://perma.cc/6NU3-QC5Q] (criticizing Smollett's actions and statements, as well as prominent individuals' readiness to accept and "amplify 'perfect crimes' that advance their political agenda—and to ignore crimes that don't").

[132] *See, e.g.*, Natalie Robehmed, *Police Say Jussie Smollett Case Was About Money, But He Earned An Estimated $125,000 An Episode*, FORBES (Feb. 22, 2019, 2:41 PM), https://www.forbes.com/sites/natalierobehmed/2019/02/22/police-say-jussie-smollett-case-was-about-money-but-he-earned-an-estimated-125000-an-episode/?sh=21529f026230 [https://perma.cc/2DND-CXLC] (questioning this theory).

[133] *See, e.g.*, Rothman, *supra* note 131. For a broader definition of hate crime hoaxes that accordingly yields a greater frequency of incidents, as well as a different view of the harms caused by hate crime hoaxes as so defined, see Wilfred Reilly, *Hate Crime Hoaxes and Why They Happen*, COMMENT. MAG. (Apr. 2019), https://www.commentary.org/articles/wilfred-reilly/hate-crime-hoaxes-why-they-happen [https://perma.cc/F4SM-WW9Q] (contending, for example, that "the actual number of hate-crime hoaxes is indisputably large" and that such

is the circumstances under which the commission or reporting of a false hate crime should itself be prosecuted as a crime.[134]

CONCLUSION: SUITABLE VICTIMS AND SELECTIVE SYMPATHY

Another prominent news story serves as a final illustration of how society regards some groups, but not others, as suitable victims. That illustrative episode was not itself a hate crime, but it was a case that riveted people across the country: The 2021 disappearance and murder of Gabrielle Petito, a twenty-two-year-old white woman who was killed during a cross-country road trip with her fiancé.[135] Certainly the fact that Ms. Petito had extensively publicized their adventures on social media contributed to the nationwide attention that her disappearance received.[136] Even so, public fascination with her case was outsized. The case "[g]alvanized the [i]nternet," inspiring individuals across the country to take action by posting updates as it developed and even engage in their own amateur detective work.[137] More pertinent to our topic is that Petito's case is just one recent

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incidents create a false impression of the prevalence of racist acts and thereby themselves contribute to racial hostility).

[134] For differing views on this and related issues in the context of the Smollett case, compare, Noah Rothman, *A Miscarriage of Justice*, COMMENT. MAG. (Mar. 26, 2019), https://www.commentary.org/noah-rothman/jussie-smollett-miscarriage-of-justice/ [https://perma.cc/MJ2N-CDYX] (arguing that "Smollett should be held to account"), with Kim Foxx, Opinion, *Kim Foxx: In Jussie Smollett Case, Our Justice System Failed. Here's How and Why.*, CHI. SUN TIMES (Mar. 10, 2022, 7:01 PM), https://chicago.suntimes.com/2022/3/10/22971657/jussie-smollett-case-our-justice-system-failed-states-attorney-kim-foxx-op-ed [https://perma.cc/L9F3-A56S] (prosecutor who declined to charge Smollett explaining her decision and criticizing "the damaging, costly, and disingenuous criminal prosecution of Jussie Smollett" that followed the subsequent appointment of a special prosecutor).

[135] *See* Michael Levenson, *Brian Laundrie Claimed Responsibility for Gabrielle Petito's Death, F.B.I. Says*, N.Y. TIMES (Jan. 21, 2022), https://www.nytimes.com/2022/01/21/us/gabby-petito-brian-laundrie-notebook-confession.html [https://perma.cc/XAM3-REW2] (recounting events surrounding the disappearance and murder of Ms. Petito and the discovery of her fiancé's written confession).

[136] *See* Noah Y. Kim, *Why the Gabby Petito Case Has Drawn So Much Attention Compared to Other Missing People Cases*, POYNTER (Sept. 23, 2021), https://www.poynter.org/fact-checking/2021/why-the-gabby-petito-case-has-drawn-so-much-attention-compared-to-other-missing-people-cases [https://perma.cc/HQ2X-9UZX].

[137] *See* Katherine Rosman, *How the Case of Gabrielle Petito Galvanized the Internet*, N.Y. TIMES (Oct. 20, 2021), https://www.nytimes.com/2021/09/20/style/gabby-petito-case-tiktok-social-media.html [https://perma.cc/5UDB-BK33].

example of the phenomenon known as "Missing White Woman Syndrome."[138] That term, which has been attributed to the late journalist Gwen Ifill,[139] refers to the disproportionate coverage, attention, and sympathy given to cases involving the disappearance of white women and girls compared to similar cases involving women and girls of color, which often merit only passing notice, if they are noticed at all.[140] That pattern of differential attention and sympathy also follows violent crimes that do not technically involve "missing" women.[141]

The comparative lack of attention paid to crimes against women of color is not necessarily due to general indifference or hardness towards them. To a large extent, it reflects a difference in what we regard as normal. In other words, the more difficult it is for us to imagine someone as a victim, the greater our reaction to their victimization, and vice versa; the more accustomed we are to thinking of someone as a victim, the less we react to

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[138] *See generally, e.g.*, Zach Sommers, *Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons*, 106 J. CRIM. L. & CRIMINOLOGY 275 (2016).

[139] Charles M. Blow, Opinion, *Gwen Ifill Was Right About 'Missing White Woman Syndrome'*, N.Y. TIMES (Sept. 22, 2021), https://www.nytimes.com/2021/09/22/opinion/petito-missing-person-cases.html [https://perma.cc/ET9Q-E56F]; Katie Robertson, *News Media Can't Shake 'Missing White Woman Syndrome,' Critics Say*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/22/business/media/gabby-petito-missing-white-woman-syndrome.html [https://perma.cc/9H73-J73T].

[140] Blow, *supra* note 139; Robertson, *supra* note 139.

[141] One prominent such example was the 1989 rape and brutal beating of the white woman known as the Central Park jogger, a case that, like Petito's disappearance, "drew massive, sensationalized media coverage." WANG, *supra* note 76, at 92. Kimberle Crenshaw observed that this "special attention" contrasted dramatically with the lack of coverage given to "twenty-eight other cases of first-degree rape or attempted rape" that were reported in New York that week:

> Many of these rapes were as horrific as the rape in Central Park, yet all were virtually ignored by the media. Some were gang rapes, and in a case that prosecutors described as was [sic] 'one of the most brutal in recent years,' a woman was raped, sodomized, and thrown fifty feet off the top of a four-story building in Brooklyn. Witnesses testified that the victim 'screamed as she plunged down the air shaft . . . . She suffered fractures of both ankles and legs, her pelvis was shattered, and she suffered extensive internal injuries.' This rape survivor, like most of the other forgotten victims that week, was a woman of color.

Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1268 (1991) (footnotes omitted).

or even notice their victimization.[142] The pattern of differential attention and sympathy for crime victims reflected in Missing White Woman Syndrome echoes and turns on its head one argument against hate crime laws, by suggesting that some victims are, perhaps, worth more than others.[143] Plainly, that view is unacceptable.[144] As this Essay has demonstrated, however, a related and equally unacceptable understanding—that some groups are expected or suitable targets for crime and violence—is embedded in our social environment and often underlies the motivation that we have labeled "hate."

[142] For a fuller discussion of the social psychological processes that contribute to this bias in reactions, including how they lead us to attribute to the victim responsibility for their bad outcomes, see WANG, *supra* note 76, at 83–114 (discussing counterfactual thinking and the normality bias in reactions to and explanations of discriminatory outcomes).

[143] *See supra* notes 14–15 and accompanying text (describing criticism of hate crime laws on the basis that they send the message that some crime victims are worth more than others).

[144] As Charles M. Blow has written, "What kinds of people, in what kinds of bodies, with what kinds of lineage do we value? . . . It is not that these white women should matter less, but rather that all missing people should matter equally." Blow, *supra* note 139.