

OHIO STATE LAW JOURNAL

Volume 60, Number 3, 1999

The Complexities of “Hate”

LU-IN WANG*

Debate concerning the validity and proper scope of “hate crime” laws has intensified as Congress and several state legislatures consider expanding or enacting such laws in the wake of several brutal, highly publicized incidents of bias-motivated violence. In this Article, Professor Wang points out that supporters and critics of hate crimes laws approach the controversy from a common starting point: their shared assumptions concerning the nature of the motivations that propel hate crimes. These conventional assumptions center on a narrow “prototype” of perpetrators as hard-core, animus-driven individuals whose violent acts are deviant, irrational, and intended solely to inflict harm on a member of the “target” group.

This Article challenges these widely held assumptions. Searching beyond the caricatured portrayal of perpetrators’ motivations painted by the conventional assumptions, it examines the historical and social science literature on the motivations behind two “classic” forms of hate crime: racial violence during this country’s “lynching era” (1880-1930) and anti-gay violence today. That literature provides a fuller, more complex picture of the motivations that animate apparent “hate” crimes, revealing that social context plays a far greater role in inspiring such crimes than has commonly been recognized and that perpetrators often are more opportunistic and “rational” than “hate-driven.”

I. INTRODUCTION

In the 1980s, a new term, representing a new category of crime—“hate crime” (also known as “bias crime”)—entered the legal vocabulary and public discourse.¹ The term described a phenomenon that was not new: crime and

* Lu-in Wang, Associate Professor of Law, University of Pittsburgh School of Law (Internet: wang@law.pitt.edu). I thank Martha Chamallas, Dave Herring, and Welsh White for their helpful comments and J. Black, Shana Ganter, Melissa Irr, Paula Turocy, and Juliette Zaengle for their research assistance. I also thank Peter Shane for assistance that he provided me in the form of a Dean’s Scholarship Award from the University of Pittsburgh School of Law.

¹ The term “hate crime” has been traced to United States Representatives John Conyers, Barbara Kennelly, and Mario Biaggi, who in 1985 cosponsored the bill that became the federal Hate Crime Statistics Act, 28 U.S.C. § 534 (1994 & Supp. II 1996). See JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998). The Act

violence that was committed because of the victim's race or other social group status.² What was new was lawmakers' level of concern with bias-motivated crime and their view that it should be treated as a distinct legal category.³ The basis for this great concern, and the justification for the new hate crime laws, was the belief that crimes motivated by bias or prejudice cause unique and serious harms to the individual victim, the social group to which the victim belongs, and society in general.⁴

Despite the relative youth of the anti-"hate crime" movement⁵ and early resistance to the approach taken by the new laws,⁶ both the new term and the legal category that it introduced have gained widespread recognition.⁷ This

requires the federal government to collect and publish information concerning crimes that "manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity . . ." 28 U.S.C. § 534 (Supp. II 1996). The legal category to which the term refers can be traced to model "ethnic intimidation" legislation drafted by the Anti-Defamation League of B'nai B'rith in 1981. See ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE 1-4 (1994) [hereinafter ADL, HATE CRIMES LAWS]. This model legislation, which has been adopted in some form in over half of the states and at the federal level, would enhance punishment for crimes that were committed "by reason of" the victim's race or other protected social group status. See generally LU-IN WANG, HATE CRIMES LAW, §§ 8.03, 10.01 to 10.05 (1994) (discussing the vulnerable victim adjustment in the federal sentencing guidelines and state bias and ethnic intimidation statutes). For further discussion of the legal model, see *infra* Part II.

² See generally, e.g., JACOBS & POTTER, *supra* note 1, at 59-63; Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564-66 (1998).

³ Some crimes that today would be labeled "hate" crimes and could be prosecuted under the new laws, described at *supra* note 1 and *infra* Part II, could have been and sometimes still are prosecuted under older laws, including, inter alia, federal and state civil rights laws, anti-cross burning laws, and institutional vandalism laws. See generally WANG, *supra* note 1. However, the idea of separately categorizing and differentially punishing crimes based upon the defendant's bias motivation was introduced by the ADL model statute. See *supra* note 1.

⁴ See generally, e.g., H.R. REP. NO. 103-244, at 4 (1993) (discussing need for federal Hate Crimes Sentencing Enhancement Act); ADL, HATE CRIMES LAWS, *supra* note 1, at 1.

⁵ For a discussion of the history of the anti-hate crime movement and the challenges it currently faces, see generally Maroney, *supra* note 2.

⁶ See, e.g., Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 53 (1997) ("During the early 1990s, the legal community debated fundamental issues concerning the constitutionality, legitimacy, and wisdom of [bias crime legislation]."). Some legal commentators remain strongly opposed to penalty enhancement laws. See, generally JACOBS & POTTER, *supra* note 1.

⁷ See JACOBS & POTTER, *supra* note 1, at 4-5. For example, Professor Jacobs and Attorney Potter have noted the proliferation of news reports and law review articles about hate crime since the term was first introduced. In addition, bias crime legislation following the ADL

awareness, however, has not translated into a full or accurate understanding of bias-motivated crime, even among those who debate and apply the laws.⁸ Indeed, the term "hate crime" reflects and reinforces an oversimplification of the phenomenon it seeks to describe. The term attributes the commission of bias crimes solely to the perpetrator's deviant personal attitudes toward, and desire to inflict harm upon, the targeted social group. It fails to account for the possibility of more mundane, opportunistic motivations, such as the desire to obtain material rewards. This understanding lies beneath the prevailing view that the only "true" hate crimes are those in which the perpetrator was driven by personal animus toward the victim's social group. It excludes from consideration, for example, cases in which the perpetrator wanted to find an "easy target" for a robbery or vandalism and determined that a member of a vulnerable social group would readily serve that purpose.

This Article argues that the law's current focus on perpetrator "animus" produces an unduly narrow legal model that fails to capture the full range of cases giving rise to the special harms that hate crimes laws were designed to address. The focus on animus is also unwarranted. As this Article demonstrates, even incidents that are widely viewed as "easy" or "classic" cases of hate-driven violence often do not conform to the conventional model. Rather than being driven by "hate," many perpetrators seek material, social, and psychological rewards that are gained by targeting particular social groups. To achieve its goal of redressing the special harms of hate crimes, the law ought to incorporate a richer understanding of the complex motivations behind them.

The readiness with which "hate crime" is recognized—and the accompanying influence exerted by the name it has been given—are no doubt due partly to the degree of attention that political groups, politicians, and the mass media have paid both to the issue of bias-motivated violence generally and to specific cases of bias crime.⁹ In particular, several dramatic, well-publicized cases drew public notice to the issue during the period when hate crime laws were gaining hold. These cases include the 1982 beating death of Chinese-American Vincent Chin by two unemployed, white Detroit autoworkers who, assuming Chin was Japanese, blamed him for their economic woes;¹⁰ the 1986 incident in Howard Beach, New York, in which a gang of white youths chased three young black men out of their neighborhood, then beat and chased one of

model, discussed in *supra* note 1, has been adopted in the majority of states and at the federal level. See Wang, *supra* note 6, at 49 n.3.

⁸ See *infra* Parts III, IV.

⁹ See, e.g., JACOBS & POTTER, *supra* note 1, at 45–91; Maroney, *supra* note 2, at 567–68, 585–98.

¹⁰ See generally *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986).

them, Michael Griffith, into traffic, where he was struck by a car and killed;¹¹ and the 1991 Crown Heights, New York case in which a group of black youths, shouting "Kill the Jews," stabbed to death rabbinical student Yankel Rosenbaum in retaliation for an accident in which an Orthodox Jewish motorist had killed a young black child.¹²

These prominent cases share several features with one another and with the "prototypical"¹³ or "paradigmatic"¹⁴ image that has come to represent the category of "hate crime."¹⁵ The prototypical "hate" or "bias" crime is one in which the perpetrator and victim are strangers.¹⁶ The perpetrator selects the victim not because of any personal hostility between them or because the victim's own conduct has provoked an attack, but solely because the perpetrator sees the individual victim as a "fungible"¹⁷ or an "interchangeable"¹⁸ representative of a racial or social group that the perpetrator hates.¹⁹ The perpetrator commonly utters derogatory group-based epithets before, during, or after the crime,²⁰ but whether or not he verbally demonstrates his hostility, the criminal act itself is typically characterized by extreme, gratuitous violence²¹ or

¹¹ See JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 5-7 (1993).

¹² See generally *United States v. Nelson*, 68 F.3d 583 (2d Cir. 1995); LEVIN & MCDEVITT, *supra* note 11, at 137-39; Craig Horowitz, *The New Anti-Semitism*, NEW YORK, Jan. 11, 1993, 21, 21-22, reprinted in *HATE CRIMES* 18, 19 (Paul A. Winters ed., 1996).

¹³ Wang, *supra* note 6, at 49.

¹⁴ Maroney, *supra* note 2, at 604.

¹⁵ See Wang, *supra* note 6, at 49-59.

¹⁶ See, e.g., LEVIN & MCDEVITT, *supra* note 11, at 12; Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": *Recognizing Gender-Based Bias Crimes*, STAN. L. & POL'Y REV., Spring 1994, at 21, 23.

¹⁷ Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 342-43 nn.88-89 (1994).

¹⁸ JACOBS & POTTER, *supra* note 1, at 72; LEVIN & MCDEVITT, *supra* note 11, at 14-16, 67.

¹⁹ See, e.g., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *HATE CRIMES: POLICIES AND PROCEDURES FOR LAW ENFORCEMENT AGENCIES 1* (1988) [hereinafter ADL, *POLICIES AND PROCEDURES*]; LEVIN & MCDEVITT, *supra* note 11, at 14-16; Elizabeth A. Boyd et al., "Motivated by Hatred or Prejudice": *Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 L. & SOC'Y REV. 819, 834-40 (1996) (describing hate crime classification methods in one large urban police department).

²⁰ See, e.g., LEVIN & MCDEVITT, *supra* note 11, at 54; ALPHONSO PINCKNEY, *LEST WE FORGET: WHITE HATE CRIMES: HOWARD BEACH AND OTHER RACIAL ATROCITIES* 48, 101 (1994); Boyd et al., *supra* note 19, at 835; Horowitz, *supra* note 12, at 18-19.

²¹ See, e.g., LEVIN & MCDEVITT, *supra* note 11, at 8, 11; Weisburd & Levin, *supra* note 16, at 23-24. Prototypical hate crimes also frequently involve multiple attacks on the same

the destruction of property.²² The personal injury or property damage inflicted, as well as the fear that his acts create, appear to be the perpetrator's main objectives,²³ for, in prototypical cases, nothing of value is taken.²⁴ While one-on-one and group-on-group crimes could fit the pattern, the prototypical crime more commonly is committed by multiple perpetrators on a single victim.²⁵

This prototypical image has heavily influenced legal thinking about bias crimes and has had a troubling effect on the development of the law. Like prototypes generally, the bias crime prototype is useful in helping people to recognize the category that it represents.²⁶ Reasoning that is based on prototypes also can present problems, however, and these problems can be especially serious when they relate to reasoning about legal categories.²⁷ The major problem is that, while they help us to organize information, prototypes also distort our understanding of the categories that they represent. Prototypes often

victim, sometimes starting with minor harassment that escalates in severity over time. *See id.* at 26.

²² *See* Richard A. Berk et al., *Thinking More Clearly About Hate-Motivated Crimes*, in *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* 123, 132 (Gregory M. Herek & Kevin T. Berrill eds., 1992). Even when the crime involves damage to property rather than bodily injury, the property damage is intended to instill fear and may be a threat or promise of impending bodily injury. *Cf.* LEVIN & MCDEVITT, *supra* note 11, at 19, 66–67.

²³ *See, e.g.*, LEVIN & MCDEVITT, *supra* note 11, at 65; Weisburd & Levin, *supra* note 16, at 24–25.

²⁴ *See, e.g.*, ADL, *POLICIES AND PROCEDURES*, *supra* note 19, at 61, 68; LEVIN & MCDEVITT, *supra* note 11, at 68; Berk et al., *supra* note 22, at 132; Weisburd & Levin, *supra* note 16, at 25.

²⁵ *See, e.g.*, LEVIN & MCDEVITT, *supra* note 11, at 16 (explaining that most hate crimes are committed by four or more offenders who attack in a gang); Weisburd & Levin, *supra* note 16, at 25.

²⁶ Social psychologists Susan T. Fiske and Shelley E. Taylor have explained that, when a category has "fuzzy boundaries," a category member that is "most typical" or that represents the "average" or "central tendency" of category members—that is, a "prototype"—comes to be viewed as representing the category. SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 106 (2d ed. 1991). People develop prototypes for all sorts of categories, including object categories (*e.g.*, the category of "games" might be represented by the prototype "Monopoly"), person categories (*e.g.*, the category "committed person" might be represented by the prototype "religious devotee"), and social situation categories (*e.g.*, the category "ceremonies" might be represented by the prototype "graduations"). *See id.* at 106–08. Some social categories, rather than being organized around an "average" or "typical" member, may be organized around "ideal or extreme cases." *Id.* at 111. This seems to be the case with the bias crime prototype. *See infra* Part III.

²⁷ For example, Professor Martha Chamallas has explained how biased prototypes have distorted understanding of and skewed the development of the law relating to rape, domestic violence, and the treatment of single mothers. *See* MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 222–26, 255–59, 286–88, 312–14 (1999).

are not “real life” representations, but instead are “abstracted from experiences with examples.”²⁸ In the case of bias crime, in particular, the prototype highlights the most “ideal” or extreme²⁹ features of such crimes and minimizes their other attributes.³⁰ As with other types of categories, however, the salient example is not necessarily the statistical norm.

This quality of prototypes has two related consequences, both of which have infected thinking about the legal category of bias crimes. First, the prototype can distort decisions about whether specific instances belong in the category, because people tend to decide that question by assessing the similarity of the new case to the prototype, rather than evaluating whether the case fulfills the requirements for membership in the category.³¹ Second, people exacerbate this error when, beyond using the prototype as a means of recognizing the category, they infuse the prototype with more significance than is warranted. People do this when they construct theories to explain the prototype and then use those theories to explain the category as a whole.³² With bias crimes, where the legal category turns on the perpetrator’s motivation,³³ people attempt to explain why the perpetrator of the prototypical crime engages in such conduct. They then derive from that explanation a theory for explaining the motivations behind bias crimes in general. The problem with this exercise is that common beliefs about the motivations behind bias crime have not been based on empirical study of bias crime perpetrators, but instead on people’s self-generated assumptions³⁴—and individuals’ assumptions about the causes of another person’s behavior are notorious for being inaccurate.³⁵

The first problem—determining whether a new case belongs in the category by assessing its similarity to the prototype—is evident in how legal decision makers determine which cases of bias-motivated crime are properly labeled “hate” or “bias” crimes. To be sure, the empirical attributes of the prototype do represent prominent features of many bias crime cases; however, the prototype

²⁸ FISKE & TAYLOR, *supra* note 26, at 106.

²⁹ *See supra* note 26.

³⁰ *Cf.* FISKE & TAYLOR, *supra* note 26, at 106–07.

³¹ *See id.* at 106.

³² *See id.* at 117 (noting that “most prototypic category members are used to draw inferences about the category as a whole”).

³³ *See infra* Part II.

³⁴ *See infra* Parts II, III.

³⁵ *See generally* FISKE & TAYLOR, *supra* note 26, at 66–86. People have many reasons for trying to explain the behavior of others, including a general desire to understand and predict the environment. *See id.* at 555. However, sometimes their thought processes are so “efficient”—that is, they take so many shortcuts—that they “compromise[] . . . thorough, logical, normatively correct procedures . . .” *Id.*

may not encompass the category defined by the law.³⁶ Nevertheless, legal commentators and actors within the legal system have treated the legal category as if it were bounded by the attributes of the prototype.³⁷ As a result, the legal model for bias crime that lawmakers, legal scholars, and decision makers "in the field" have applied is a model that is centered on the prototype. That is, they have considered as "real" bias crimes only those cases where the perpetrator, in selecting the victim, was motivated solely by hostility or animus toward the victim's social group and have excluded from the category cases where the perpetrator discriminated in selecting the victim for some reason other than his hatred of the victim's group (for example, because he viewed members of that group as "easy targets").³⁸

In an earlier article, this author asserted that the prototype-centered model of bias crime, which requires a showing of animus on the part of the perpetrator, misdefines the boundaries of the category that bias crime laws were intended to create.³⁹ The primary justification for bias crime laws is to redress the greater harms caused by bias crime.⁴⁰ Indeed, it was this justification that the United States Supreme Court viewed as "saving" a penalty enhancement statute from violating the First Amendment.⁴¹ Whether a case qualifies as a bona fide bias crime therefore ought to depend upon whether it causes those greater harms, and not upon how closely it resembles the prototype.⁴² The prototype-centered model

³⁶ See *infra* Part II.

³⁷ See *infra* Part III.

³⁸ See *infra* Parts II, III.

³⁹ See generally Wang, *supra* note 6.

⁴⁰ See *supra* note 4 and accompanying text.

⁴¹ In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Court upheld Wisconsin's bias crime penalty enhancement statute against a First Amendment challenge. In so doing, the Court distinguished the Wisconsin statute from a St. Paul, Minnesota hate crime ordinance that it had struck down on free speech grounds the previous year. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The ordinance in *R.A.V.* was found to violate the First Amendment because it punished particular forms of "fighting words" (such as cross burning) on the basis of content. The *Mitchell* Court distinguished *R.A.V.* because the St. Paul ordinance was "explicitly directed at expression," while the Wisconsin statute was "aimed at conduct unprotected by the First Amendment." 508 U.S. at 487. Further, the Court noted that the Wisconsin statute singled out bias-motivated crime not just because the legislature *disagreed with* the offenders' beliefs or biases, but because "this conduct is thought to inflict greater individual and societal harm." *Id.* at 487-88. The Court noted, for example, that the state had asserted that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." *Id.* at 488.

⁴² See Wang, *supra* note 6, at 130. Of course, even if the crime creates or risks creating those harms, a defendant cannot properly be punished under bias crime legislation unless he or she is sufficiently culpable. See *id.*

fails to capture the full range of such cases because—as social psychologists have shown—when it is understood that the perpetrator discriminated in the selection of the victim, the crime will produce those greater harms regardless of whether the perpetrator’s “true” motivation was pure and simple “hate.”⁴³

This Article addresses the second problem. Not only does defining the category of bias crime by reference to the prototypical case cause decision makers to exclude cases that belong in the category, it also leads them to misdefine the category because they develop erroneous explanations for why cases do or do not belong in the category based upon inaccurate understandings of the prototype itself. Social psychologists have shown that fundamental biases in the cognitive process can produce faulty reasoning concerning the issue that is the central focus of bias crime laws: the causes of human behavior.⁴⁴ The law of bias crimes is one area in which a new understanding of the causal attribution process—that is, the way in which people use information to develop causal explanations for another person’s behavior or outcomes (things that happen to the other person)⁴⁵—could play a critical role.⁴⁶ For example, the “most commonly documented bias in social perception”⁴⁷ is the tendency to attribute another person’s behavior to his or her enduring *dispositional qualities* (such as attitudes, prejudices, or personality traits) and to overlook *situational factors* (such as social norms) that provide alternative explanations for the behavior.⁴⁸ This “fundamental attribution error”⁴⁹ arises even when situational factors partly or fully explain the behavior.⁵⁰ In other words, when we seek to explain another person’s behavior, we tend to see the forces that propel his or her actions as being solely or primarily related to the way the person “is” or “feels”—even when those actions are also or are primarily the result of constraints, pressures, or expectations introduced by the situation, such as the social context.⁵¹

⁴³ See *id.* at 129.

⁴⁴ See FISKE & TAYLOR, *supra* note 26, at 66.

⁴⁵ See *id.* at 23.

⁴⁶ Another area in which social cognition theory can make a major contribution is employment discrimination law. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

⁴⁷ FISKE & TAYLOR, *supra* note 26, at 67.

⁴⁸ See *id.* This bias seems to be dominant in Western, but not non-Western culture. See *id.* at 68 (citing G.J.O. Fletcher & C. Ward, *Attribution Theory and Processes: A Cross-Cultural Perspective*, in THE CROSS-CULTURAL CHALLENGE TO SOCIAL PSYCHOLOGY 230, 230–44 (M.H. Bond ed., 1988)).

⁴⁹ FISKE & TAYLOR, *supra* note 26, at 67.

⁵⁰ See *id.*

⁵¹ See *id.*

Assumptions about the motivations of the prototypical bias crime perpetrator—the assumptions that have influenced development of the legal model of bias crime⁵²—reflect this fundamental attribution error. As will be explained in Part III, it is generally assumed that bias crime perpetrators act on their own negative opinions or attitudes toward the victim's social group; that their motivations do not reflect social norms, but instead are deviant and irrational; and that they are driven to commit their crimes solely by the desire to inflict harm on the target group. These assumptions have not been informed by empirical research into the motivations of bias crime perpetrators. If the development of bias crime law was informed by the research of social scientists who have studied discrimination and bias-motivated violence, the legal model might look quite different from the "hate" or "animus"-based model that has been put into practice and has shaped debate concerning the merits and proper scope of bias crime legislation.

Social scientists who have studied bias-motivated crime have stated that the term "hate crime" is a misnomer,⁵³ and that the simplistic conventional assumptions are flawed.⁵⁴ The reasons why perpetrators engage in bias-motivated crime are varied and complex, and often perpetrators are influenced equally or more strongly by situational factors (including social norms that identify particular groups as suitable victims) than by their own attitudes toward the target group. Significantly, researchers have found that even cases that appear to conform strongly to the prototype cannot be explained fully or accurately by the conventional assumptions.

The extent to which the development of bias crime law has been based on faulty assumptions about the prototypical case is troubling, for the error in those assumptions is compounded when the "prototypical" case serves as the basis for defining the category of bias crime, for assessing whether new cases fit into that category, and for debating the basic merits of bias crime legislation. This Article attempts to check that tendency by challenging conventional understanding of the prototypical bias crime perpetrator and offering a new starting point for thinking about the legal category that the prototype represents.

This Article begins by describing the conventional view of bias crimes and

⁵² See *infra* Part III.

⁵³ E.g., Gregory M. Herek, *Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 22, at 164 [hereinafter Herek, *Psychological Heterosexism*]; Karen Franklin, *Psychosocial Motivations of Hate Crimes Perpetrators: Implications for Educational Interventions* 7 (Aug. 16, 1998) (unpublished paper, 106th Annual Convention of the American Psychological Association) (on file with author) [hereinafter Franklin, *Psychosocial Motivations*].

⁵⁴ See *infra* Part IV.

bias crimes law. Part II discusses the two legal models of bias crime that seem to be viable at present: the “discriminatory victim selection” model and the more popular, prototype-centered, “motivated by racial animus” model. These two models serve as the starting point for discussion because they represent two ways of understanding bias crime itself. Part III explains the popularity of the “racial animus” model, explicating the broader assumptions concerning the motivations of “true” bias crime perpetrators. Although these assumptions have not been informed by research into bias-motivated crime, they have strongly influenced debate concerning the merits of bias crime legislation, as well as development of the law in this area.

Part IV “debunks” the conventional assumptions by examining social science research into the motivations behind two “prototypical” cases of bias crime: racial violence during this country’s “lynching era” (1880–1930) and anti-gay crime and violence today. These two cases are often invoked as representatives of bias crime generally, for their typical empirical attributes—stranger-on-stranger crime, committed by multiple perpetrators on one or two victims, the use of extreme or gratuitous violence—look a lot like those of the prototype. Yet empirical research into the motivations behind these two types of crime—including statistical studies and interviews with admitted perpetrators—reveals that the conventional explanations do not capture, but instead actually distort, perpetrators’ reasons for acting. Part V derives from the findings discussed in Part IV some suggestions for rethinking the motivations behind “hate” crime and for revising the legal model.

II. TWO MODELS FOR PENALTY ENHANCEMENT, TWO VIEWS OF “BIAS”

The modern legal approach to prosecuting bias crime takes the form of “ethnic intimidation” statutes that enhance the punishment for criminal conduct where the defendant chose the victim on the basis of the victim’s membership in a protected social group. Penalty enhancement statutes have been adopted in the majority of states and at the federal level.⁵⁵ Most of these laws follow model legislation drafted by the Anti-Defamation League (ADL) of B’nai B’rith in 1981. The model statute would increase punishment where the defendant committed a crime “by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals”⁵⁶

⁵⁵ For discussion of the state penalty enhancement statutes, see WANG, *supra* note 1, § 10.03[2]. The federal penalty enhancement provision takes the form of a “victim-related” upward adjustment in the federal sentencing guidelines. *Id.* § 8.03 & n.1 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1997)).

⁵⁶ ADL, HATE CRIMES LAWS, *supra* note 1, at 3. Statutes following this model typically

While the precise phrasing of the punishable state of mind varies from statute to statute,⁵⁷ most of the laws that follow the ADL model employ a range of causal terms connecting the defendant's act to the victim's social group status, much like civil anti-discrimination laws.⁵⁸ The most common language provides that a defendant has committed a bias crime if he or she selected the victim "because of" or "by reason of" the victim's social group status.⁵⁹

While these phrases might seem straightforward, considerable uncertainty and some controversy exist over the precise state of mind that warrants enhanced punishment under bias crime statutes. Two models of bias crime seem to be viable at present: (1) the "discriminatory victim selection" model and (2) the narrower "motivated by racial animus" model.⁶⁰ In addition to these models for applying the "because of" formulation, some scholars have suggested alternative

either increase the punishment for an already-defined crime where commission of that crime was motivated by bias or create a separate, higher grade substantive offense comprising those elements, where the "new," more serious crime is made up of an existing offense plus a bias motive. *See generally* WANG, *supra* note 1, § 10.03.

⁵⁷ Statutes run the gamut in specificity of intent from requiring that the defendant "intentionally select" the victim based on race or other prohibited ground to requiring only that the offense "demonstrate prejudice." *Compare, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1997), and WIS. STAT. ANN. § 939.645 (West 1996) with D.C. CODE ANN. § 22-4001 (1996), and FLA. STAT. ANN. § 775.085(1) (West 1992 & Supp. 1999). Still other statutes explicitly require not just bias, but some degree of malice or animus. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-181b (West 1994); 18 PA. CONS. STAT. ANN. § 2710 (West 1983); *infra* notes 74-75 and accompanying text.

While some statutes plainly require that the actor be motivated by bias toward the *direct victim* of the offense, other statutes explicitly permit—or potentially allow—prosecution where the defendant selected the victim based on a bias toward some *other person* or persons. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.147b(1) (1991); OHIO REV. CODE § 2927.12 (Baldwin 1997). For a fuller discussion of how the relevant state of mind is defined in various statutes and how the element has been interpreted, see WANG, *supra* note 1, § 10.04[1]; Lawrence, *supra* note 17, at 326-41.

⁵⁸ *See Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (comparing the motivation element in the Wisconsin bias crime statute to that found in Title VII).

⁵⁹ WANG, *supra* note 1, § 10.04[1] & n.3.

⁶⁰ *See, e.g.*, Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, ANN. SURV. AM. L., 1992/1993, at 485, 487-89 (distinguishing statutes that "seek to punish an action because it manifests racial animus" (i.e., where racial animus plays a role in the selection of the victim), from those that punish simply "victim selection on the basis of one of the enumerated categories") Lawrence, *supra* note 17, at 376 (distinguishing statutes that punish discriminatory victim selection from those that punish purposefully acting in furtherance of racial animus); Wang, *supra* note 6, at 65-78 (describing the "discriminatory victim selection" and the "motivated by racial animus" models, as well as the constitutionally suspect "manifests racial animus" model).

statutory language, and some of their proposals offer additional legal models.⁶¹ The purpose of this Article is not to evaluate the merits of specific statutory proposals, but instead to examine more broadly the conceptualizations of bias crime that underlie potential legal approaches. Because the “discriminatory victim selection” and “racial animus” models can be viewed as rough representations of two different ways of understanding bias crime itself, highlighting the distinctions between the two models will serve as the starting point for the analysis.

A. The “Discriminatory Victim Selection” Model⁶²

If applied literally, most bias crime statutes would enhance punishment when a defendant chose a victim because of the victim’s membership in a protected social group, without regard to the defendant’s *feelings toward* that group. In other words, while they undoubtedly would apply to a defendant who felt or acted upon personal hostility or hatred toward the social group,⁶³ they would *require* only that the victim’s social group status was a significant or substantial factor⁶⁴ in the defendant’s selection. This “discriminatory victim

⁶¹ Susan Gellman, for example, has suggested that a more viewpoint-neutral and direct way of redressing the harms associated with bias crime would be to adopt “effects-centered approaches.” Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, ANN. SURV. AM. L., 1992/1993, at 509, 512 [hereinafter Gellman, *Thought Crime Laws*]. Such an approach might enhance the penalty where an offender acted with the intent to create or with knowledge that she was likely to “create . . . terror within a definable community,” or where the defendant intended to interfere with another person’s exercise of civil rights. *Id.* at 511 n.628.

Frederick M. Lawrence proposes a two-tiered model under which a perpetrator would be guilty of a “first degree bias crime” if he was motivated by group-based “ill will, hatred, or animus” *and* knew that it was “virtually certain” that the victim or target group would perceive that motivation. A lesser offense, “second degree” or “reckless bias crime,” would consist of committing a crime “with conscious disregard for the substantial and unjustifiable risk” that the victim or target group would perceive the perpetrator to have been motivated by group-based animus. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 170–71 (1999).

⁶² Professor Lawrence refers to this model as the “discriminatory selection” model. *See* Lawrence, *supra* note 17, at 327 & n.24 (referencing brief of petitioner in *Wisconsin v. Mitchell*, *supra* note 41).

⁶³ *See id.* at 376; *see also infra* note 71 and accompanying text.

⁶⁴ Courts applying penalty enhancement statutes have held that the defendant’s bias motivation need not have been the sole motivation for the offense, though it must be a significant or substantial cause. *See, e.g., In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995); *State v. Hart*, 677 So.2d 385, 386–87 (Fla. Dist. Ct. App. 1996); *People v. Nitz*, 674 N.E.2d 802, 806–07 (Ill. App. Ct. 1996); *In re Vladimir P.*, 670 N.E.2d 839, 844 (Ill. App. Ct. 1996); *In re Welfare of S.M.J.*, 556 N.W.2d 4, 6–7 (Minn. Ct. App. 1996).

selection" model potentially would apply to a broad range of discriminatory crimes. In addition to "pure animus" cases (the category into which the prototypical crime ostensibly falls),⁶⁵ it would apply, for example, where a "rational" criminal took the victim's protected characteristic into account in planning his or her crime. That is, it would enhance punishment for an opportunistic actor who sought to get greater "benefits" from his crime relative to the "cost" or effort expended committing it and therefore chose a victim from a particular social group because he assumed that targeting such a person would make the crime "easier" or more "profitable" to commit.⁶⁶ One such perpetrator would be the purse snatcher who preys exclusively on women, not because he feels hostility toward women as a group, but because their general practice of carrying handbags or their typically smaller stature makes them, for the most part, easier targets than men.⁶⁷ Another might be a juvenile delinquent who chooses to rob grocery stores owned by recent immigrants from Asia because she presumes that those merchants have lots of cash on hand and, due to their difficulties with the English language and isolation from the mainstream community, are less likely than other store owners to report the crime or to receive assistance from law enforcement.⁶⁸

The discriminatory victim selection model also could apply to another type of "opportunistic" discriminator: a defendant who chooses to commit a crime against a member of a protected group simply in order to provoke a reaction from observers.⁶⁹ Defendants of this kind would include a person who

⁶⁵ *But see infra* Parts IV, V.

⁶⁶ In an earlier article, I described this type of perpetrator as a "Calculating Discriminator":

This perpetrator selects victims on the basis of their social group membership, not because he consciously bears any ill will toward that group, but because he seeks to maximize the "benefits" relative to the "costs" of criminal conduct in which he already was planning to engage. In other words, the Calculating Discriminator uses the victim's social group status "merely as a proxy" for other information relevant to his decision making process in committing the crime—the perpetrator "economize[s] on his information costs] by using stereotypes and playing the odds."

Wang, *supra* note 6, at 57–58 (footnote omitted).

⁶⁷ *See, e.g.,* Lawrence, *supra* note 17, at 376; Weisburd & Levin, *supra* note 16, at 44 n.44.

⁶⁸ *See, e.g.,* Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1929–30 (1993) (reporting that criminals usually select victims who offer the highest reward at the lowest risk and often use race as a proxy for both risk and reward).

⁶⁹ This type of perpetrator has been labeled the "Violent Show-Off" by Professor Frederick M. Lawrence. Lawrence, *supra* note 17, at 376–77. I have described the "Violent Show-Off" as a perpetrator who "selects his victim based on social group status, but not

vandalizes a Jewish synagogue in order to shock and offend members of the congregation and the community, as well as an individual who joined his friends in an episode of “gay-bashing” in order to win their approval (or perhaps just to avoid their rejection).

B. *The “Motivated by Racial Animus” Model*

While the statutory language seems to authorize the relatively broad reading represented by the discriminatory victim selection model, bias crime laws often are applied only to a narrow range of cases in which it appears that the defendant felt and acted upon personal hostility or animus toward the victim’s social group. In other words, rather than the broader discriminatory victim selection model described above, in practice a narrower racial animus model often applies. This model adds to the element of discriminatory victim selection the requirement that the actor “purposefully acted in furtherance of his *hostility toward* the target group.”⁷⁰ That is, it requires not only that the defendant chose the victim based on his or her social group status, but also that the defendant consciously *felt* hatred or hostility toward the target group and committed the crime as a direct result of that animus. The “racial animus” model, therefore, would not cover several types of cases that would fall under the “discriminatory victim selection” model.⁷¹ In particular, it would not apply to cases, such as those described above,

because he feels any animus or hostility toward the victim’s group. Rather, the Violent Show-Off’s purpose in selecting the victim is to impress his peers or to evoke a strong reaction from observers.” Wang, *supra* note 6, at 57 (footnote omitted).

⁷⁰ Lawrence, *supra* note 17, at 364 (emphasis added). Professor Lawrence has described the relationship between the “discriminatory victim selection” and “racial animus” models:

The two models of bias crimes differ as to the role racial animus plays, if any, in defining the elements of the crime. The racial animus model defines these crimes on the basis of the perpetrator’s animus toward the racial group of the victim and the centrality of this animus in the perpetrator’s motivation for committing the crime. The discriminatory selection model defines these crimes solely with reference to the perpetrator’s choice of victim on the basis of the victim’s race.

Id. at 376 (footnotes omitted).

⁷¹ As Professor Lawrence has explained:

Any case that would meet the requirements of the racial animus model would necessarily also satisfy those of the discriminatory selection model because a crime motivated by animus toward the victim’s racial group will necessarily be one in which the victim was discriminatorily selected on this basis. The reverse is not true. Cases of discriminatory selection need not be based upon racial animus.

Id.

where the defendant's selection of the victim appears to be "opportunistic" rather than animus-driven—for example, where the defendant chooses to target a member of a protected group in order to shock the neighborhood or "show off" to his friends,⁷² or where the defendant chooses the victim based on a calculated judgment that members of a protected group would be "easier" marks than other potential victims.⁷³

The narrowing of the model for penalty enhancement has been the result of both stated preferences for the animus model and implicit assumptions about what types of incidents are motivated by group-based bias. Explicit preference for the animus model has been expressed by legislatures that have included in their penalty enhancement statutes a requirement that the defendant possessed a "malicious" as well as a discriminatory intent,⁷⁴ or that, like the United States Congress, have stated their preference for the racial animus model in the legislative history.⁷⁵ Some scholars also maintain that the racial animus model is preferable.⁷⁶ According to those who prefer the animus model to the discriminatory victim selection model, the former more accurately identifies both those crimes that cause the harms associated with bias crimes⁷⁷ and those perpetrators who are more blameworthy.⁷⁸

⁷² See *id.* at 378–79; Wang, *supra* note 6, at 78.

⁷³ See Lawrence, *supra* note 17, at 377–78; Wang, *supra* note 6, at 78.

⁷⁴ See, e.g., CONN. GEN. STAT. ANN. § 53a-181b (Supp. 1999); 18 PA. CONS. STAT. ANN. § 2710 (1999).

⁷⁵ The Committee Report on the federal Hate Crimes Sentencing Enhancement Act, Pub. L. No. 103-322, § 280003, 108 Stat. 2096 (codified as amended at 28 U.S.C. § 994 note (1994)), states: "In order to constitute a hate crime, the selection of a victim . . . must result from the defendant's hate or animus toward any person for bearing one or more of the [enumerated] characteristics[.]" H.R. REP. NO. 103-244, at 5 (1993); see also *infra* notes 154–55 and accompanying text.

⁷⁶ See, e.g., Crocker, *supra* note 60, at 486–89; Lawrence, *supra* note 17, at 377–78, 380–81; see also JACOBS & POTTER, *supra* note 1, at 146.

⁷⁷ These scholars contend that, when racial animus is not manifested, none of the greater harms associated with hate crime is likely to result from the act. See, e.g., Crocker, *supra* note 60, at 488–89, 497; cf. Lawrence, *supra* note 17, at 369 (asserting that the law should not focus on harmful results but instead on the actor's state of mind, because "[t]he occurrence of harmful results is often fortuitous and therefore outside the realm of that which provides a justifiable indication of the actor's blameworthiness"). But see Wang, *supra* note 6, at 129 (contending that greater harms are likely to result where the perpetrator discriminates in selecting the victim, even if he or she was not motivated by racial animus).

⁷⁸ Those who prefer the animus model consider an act that is not motivated by racial animus to be no worse morally than the first-tier crime. See, e.g., H.R. REP. NO. 103-244, at 4 (1993) (stating that to apply sentence adjustment "would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense."); Crocker, *supra* note 60, at 489, 491–93 ("I see no plausible argument that non-animus categorical victim

Even where lawmakers have expressed no clear preference for the racial animus model, that model will control to the extent that law enforcement officers and prosecutors recognize only prototypical cases as “real” bias crimes because they perceive only those cases to have been driven by the hostility or hatred they assume the laws are designed to condemn. The way in which these actors within the criminal justice system choose to classify bias crimes is important, not just because they determine which cases are prosecuted and therefore how the law develops,⁷⁹ but also because their labeling decisions influence society’s perception of bias crime.⁸⁰ As elaborated in the following section,⁸¹ law enforcement officers often classify as bias crimes only “paradigmatic”⁸² cases involving extraordinary brutality or dramatic facts,⁸³ thus eliminating from consideration less sensational cases, such as those in which the perpetrator’s crime was precipitated by a combination of bias and other motives including, for example, a desire for pecuniary gain.⁸⁴ This narrow view may be based on adherence to department policies that define bias-motivated incidents as those

selection is justly subject to enhanced penalties.”); Lawrence, *supra* note 17, at 377–78 (“From either a retributive or utilitarian perspective, the Purse Snatcher should not be punished for a bias crime.”); *see also supra* text accompanying note 67 (providing a description of the purse snatcher). *But see* Wang, *supra* note 6, at 130–34 (arguing that “neither the Violent Show-Off nor the Calculating Discriminator is less blameworthy than the prototypical, hate-motivated perpetrator.”).

⁷⁹ See Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 423 (“[B]ias crimes do not legally exist until the police say they do.”); Maroney, *supra* note 2, at 604 (“Because the ultimate power to label or prosecute a crime as bias-motivated lies within the criminal justice system, it will be police and prosecutors . . . who define those crimes.”).

⁸⁰ See Susan E. Martin, “A Cross-Burning Is Not Just an Arson”: *Police Social Construction of Hate Crimes in Baltimore County*, 33 CRIMINOLOGY 303, 304 (1995) (asserting that police “socially construct” hate crime through the ways in which they identify and verify incidents).

Law enforcement officers sometimes are called upon to identify bias crimes without regard to the application of a penalty enhancement statute, if their jurisdiction has implemented other programs or policies to address bias crime, such as reporting requirements or special prosecutorial or victim service units designed to provide additional resources to bias crime cases. *See generally* Susan E. Martin, *Investigating Hate Crimes: Case Characteristics and Law Enforcement Responses*, 13 JUST Q. 455, 456 (1996). Whether acting pursuant to a penalty enhancement statute or other bias crime policy, the task before the officer is very much the same: to determine whether a criminal act (or, if local policy so directs, a noncriminal act) was motivated by bias.

⁸¹ *See infra* notes 161–79 and accompanying text.

⁸² Maroney, *supra* note 2, at 604.

⁸³ *See id.* at 604–06 & nn.227–32; Boyd et al., *supra* note 19, at 828.

⁸⁴ *See infra* notes 162–66 and accompanying text.

motivated solely by hatred or hostility,⁸⁵ the officers' own sense that only such incidents are "real" bias crimes,⁸⁶ or the officers' inclination (whether based on their own preferences or instruction from the prosecuting attorney's office)⁸⁷ to pursue only those cases that present "clear" evidence of "hate" and therefore are more likely to result in a bias crime conviction.⁸⁸ Whatever the basis, the result of law enforcement's adherence to the prototype is that the cases that actually are prosecuted tend to be those that conform to the "racial animus" model, and the question of which model controls becomes largely academic.

This strict adherence to the "animus" model of bias crime is problematic for several reasons. First, it excludes from enhanced punishment a range of cases that cause the special harms associated with bias crime,⁸⁹ a result that is troubling because redressing those harms is the primary purpose of bias crime legislation.⁹⁰ In addition, opportunistic or calculating perpetrators are not necessarily less blameworthy than those driven by "hatred."⁹¹ Furthermore, as the following sections demonstrate, an insistence on compliance with the pure "animus" model reflects and perpetuates an overly simplistic and uninformed view of the motivations of bias crime perpetrators. Indeed, preference for the animus model rests on a number of assumptions about perpetrators that are so erroneous that they fail to explain accurately even *prototypical* cases of bias crime. Moreover, as will be explained, these assumptions confound the law and society's efforts to deal with the harms created by bias crimes by failing to recognize the ways in which the cultural ideology "rewards" bias crime perpetrators.

III. CARICATURED PORTRAYALS OF BIAS CRIME PERPETRATORS: THREE KEY ASSUMPTIONS

For all of the controversy surrounding penalty enhancement statutes and the differential treatment of bias crimes generally, there seems to be wide agreement (at least among mainstream legal commentators and law enforcement officials) on the motivations that drive the bias crime perpetrator or that should be present for an actor to be labeled a "bias criminal." Indeed, as elaborated below, much of the disagreement as to the merits of bias crime legislation actually rests on this

⁸⁵ See *infra* notes 162–66 and accompanying text.

⁸⁶ See *infra* notes 168–75 and accompanying text.

⁸⁷ See *infra* notes 176–77 and accompanying text.

⁸⁸ See *infra* notes 178–79 and accompanying text.

⁸⁹ See Wang, *supra* note 6, at 128–29.

⁹⁰ See *supra* note 4; Wang, *supra* note 6, at 59, 128.

⁹¹ See Wang, *supra* note 6, at 130–34; cf. JACOBS & POTTER, *supra* note 1, at 80.

shared view of the perpetrator's motives and the evils at which the laws are directed. Yet, though this view is common, 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 or her in isolation from the social context.

The common understanding of the “true” bias crime perpetrator seems to be based, in part, on the empirical attributes of the “prototypical” bias crime.⁹² As described in Part I, the prototypical case is a stranger-on-stranger crime, usually involving multiple perpetrators who target an individual victim who represents a hated social group, and inflict on that person extreme, gratuitous violence.⁹³ This Article does not dispute that these empirical attributes are commonly associated with bias crime, but it does take issue with the explanations for bias crime that are implicit in the widespread adherence to a legal model centered on the prototype that exhibits those attributes.

The popular image of bias crime gives rise to three interrelated assumptions concerning the motivations of “true” bias crime perpetrators. First, the perpetrator's bias is personal; it is based in his own negative opinions or attitudes toward the targeted social group.⁹⁴ Second, the perpetrator's bias is deviant and irrational; it is abhorrent and aberrant, and it makes no logical sense.⁹⁵ Third, the perpetrator's bias is so irrational that it drives him to commit crimes for no other reason than to inflict harm on a member of the target group, rather than for a more easily understandable reason—for example, to obtain personal gain.⁹⁶ While each of these assumptions is important to conventional understandings of bias crime, each can lead to different conclusions on the ultimate questions of whether differential legal treatment is warranted or wise. In addition, these assumptions can precipitate unsound conclusions relating to the content and application of bias crime legislation.

The problem with these assumptions is that, while they purport to *explain* the motivations of bias crime perpetrators, they actually *distort* our understanding of those motivations. The three assumptions paint a picture of bias criminals that is essentially a caricature. The caricature magnifies the perpetrators' hostility while it masks both the range of other motivations that propel bias crimes and the contributing role played by a social environment that marks members of certain social groups as “suitable victims” and thereby enables perpetrators to use violence against them as a means to a variety of goals.

⁹² See *supra* note 15 and accompanying text.

⁹³ See *supra* notes 16–25 and accompanying text.

⁹⁴ See *infra* Part III.A.

⁹⁵ See *infra* Part III.B.

⁹⁶ See *infra* Part III.C.

In particular, the caricature obscures the following realities: that the perpetrators' bias is socially reinforced, and not simply personal; that the perpetrators' acts are *not* uncommon and often *are* rational; and that perpetrators often are able to obtain—and frequently are motivated at least in part by the desire to obtain—material rewards or other personal benefits.

A. The Perpetrator's Bias is Personal and Based on His Opinions, Beliefs, or Attitudes Toward the Target Group

While a wide range of "discriminatory" acts might be counted as bias crimes,⁹⁷ most commentators either seem to assume or else explicitly advocate a narrow understanding of the "true" bias crime perpetrator as being one who acts in furtherance of his own hostility or hatred toward the target group⁹⁸ and not, for example, in response to situational factors or the prejudices of others.⁹⁹ The FBI guidelines for the collection of hate crimes data are among the official statements that reflect this view. They define the relevant "bias" as "[a] preformed negative opinion or attitude toward a group of persons based on their race, religion, disability, ethnicity/national origin, or sexual orientation."¹⁰⁰ In other words, the "true" bias crime perpetrator does not just discriminate in his selection of a victim, but is "prejudiced against" the target group.¹⁰¹ While the legal definition speaks in terms of "motive," in common usage that term refers more to a pre-existing set of beliefs, a predisposition, or an attitude.

Under this assumption, the true bias crime perpetrator did not affirmatively seek to acquire his "negative opinions or attitudes";¹⁰² they are just some among the many views he holds and emotions he feels.¹⁰³ In this regard, the prejudice that drives the bias crime perpetrator can be compared to any of the numerous

⁹⁷ See *supra* notes 63–69 and accompanying text; see also, e.g., JACOBS & POTTER, *supra* note 1, at 21–28.

⁹⁸ See, e.g., JACOBS & POTTER, *supra* note 1, at 146; LAWRENCE, *supra* note 17, at 380–81.

⁹⁹ See generally *supra* notes 72–73 and accompanying text.

¹⁰⁰ U.S. DEP'T OF JUSTICE, FBI, UNIFORM CRIME REPORTING, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION 14 (1991) [hereinafter FBI, HATE CRIME DATA COLLECTION].

¹⁰¹ See JACOBS & POTTER, *supra* note 1, at 11; LAWRENCE, *supra* note 61, at 10; Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1047–48 (1997); cf. Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 367 (1991) [hereinafter Gellman, *Sticks and Stones*] (pointing out that "[d]iscrimination and bigotry are not the same thing").

¹⁰² See JACOBS & POTTER, *supra* note 1, at 81.

¹⁰³ Cf. *id.* at 11–16.

likes and dislikes we all have—including prejudices against certain types of food or weather.¹⁰⁴ Of course, the prejudice that motivates the bias crime perpetrator is *not* just like a negative attitude toward French food, rich people, or the color green. What distinguishes the bias crime perpetrator's prejudice from these other dislikes is the fact that, in contemporary times, his prejudice is “politically salient”¹⁰⁵ or “implicate[s] societal fissure lines, divisions that run deep in the social history of [our] culture.”¹⁰⁶ Were it not for the political salience or social divisiveness of his prejudice, the bias crime perpetrator would be regarded as any other criminal, punishable only for his criminal act and not for the reason why he chose his victim.¹⁰⁷

The assumption that the perpetrator's motivation is a reflection of his personal dislike of, for example, black people, requires the prosecutor at trial to establish the defendant's racist leanings and the defendant to prove that he is “not a racist.”¹⁰⁸ This issue opens the door to a wide range of testimony regarding the defendant's personal history (who his friends are, what books he has read, whether he has ever told racist jokes)¹⁰⁹ and can lead to the kind of “distasteful”¹¹⁰—if not downright absurd—questioning that Professor James B. Jacobs and Attorney Kimberly Potter have cited as an illustration of the foolishness that can arise in the enforcement of bias crime laws. Their example comes from the Ohio case *State v. Wyant*,¹¹¹ in which the defendant was charged with violating Ohio's ethnic intimidation statute following an interracial dispute at a campground:

¹⁰⁴ See *id.* at 11.

¹⁰⁵ *Id.* at 16, 65–78.

¹⁰⁶ LAWRENCE, *supra* note 61, at 12.

¹⁰⁷ See JACOBS & POTTER, *supra* note 1, at 16.

¹⁰⁸ *Id.* at 106.

¹⁰⁹ Opponents of bias crime legislation have cited the potential for the use of such evidence to burden or “chill” the exercise of First Amendment rights as a basis for finding such laws unconstitutionally overbroad. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 488–89 (1993) (presenting argument of defendant); Gellman, *Sticks and Stones*, *supra* note 101, at 358–62. The Supreme Court rejected this argument in *Mitchell*, stating that the chill envisioned was “attenuated” and “unlikely,” for “the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property [was] simply too speculative a hypothesis” to support the overbreadth claim. *Mitchell*, 508 U.S. at 488–89. Moreover, the Court noted that evidence of a defendant's prior statements was commonly admitted at trial to establish the elements of a crime or to prove motive or intent, and that the First Amendment imposes no bar to such use—subject, of course, to evidentiary rules. *Id.* at 489–90.

¹¹⁰ JACOBS & POTTER, *supra* note 1, at 106.

¹¹¹ 597 N.E.2d 450 (Ohio 1992), *vacated and remanded*, 508 U.S. 969 (1993), *rev'd*, 624 N.E.2d 722 (Ohio 1994).

The defendant took the stand to proclaim that he was not a racist. On cross examination, the prosecutor sought to rebut that claim:

Q. And you lived next door to [a 65-year-old black neighbor of the defendant's] for nine years and you don't even know her first name?

A. No.

Q. Never had dinner with her?

A. No.

Q. Never gone out and had a beer with her?

A. No.

Q. Never went to a movie?

A. No.

Q. Never invited her to a picnic at your house?

A. No.

Q. Never invited her to Alum Creek?

A. No. She never invited me nowhere.

Q. You don't associate with her, do you?

A. I talk with her when I can, whenever I see her out.

Q. All these black people that you have described that are your friends, I want you to give me one person, just one who was really a good friend of yours.¹¹²

The assumption that the perpetrator's bias is personal is an important one to both those who advocate enhanced punishment and those who oppose it. For some supporters of enhanced punishment, the assumption that the perpetrator acted in furtherance of his personal hostility, rather than in reaction to external forces or from a desire to attain a tangible objective, makes him morally worse, as well as more culpable and therefore a suitable candidate for increased punishment.¹¹³ Supporters also assert that bias crime laws are needed to send the important message that the perpetrator's bigotry and hatred have no place in American society and will not be tolerated.¹¹⁴ Although this message could be sent through government proclamations alone, Professor Lawrence explains that "the expressive value of punishment" itself is most effective for condemning criminal acts that violate the principles of racial harmony and equality, which "are among the highest values held in our society."¹¹⁵ Indeed, the enhanced punishment of bias crimes is imperative, as it "is necessary for the full expression of commitment to American values of equality of treatment and

¹¹² JACOBS & POTTER, *supra* note 1, at 106-07.

¹¹³ See, e.g., Crocker, *supra* note 60, at 492-94; Lawrence, *supra* note 17, at 377-78.

¹¹⁴ See, e.g., Weisburd & Levin, *supra* note 16, at 42.

¹¹⁵ LAWRENCE, *supra* note 61, at 167. Lawrence explains that "[s]ociety's most cherished values will be reflected in the criminal law by applying the harshest penalties to those crimes that violate [those] values." *Id.* at 169.

opportunity.”¹¹⁶

For some who oppose enhanced punishment, the assumption that the bias crime perpetrator acted in furtherance of his hatred of the target group might render him *less* culpable to the extent that he is not “fully responsible for” his prejudices.¹¹⁷ While it is not clear that all opponents of bias crime legislation would go that far, most do contend that punishing the perpetrator’s racist motivation is illegitimate and unconstitutional, as it amounts to the punishment of offensive thoughts or beliefs.¹¹⁸ Although the argument that a bias crime penalty enhancement statute violated the First Amendment on this ground was rejected by the United States Supreme Court in *Wisconsin v. Mitchell*,¹¹⁹ critics of that decision have characterized it as “unconvincing,”¹²⁰ “superficial,”¹²¹ “hypocritical,”¹²² and “deeply and irrevocably flawed.”¹²³ And even if the laws are “just barely constitutional,”¹²⁴ critics contend that they are unwise. For one thing, to permit the punishment of *these* offensive beliefs or thoughts starts us down the “slippery slope” to outlawing all manner of unpopular opinions,¹²⁵ such as support for abortion rights¹²⁶ or opposition to war.¹²⁷ In addition,

¹¹⁶ *Id.*

¹¹⁷ See JACOBS & POTTER, *supra* note 1, at 81. Jacobs and Potter explain:

A prejudiced offender might plea [*sic*] that he is *less culpable* than a “cold-blooded” profit-motivated criminal, because he was indoctrinated by his parents and youthful peers. He might argue that he was brought up to believe that homosexuals, women, Jews, blacks, and/or others are inferior, evil, immoral, hostile, etc. He might even argue that his prejudice, for example, against homosexuals, was the result of religious training. According to this account, his prejudice was imposed, not chosen, and should make him a candidate for a lesser punishment, not a greater one.

Id. (emphasis in original).

¹¹⁸ See, e.g., JACOBS & POTTER, *supra* note 1, at 128 (discussing the legal failure of current attempts to control hate speech); Gellman, *Sticks and Stones*, *supra* note 101, at 354–80 (discussing the vagueness of statutes aimed at bias crime and the questionable constitutionality of punishing motive).

¹¹⁹ 508 U.S. 476 (1993); see *supra* note 41.

¹²⁰ JACOBS & POTTER, *supra* note 1, at 126.

¹²¹ Gellman, *Thought Crime Laws*, *supra* note 61, at 514.

¹²² Michael S. Greve, *Hate Crime Laws and Hypocrisy*, ANN. SURV. AM. L., 1992/1993, at 563, 566.

¹²³ Gey, *supra* note 101, at 1014; see also David Goldberger, *Hate Crime Laws and Their Impact on the First Amendment*, ANN. SURV. AM. L., 1992/1993, at 569, 577.

¹²⁴ Gellman, *Thought Crime Laws*, *supra* note 61, at 509.

¹²⁵ See Gellman, *Sticks and Stones*, *supra* note 101, at 382; Gey, *supra* note 101, at 1062–69; Greve, *supra* note 122, at 568.

¹²⁶ See Gellman, *Thought Crime Laws*, *supra* note 61, at 528.

penalizing prejudice only invites political jockeying for recognition and special benefits from the various identity groups that might see some advantage in having bias against them included among the "officially designated prejudices."¹²⁸

The assumption that bias crime perpetrators act in furtherance of their own "negative opinions"—and that a goal of bias crime legislation is to eradicate such bigotry¹²⁹—also leads some critics to argue that enhanced punishment will not "work," for criminals cannot be forced to change their opinions, to be tolerant, or to treat all social groups with respect.¹³⁰ To the extent that the laws' message is intended for a wider audience,¹³¹ it is superfluous, because a "plethora of 'messages' and symbols . . . already denounce bigotry."¹³² Even 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 others¹³³ or "need more protection" than others¹³⁴ can itself create resentment among groups or aggravate already existing divisions.¹³⁵

B. *The Perpetrator's Bias is Deviant and Irrational*

Under the conventional view, the perpetrator's bias may originate in the same way as many other prejudices, but his hostile views are not shared by members of mainstream society, nor are they sensible or rational. Indeed, both those who advocate and those who oppose the differential treatment of bias crimes are careful to point out that they abhor the prejudices that drive those acts.¹³⁶ Perhaps because their presumed opinions or attitudes are considered

¹²⁷ See JACOBS & POTTER, *supra* note 1, at 112 (quoting Brief of Center for Individual Rights as Amicus Curiae in Support of Respondent at 7–8, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515)).

¹²⁸ JACOBS & POTTER, *supra* note 1, at 16.

¹²⁹ See, e.g., JACOBS & POTTER, *supra* note 1, at 8; Gellman, *Sticks and Stones*, *supra* note 101, at 390; Goldberger, *supra* note 123, at 580.

¹³⁰ See, e.g., JACOBS & POTTER, *supra* note 1, at 8, 68, 130; Gellman, *Sticks and Stones*, *supra* note 101, at 390–91; cf. Gellman, *Thought Crime Laws*, *supra* note 61, at 529–30 (arguing that community taboos would be more effective than criminal penalties at "stop[ping] people from believing and expressing bigoted views").

¹³¹ See *supra* notes 114–16 and accompanying text.

¹³² JACOBS & POTTER, *supra* note 1, at 131.

¹³³ E.g., JACOBS & POTTER, *supra* note 1, at 28; Nat Hentoff, *Beware Stiffer Sentences for Thought Crimes*, WASH. POST, June 19, 1993, at A21.

¹³⁴ Gellman, *Sticks and Stones*, *supra* note 101, at 385–86.

¹³⁵ See *id.* at 389.

¹³⁶ See, e.g., JACOBS & POTTER, *supra* note 1, at 148; Gellman, *Sticks and Stones*, *supra*

illegitimate and objectionable, the perpetrators themselves are often characterized as being deviant or freakish.¹³⁷ Especially since the rise of “hate crimes jurisprudence” in the 1980s, racial and other group-based violence that has been practiced throughout our country’s history (and that at times has been widely tolerated) “increasingly [has been] viewed as extraordinary, aberrant, and intolerable.”¹³⁸ Author David Bradley points out that racial killings tend to be described in the news media as “isolated incidents” despite this country’s long history of such violence and despite the fact that it often follows a common script.¹³⁹ In contemporary discourse, bias crime perpetrators are “predators” with a “pack mentality” who “feed off each others’ hatred and lunacy,”¹⁴⁰ and racist skinheads are a “bewildering menace.”¹⁴¹

The perpetrator’s prejudice is not just deviant; it is also irrational. Perpetrators are not understood to have arrived at their opinions or attitudes following well-reasoned reflection, nor are they assumed to act based on logic or calculation—for example, on an assessment that members of some social groups make more compliant or financially rewarding targets than others.¹⁴² Instead, they are portrayed as acting out of an almost insane ignorance of, fear of, or aversion to the target group.¹⁴³ Moreover, because the perpetrator’s prejudice toward the target group is viewed as having pre-existed the violent act,¹⁴⁴ the

note 101, at 334; Lawrence, *supra* note 17, at 320.

¹³⁷ See, e.g., JACOBS & POTTER, *supra* note 1, at 135.

¹³⁸ Maroney, *supra* note 2, at 568; see also, e.g., Hon. John Conyers, Jr., *Foreword to HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN*, *supra* note 20, at xiv.

¹³⁹ David Bradley, *Texas Murder Was a Lynching*, PLAIN DEALER, June 16, 1998, at 9B. Bradley contrasts this rhetoric with the common characterization of the rash of schoolyard killings in 1997 and 1998 as “copycat” killings and the desire of experts and the media to discover the connections between them, as if “there is some kind of atmosphere in our society that has compelled these young people to start blowing their classmates away.” *Id.*

¹⁴⁰ Robert V. Ward, Jr., *Hate Crimes*, 32 GONZ. L. REV. 511, 514 (1997).

¹⁴¹ MARK S. HAMM, *AMERICAN SKINHEADS: THE CRIMINOLOGY AND CONTROL OF HATE CRIME* 8 (1993) (quoting ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH, *SKINHEADS TARGET THE SCHOOLS* 1 (1989)).

¹⁴² See *infra* notes 180–82 and accompanying text.

¹⁴³ Consistent with this conception, research psychologist Gregory M. Herek has described the conventional view of anti-gay prejudice and violence as being “unidimensional” and based on “irrational fear” of gays. Gregory M. Herek, *Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, J. HOMOSEXUALITY, Fall 1984, 1, 1–3 (1984) [hereinafter Herek, *Beyond “Homophobia”*]. Racist violence is often described similarly. See, e.g., Ward, *supra* note 140, at 514 (referring to perpetrators’ “hatred and lunacy”).

¹⁴⁴ See FBI, *HATE CRIME DATA COLLECTION*, *supra* note 100, at 14.

violence is seen as having been propelled by and committed in furtherance of that prejudice.¹⁴⁵ Accordingly, perpetrators are sometimes described as being "driven"¹⁴⁶ or "blind[ed]"¹⁴⁷ by their hatred toward the target group. In other words, the perpetrator does not "control" his bias; it controls him.¹⁴⁸

The notion that bias crimes are exceptional and that bias crime perpetrators are extremely deviant may be central to the appeal of enhanced punishment for bias crimes. In a law review note tracing the origins of the anti-hate crime movement, Terry A. Maroney identified the factors that contributed to the institutionalization of the movement. Among them are the movement's naming and portraying "hate crime" as "a specific evil requiring a specific response"¹⁴⁹ and its characterization of such crime as "extraordinary" and "aberrant,"¹⁵⁰ as well as the opportunity the movement created for politicians to gain points with the public by getting tough on a problem that fit the agendas of both the liberal civil rights lobby and the conservative victims' rights lobby, yet did not require them to back "the more controversial and resource-heavy demands of disenfranchised groups for equality in housing, education, wealth, and sexual freedoms."¹⁵¹ As Maroney explained, "Doing so allows government authorities to condemn the most extreme manifestations of prejudice without committing to eradication of lesser, more pervasive forms."¹⁵²

Those who support enhanced punishment often implicate the perpetrator's deviance and irrationality in support of his culpability.¹⁵³ Indeed, when a perpetrator's reasons for selecting a victim on the basis of race or other group status make some logical sense (such as where the victim might be perceived as an "easy target" because of that status), some proponents of enhanced

¹⁴⁵ See, e.g., Lawrence, *supra* note 17, at 377, 380–81.

¹⁴⁶ E.g., *id.* at 377; Dan Balz, *Clinton Decries Chicago Racial Attack; In Radio Talk, President Urges End to "Constant Curse" of Hatred*, WASH. POST, Mar. 30, 1997, at A9 (quoting President Clinton).

¹⁴⁷ Steve Lash, *Proposal Made to Broaden Law*, HOUS. CHRON., June 17, 1998, at 1 (quoting Rep. Charles Schumer).

¹⁴⁸ Cf. Steven M. Freeman, *Hate Crime Laws: Punishment Which Fits the Crime*, ANN. SURV. AM. L., 1992/1993, at 581, 585 (noting that perpetrators' "bigotry [may] tempt[] them to commit a bias-motivated crime").

¹⁴⁹ Maroney, *supra* note 2, at 579.

¹⁵⁰ *Id.* at 568.

¹⁵¹ *Id.* at 584–85.

¹⁵² *Id.* at 585; see also JACOBS & POTTER, *supra* note 1, at 67–68 (describing how politicians, using a "cost and benefit" approach, find supporting hate crime legislation to be politically favorable); Gellman, *Thought Crime Laws*, *supra* note 61, at 509–11, 531 (pointing out that, while "[p]roponents of hate laws surely have the finest of intentions," hate crime laws "simply do not accomplish their objectives").

¹⁵³ See, e.g., Lawrence, *supra* note 17, at 377–78.

punishment are reluctant to attribute a punishable motivation to him. In its report on the federal Hate Crimes Sentencing Enhancement Act, the Committee on the Judiciary of the House of Representatives stated that the enhancement should not apply where, for example, a defendant committed a fraud offense against a member of a particular ethnic or religious group “due solely to the defendant’s belief that all members of that group are wealthy, absent any hate or animus toward that group.”¹⁵⁴ According to the Committee, to apply the enhancement where the defendant’s selection of a victim did not “result from [his] hate or animus toward any person for bearing one or more of the characteristics set forth in the definition of ‘hate crime[.]’ . . . would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense.”¹⁵⁵ Similarly, Professor Lawrence would enhance the punishment of “someone who targets women out of a violent expression of misogyny,” but not that of a purse snatcher who preys exclusively on women because he views them as easier targets, reasoning that the violent misogynist is both morally worse and a more “driven” criminal.¹⁵⁶

Once again, shared assumptions lead those on both sides of the debate to opposite conclusions, for those who oppose enhanced punishment also cite the deviance and irrationality of bias crime perpetrators in support of their position. One simple reason they offer for repealing bias crime legislation is the sheer rarity of the “true” bias crime perpetrator. Jacobs and Potter ask: “How many hate crimes (or how high a hate crime rate) does it take to constitute a problem, much less an epidemic? Should we regard hate crimes as an indicator of something other than the activities of a small number of deviant bigots?”¹⁵⁷ Critics also question the ability of the laws to chasten or deter these anti-social (and impliedly unreasonable and unreachable) beings.¹⁵⁸ Furthermore, at the extreme, the perpetrator’s deviance may be seen to *excuse* his actions—rather than to make him more culpable—on the ground that he was not responsible for his motivations or was delusional or insane.¹⁵⁹

¹⁵⁴ H.R. REP. NO. 103-244, at 5 (1993).

¹⁵⁵ *Id.*

¹⁵⁶ Lawrence, *supra* note 17, at 376–78.

¹⁵⁷ JACOBS & POTTER, *supra* note 1, at 7–8 (questioning the utility of gathering hate crime statistics); *see also id.* at 27–28, 146 (pointing out that how the relevant prejudice is defined will determine how large a problem “hate crime” is and advocating a narrow definition of bias crime, limited to “those criminal acts primarily motivated by the actor’s hatred for a particular group” or, in addition to the above requirement, also “linked, in some way, to furthering the ideology and goals of a recognized racist, anti-Semitic, or other such group”).

¹⁵⁸ *See, e.g.,* JACOBS & POTTER, *supra* note 1, at 8; Gellman, *Thought Crime Laws*, *supra* note 61, at 529–30.

¹⁵⁹ *See* JACOBS & POTTER, *supra* note 1, at 81, 139–40 (discussing seemingly

C. *The Perpetrator's Only Purpose Is to Do Harm to a Member of the Target Group*

The "true" bias crime perpetrator's animus is assumed to be not just irrational and deviant, but also so powerful that it creates in him the overwhelming desire to further his hostility by doing harm to some member of the target group. It is further assumed that the drive to do harm is so strong that it eliminates all other possible motivations for committing a crime, such as the desire to obtain material gains or other personal benefits. The assumption, in other words, is that—while the law requires only that the defendant's bias motivation be "substantial" or "significant"¹⁶⁰—the "true" bias crime perpetrator's desire to express his hostility toward the target group is his *exclusive* purpose. This presumption leads to a tendency to see only the most dramatic and extraordinary cases as bias crimes and to view as problematic (or exclude from consideration altogether) crimes that appear to involve both bias and other, more mundane motivations—in particular, the desire to obtain personal benefits.

This third assumption most directly affects how potential cases are handled within the legal system. Many law enforcement agencies have adopted official guidelines for the classification of bias crimes¹⁶¹ that explicitly endorse this assumption. For example, the Los Angeles, California guidelines for reporting hate crimes state that "[b]igotry must be the central motive for the attack, rather than economics, revenge, etc., as in other kinds of crime."¹⁶² The Baltimore County, Maryland policy indicates that the officer assigned to verify an incident as bias-motivated should consider, among others, the questions, "Did the incident occur solely because of an RRE [racial, religious, or ethnic] difference between the person(s)/group(s) or for other reasons?"¹⁶³ and "Were the *true*

inconsistent reactions of some supporters of hate crime laws to the crimes of Colin Ferguson, a black man who opened fire on a commuter train crowded mostly with white passengers, killing six people, and who appeared to have committed those murders out of hatred toward whites).

¹⁶⁰ See *supra* note 64.

¹⁶¹ These guidelines may or may not be intended to have consequences for how cases are handled within the criminal justice system (some might, for example, have been adopted only as guidelines for reporting hate crime statistics), but they certainly do reflect the official view of what a bias crime is and influence public perception on this issue as well. See *supra* notes 79–80 and accompanying text.

¹⁶² OFFICE OF THE CHIEF OF POLICE OF LOS ANGELES, CAL., REPORTING INCIDENTS MOTIVATED BY HATRED OR PREJUDICE (Special Order No. 11, Aug. 10, 1987), *reprinted in* ADL, POLICIES AND PROCEDURES, *supra* note 19, at 68.

¹⁶³ BALTIMORE COUNTY POLICE DEP'T, THE POLICY AND PROCEDURES FOR THE HANDLING OF RACIAL, RELIGIOUS & ETHNIC INCIDENTS (RRE) BY THE BALTIMORE COUNTY POLICE DEPARTMENT (5.1, Question 2), *reprinted in* ADL, POLICIES AND PROCEDURES, *supra*

(documentable) intentions of the responsible party(ies) RRE oriented, or were there other reasons such as childish pranks, unrelated vandalism, etc.?"¹⁶⁴ The FBI guidelines for the collection of hate crime statistics, a highly influential source of guidance on the classification of bias crimes, also incorporate this assumption. Those guidelines list several hypothetical situations and explain how each situation should be classified for reporting purposes. In these examples, the perception that the perpetrator had some additional reason for committing a crime is sufficient to obscure or even negate the perpetrator's otherwise apparent bias motivation. While examples involving solely assaults and vandalism are properly reported as bias crimes,¹⁶⁵ those in which assaults are accompanied by robberies—even where the offenders utter racial or homophobic epithets—are considered "ambiguous" and are not to be reported as bias-motivated.¹⁶⁶

note 19, at 16.

¹⁶⁴ BALTIMORE COUNTY POLICE DEP'T, THE POLICY AND PROCEDURES FOR THE HANDLING OF RACIAL, RELIGIOUS & ETHNIC INCIDENTS (RRE) BY THE BALTIMORE COUNTY POLICE DEPARTMENT (5.1, Question 14), *reprinted in* ADL, POLICIES AND PROCEDURES, *supra* note 19, at 18 (bold emphasis in original).

¹⁶⁵ See FBI, HATE CRIME DATA COLLECTION, *supra* note 100, at 6–7 examples 1, 3, 4, 6–8.

¹⁶⁶ The examples are the following:

Example (2): A white juvenile male snatched a Jewish woman's purse, and in doing so, knocked her down and called her by a well known and recognized epithet used against Jews. The offender's identity is not known. Although the offender used an epithet for Jews, it is not known whether he belongs to another religious group or whether his motive was anything more than robbery. Because the facts are ambiguous, agencies should not report this incident as bias motivated.

....

Example (5): An adult white male was approached by four white teenagers who requested money for the bus. When he refused, one of the youths said to the others, "Let's teach this [epithet for a gay person] a lesson." The victim was punched in the face, knocked to the ground, kicked several times, and robbed of his wristwatch, ring, and wallet. When he reported the crime, the victim advised that he did not know the offenders and that he was not gay. The facts are ambiguous. Although an epithet for a gay person was used by one of the offenders, the victim was not gay, such epithets are sometimes used as general insults regardless of the target person's sexual orientation, and in this case the offenders' motivation appeared to be limited to obtaining money from the victim. Therefore, the incident would not be designated bias motivated.

Id. at 6 (bold in original). The guidelines indicate that these two examples are complicated further by their other facts—specifically, in Example (2), that it is not known whether the offender himself was Jewish and, in Example (5), that the victim was not gay and anti-gay slurs are commonly used regardless of the target's sexual orientation. However, it is interesting to

Explicit departmental policy may not be the only reason law enforcement officers tend to classify only "paradigmatic"¹⁶⁷ cases as bias-motivated and to view crimes involving mixed motives as non-bias-motivated. Individual officers' personal assumptions may lead them to such decisions, even if departmental policy provides for the inclusion of mixed motive, non-paradigmatic cases.¹⁶⁸ In a study examining the decision-making practices of police detectives who were charged with classifying and investigating hate-motivated incidents, the researchers report that the "general perception among the majority of the officers and detectives interviewed [was] that there are only a few crimes which can 'really' be called hate motivated, such as a cross burning on the lawn of an African American family or the organized activities of the KKK or Aryan Nation."¹⁶⁹ The comments of many officers contained "suggestions about the nature of 'real' hate crimes '[T]rue' hate crimes . . . are infrequent, extraordinary events, easily recognizable, obvious to anyone. They involve offenses that are violent or dramatically out of the ordinary; they are often committed by members of political or other organized groups."¹⁷⁰

The classification methods used in one of the two departments studied showed an especially strong adherence to this view that was partially grounded in the responsible detective's devotion to the prototype. In that department, the commanding officer and the hate crime detective adopted a "narrow definition that focus[ed] on methods of motive assessment as the critical factor in distinguishing hate crimes from other crimes. Their expressed desire was to eliminate all other possible explanations before categorizing an incident as hate

note that none of the examples that are properly classified as bias-motivated, *see supra* note 165, raises the possibility of mixed motives and that, in Example (3), involving vandalism of a synagogue that is properly classified as a bias crime, the guidelines point out as significant the fact that "[a]lthough valuable items were present, none was stolen." FBI, HATE CRIME DATA COLLECTION, *supra* note 100, at 6 example 3.

¹⁶⁷ *See* Maroney, *supra* note 2, at 604.

¹⁶⁸ *See id.* at 604–06. Maroney has suggested additional reasons for the "pull to the paradigm case":

This reductionist tendency is at least partially a function of the fact that bias units are operated on a scarcity model. With limited personnel, they cannot handle every case in which bias is a factor; in order to control their own workloads, they will tend to focus on the few paradigmatic cases. More profoundly, police may focus on extraordinary cases because they find them more exciting and professionally gratifying. Rather than focus on the hate crimes most likely to be experienced by the target communities they serve, police may choose to focus on the hate group activities they find more interesting.

Id. at 605 (footnotes omitted).

¹⁶⁹ Boyd et al., *supra* note 19, at 827.

¹⁷⁰ *Id.* at 828.

motivated.”¹⁷¹ In accordance with this method, the detective counted as hate crimes “only those incidents which could be shown to be motivated solely and unambiguously by hatred.”¹⁷² The elements of a “true” hate crime would include “no provocation by the victim, no prior encounters between the victim and the perpetrator, a specific target, and accompanying derogatory insults.”¹⁷³ The authors found this detective to have been heavily influenced by the prototype, for, in classifying an incident, he tended to invoke his own understanding of a “‘normal’ hate crime” as including “features such as the actions of a perceived typical perpetrator.”¹⁷⁴ Having added features of the prototype to the definition of a bias crime, the detective then treated actions that he viewed as inconsistent with the prototype “as evidence against the appropriateness of the category for that instance.”¹⁷⁵

Law enforcement officers also may be prompted by prosecuting attorneys to exclude cases exhibiting mixed motives. Some prosecutors expressly prefer cases that they perceive as more “winnable,” such as those “in which the

¹⁷¹ *Id.* at 832–33.

¹⁷² *Id.* at 835.

¹⁷³ *Id.* at 846; *see also id.* at 836–38 (describing incidents that were not classified as hate crimes because of their failure to conform to detective’s view of a “true” hate crime, including a case where the victim might have cut off the perpetrators’ car in traffic (and thereby might have provoked them), a case where the perpetrator later apologized for his actions (the detective assumed that a “true racist” would not have apologized for his actions), and cases involving perpetrators who were juveniles (based on the view that juveniles are “irresponsible” and “categorically immune from hate motives”).

¹⁷⁴ Boyd et al., *supra* note 19, at 838.

¹⁷⁵ *Id.* Also among the reasons the detective cited for applying a narrow definition of bias crime was to “deflate” the bias crime statistics for the area. *Id.* at 833. The detective did not have ulterior motives for wanting to lower the number of bias crimes reported. Rather, his wish was related to his assumptions concerning what constitutes a “real” hate crime. The detective expressed the view that true hate crimes were rare occurrences and that some of the crimes that fit the official designation—“despite his stringent criteria”—“were not really hate crimes.” *Id.* at 838.

It is interesting to note that the other police division studied by Boyd et al. applied a much broader definition of bias crime and classified as such any crime in which “a single element suggested racial, ethnic, religious, or sexual prejudice”—even if that element was based only on the victim’s perception. *Id.* at 843. While this broader view might be seen as evidence against the influence of the prototype and related assumptions in this division, the authors actually found that it was simply another “manifestation of the pervasive view that ‘hate crimes do not happen here,’” for in that division the responsible detective regarded hate crimes as “a non-issue” and gave them no special attention. (Her approach was consistent with the practice of the departmental administration, which instituted no bureaucratic changes to attend to such crimes, other than to designate one detective to classify hate crimes.) *Id.* at 845.

evidence of bias is overwhelming and the victim highly sympathetic,¹⁷⁶ and refuse to pursue as hate crimes cases involving mixed motives.¹⁷⁷ Police officers may take their cues from this attitude, for pursuing a case that the prosecuting attorney does not consider "a good one" is "a waste of time."¹⁷⁸ This concern was a factor in the classification practices of the prototype-dependent detective discussed above; he was interested "in only filing cases with a 'good chance' of being pursued by the [prosecuting attorney]—that is, cases in which there is 'clear' evidence of a hate motivation."¹⁷⁹

The view that mixed motive crimes cannot be bias crimes may simply reflect the assumptions that the true bias crime perpetrator acts on his personal hostility toward the target group¹⁸⁰ and that he is deviant and irrational.¹⁸¹ That is, the prototype may simply exclude consideration of a perpetrator who both discriminates and seeks personal gain because the two types of perpetrators are seen as so completely different and their motivations as mutually exclusive. Whereas the "true" bias crime offender is viewed as an irrational person who acts irrationally (as evidenced by his overwhelming desire to harm the victim and the social group with which he is associated), the offender who discriminates in his selection of a victim because it increases his personal gain is viewed as being calculating and cool-headed, focused purely on self-interest. If he does inflict harm, even intentionally, it is only because that harm eases the attainment of his objective of personal gain.¹⁸²

Other reasons may explain the exclusion of the opportunistic or calculating bias offender. First, advocates of sentence enhancement who cite the greater harms of bias crime in support of their position have asserted that the criminal who discriminates rather than "hates" does not ordinarily inflict those greater harms.¹⁸³ If by chance his crime should be misperceived as being motivated by hostility rather than calculation, he should not be subjected to extra punishment for what is out of his control, essentially a matter of bad luck.¹⁸⁴ (On this point, these scholars differ with social scientists who have explained that, regardless of the perpetrator's "true" motivations, when the victim and target group perceive

¹⁷⁶ Maroney, *supra* note 2, at 604.

¹⁷⁷ *See id.* at 605 n.228 (describing interviews with victim advocates who work closely with prosecutors).

¹⁷⁸ Boyd et al., *supra* note 19, at 839.

¹⁷⁹ *Id.* at 847.

¹⁸⁰ *See supra* Part III.A.

¹⁸¹ *See supra* Part III.B.

¹⁸² *Cf.* Wang, *supra* note 6, at 72–73.

¹⁸³ *See, e.g.,* Crocker, *supra* note 60, at 488–89, 497.

¹⁸⁴ *See* Lawrence, *supra* note 17, at 369.

that the victim was selected on the basis of social group status, they experience the crime as they would a “hate” crime.)¹⁸⁵ Those who support penalty enhancement on the basis that bias criminals generally are more blameworthy than non-bias criminals contend that the criminal who discriminates in pursuit of personal gain is no more culpable than the perpetrator of a parallel crime¹⁸⁶ (that is, “the identical underlying criminal conduct . . . without the bias motive[]”).¹⁸⁷ After all, the thinking seems to be, in selecting a victim who enables him to maximize the benefits or minimize the costs of his crime, the perpetrator is acting only as one would expect any rational, profit-seeking criminal to act.¹⁸⁸ Similarly, where the perpetrator seems to have acted out of self-interest or a desire to obtain some material gain, we may be better able to understand his reasons for acting. In that case, the perpetrator may be easier to “relate to” and his motivation seem more excusable.¹⁸⁹

Critics of bias crime laws share the assumption that the “true” bias offender has no material objectives, but they view this as an argument *against* enhancing his or her punishment. Applying reasoning that they appear to regard as almost algebraic in its logic, these critics contend that, when the basis for enhanced punishment is that the offender acted on his negative opinions or his hostility toward the target group, the only plausible reason for that extra penalty must be to punish him for the offensive content of his views.¹⁹⁰ Therefore, the laws must be punishing him for holding and expressing opinions that do not conform to the viewpoints approved by the state—a clear violation of the right to freedom of expression guaranteed by the First Amendment.¹⁹¹

IV. DEBUNKING THE THREE ASSUMPTIONS: TWO CASE STUDIES

That supporters and critics of bias crime legislation share the three assumptions concerning perpetrators’ motivations is troubling, because the three assumptions provide a faulty starting point for their debate. The three

¹⁸⁵ See Wang, *supra* note 6, at 112–24 (describing research).

¹⁸⁶ See H.R. REP. NO. 103-244, at 5 (1993); Lawrence, *supra* note 17, at 377–78.

¹⁸⁷ Lawrence, *supra* note 17, at 321 n.5.

¹⁸⁸ See, e.g., H.R. REP. NO. 103-244, at 4–5.

¹⁸⁹ As Professor Welsh White has explained, in the sentencing context a defendant’s crime is often mitigated when he can offer reasons that make it understandable and, by extension, make him seem more “human.” Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 360–61.

¹⁹⁰ See, e.g., JACOBS & POTTER, *supra* note 1, at 122; Gellman, *Sticks and Stones*, *supra* note 101, at 363.

¹⁹¹ See, e.g., JACOBS & POTTER, *supra* note 1, at 128–29; Gellman, *Sticks and Stones*, *supra* note 101, at 362–79.

assumptions paint a caricature of bias crime perpetrators that is so exaggerated it fails to explain adequately the motivations of even the prototypical perpetrator. The following sections explore two paradigmatic examples of bias crime, one historical and one contemporary. Close examination of these cases reveals that, in many important respects, the motivations of the perpetrators are not captured by conventional assumptions. The first bias crime examined is mob violence against black Americans in the South during the "lynching era" (1880 to 1930), the period in this country's history when that distinctive form of racial violence was most common. The second example studied is contemporary anti-gay crime and violence.

Lynching stands as the archetypal "hate" crime—the historical antecedent of contemporary "hate" crimes and the original model on which contemporary images and understandings of such crimes are based. In contemporary discourse, "lynching" has come to signify *all* hate crime; it is the exemplar to which each new incident of bias-motivated violence evokes inevitable comparison.¹⁹² (The 1981 hanging of Michael Donald in Mobile, Alabama, and the 1998 dragging death of James Byrd in Jasper, Texas, remind us that lynching itself is not just a relic of the distant past.)¹⁹³ Recent studies of the historical data on lynching show that it was often driven by white southerners' economic self-interest as much as by their hostility toward blacks, that the practice was permitted and even encouraged by the racist ideology of white southerners generally, and that white southerners often controlled the level and timing of racial violence as it suited their interests. (It should be noted that, even in cases where a lynching was both clearly motivated by economic interest and used in a calculated fashion—for example, where a group of white farm laborers sought to remove a black tenant

¹⁹² See, e.g., Diane Hirth, *Ban on Burning of Crosses Is Upheld*, SUN SENTINEL, June 16, 1995, at 16A (reporting that cross burning was linked to lynchings and other types of hate crimes); Veronica T. Jennings, *Calling Racial Attack "Savagery," Judge Gives Man 60 Years*, WASH. POST, Feb. 4, 1993, at B1 (describing white man's attack on two black women as "lynching by burning"); Catharine A. MacKinnon, *If Rape Were Treated as the Hate Crime That It Is*, STAR-TRIBUNE, Dec. 17, 1991, at 17A (stating that sexual assault resembles lynching); *Victim's Mother Joins Rally for Hate-Crimes Legislation*, HERALD, May 23, 1998, at 2B (reporting that attack on lesbian was called "a modern-day lynching").

¹⁹³ On March 20, 1981, three Ku Klux Klansmen beat and hanged Mr. Donald—whom they had selected at random when they saw him walking alone on a deserted street—out of their anger over a hung jury in the criminal trial of a black man who had been charged with killing a white policeman. See MORRIS DEES & STEVE FIFFER, *A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES* 212–14 (1991). In June 1998, three young men were charged with murder for chaining Mr. Byrd to the back of a pick-up truck and dragging him for two miles until he died. Mr. Byrd's torso was found without his head or right arm; those body parts were found a mile away from his torso. See *3 Charged in Texas Dragging Death*, CHI. TRIB., June 9, 1998, at 1; Rick Bragg, *Unfathomable Crime, Unlikely Figure*, N.Y. TIMES, June 17, 1998, at A16.

from desirable land that they wished to work¹⁹⁴—common understanding would not remove that lynching from the category of “hate” crime. The prototype does allow for such calculating motivations.) While the economic, political, and social environment today differs significantly from that of the lynching era, examining the explanations that social scientists have discovered for that extended period of widespread and unquestionably race-targeted violence can yield important insights into the potential functions for such violence and add to our understanding of the more modern forms of discriminatory violence at which bias crime legislation is directed.

Similar to lynching, anti-gay violence conforms to the attributes of the prototype, for it usually involves extreme and vicious brutality perpetrated by a group of ostensibly heterosexual young men on a lone victim. In addition to exemplifying the prototype, anti-gay violence is a helpful vehicle for understanding the motivations of perpetrators who target victims based on their membership in other social groups. As research psychologist Gregory M. Herek has explained, “antigay prejudice manifests the same general psychological structures and dynamics as racism, anti-Semitism, and other prejudices against stigmatized groups. Each can be understood by the same social scientific theories and measured by the same methodologies.”¹⁹⁵ Moreover, many perpetrators of violence motivated by the victim’s race or religion also commit anti-gay violence.¹⁹⁶ Furthermore, while social scientists who study today’s violent racists have noted the general lack of social science research into the causes of bias crime,¹⁹⁷ a substantial body of psychological and sociological research into anti-gay prejudice and violence does exist. As with lynching, closer examination of the motivations behind anti-gay crimes reveals that they often are prompted by the desire for personal rewards—be they excitement, the recognition and approval of others, social bonding with peers, or, most mundane of all, money—and often are encouraged by a cultural ideology that views gay persons as

¹⁹⁴ See *infra* text accompanying notes 332–33.

¹⁹⁵ Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 60, 65 (John C. Gonsiorek & James D. Weinrich eds., 1991); see also *id.* at 66, 69, 72; Franklin, *Psychosocial Motivations*, *supra* note 53, at 4 & n.3.

¹⁹⁶ See Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN*, *supra* note 22, at 19, 31 [hereinafter Berrill, *An Overview*] (“anti-gay violence by hate groups appears to be increasing.”); GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 60–62 (1990) (giving empirical data on perpetrators); Gregory M. Herek & Kevin T. Berrill, *Introduction* to *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN*, *supra* note 22, at 1, 2–3.

¹⁹⁷ See RAPHAEL S. EZEKIEL, *THE RACIST MIND* 324 (1995); MARK S. HAMM, *AMERICAN SKINHEADS: THE CRIMINOLOGY AND CONTROL OF HATE CRIME* 7–12 (1993).

suitable vehicles for attaining such goals.

A. Racial Violence in the Lynching Era

1. The Archetypal "Hate" Crime

During this country's "lynching era"—the five decades between the end of Reconstruction and the beginning of the Great Depression, between 1880 and 1930¹⁹⁸—at least 2,462 African American men, women, and children died at the hands of southern mobs.¹⁹⁹ Almost all of their killers were white.²⁰⁰ The "regional ritual"²⁰¹ became so common that, between 1882 and 1903, it claimed an average of 69 victims per year in the six states of Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina.²⁰² As startling as these figures are, they actually understate the level of racial violence in the United States during that period. This understatement results from the fact that these figures do not include the victims of race riots or of racially motivated murders committed by one or a pair of killers, nor the victims of the beatings, whippings, threats and other abuses commonly suffered by blacks in the South.²⁰³

Historians' accounts of lynching comprise all of the elements of the prototype.²⁰⁴ Herbert Shapiro's description of the general pattern of southern lynchings captures the bloodthirsty racism of the attacking mob,²⁰⁵ the brutal,

¹⁹⁸ See STEWARD E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 17 (1995). [hereinafter *FESTIVAL OF VIOLENCE*].

¹⁹⁹ See *id.*; see generally NATIONAL ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918* (1969) (listing and analyzing the number of persons lynched in the United States).

²⁰⁰ See ARTHUR F. RAPER, *THE TRAGEDY OF LYNCHING* 1 (1933).

²⁰¹ JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 185 (1984).

²⁰² See JAY R. MANDLE, *NOT SLAVE, NOT FREE: THE AFRICAN AMERICAN ECONOMIC EXPERIENCE SINCE THE CIVIL WAR* 64-65 (1992).

²⁰³ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at ix.

²⁰⁴ See *supra* notes 16-25 and accompanying text (giving a description of the "prototypical hate crime").

²⁰⁵ Lynching is often referred to as "mob violence," and by definition (and consistent with the prototype) involves multiple perpetrators. A widely accepted definition of lynching is that offered by James Elbert Cutler in 1905: "an illegal and summary execution at the hands of a mob, or a number of persons, who have in some degree the public opinion of the community behind them." JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* 276 (1905); see, e.g., Jay Corzine et al., *Rethinking Lynching: Extralegal Executions on Postbellum Louisiana*, 17 *DEVIANT BEHAV.: AN INTERDISC. J.* 133, 135 (1996) (quoting Cutler); Charlotte Wolf, *Constructions of a Lynching*,

gruesome means by which the victims were put to death, and the fervor and ritual that characterized the entire spectacle:

The specifics of each lynching might vary, but the general pattern of this racial barbarism was clear. Whites would be roused to hysteria by accounts of some purported black offense. The hysteria could be evoked by charges that a crime had been committed, but frenzy could also be incited by simply alleging that a black man had been "uppity," had argued with a white employer, or had neglected to move out of the path of a white person. The cry of rape, appealing to the most extreme fears and hatreds, drawing upon racist myths concerning black male sexuality and a hypocritical view of white womanhood, became a summons to the mob and also was used to justify the lynching to national public opinion. The mob would then begin the search for the black or blacks reported to have offended, and if the black person identified could not be found the mob would turn its wrath upon someone else, a wife perhaps or other relative of the accused, and indeed sometimes anyone who was black would do. The point was that for the supposed crime or insult the black community as a whole was accountable, and one black victim for the lynch mob would serve as well as another. The victims of the lynch mob included grown men but also teenagers, elderly women, and pregnant mothers.

The lynchers, characteristically, were not content merely to kill the victim; the act of lynching was often transformed into a public spectacle, and sometimes hundreds or thousands of whites from the surrounding countryside would come to town to observe the event. The mob inflicted death, death that was the result of extraordinary, sadistic cruelty. Before death came the victim was tortured, tormented by having limbs or sexual organs amputated, by being slowly roasted over a fire. Before or after death the body might be riddled with bullets and dragged along the ground. After death pieces of the charred remains would often be distributed as souvenirs to the mob whose members desired a keepsake as a remembrance of the notable happening. In short, the phenomenon of lynching exhibited American society in its most ferocious and inhuman manifestation.²⁰⁶

As Shapiro's account suggests, the perpetrators and their supporters hardly concealed their racism. The principal allegation offered as justification for

62 SOC. INQUIRY 83, 83 (1992) (quoting Cutler); see also J. William Harris, *Etiquette, Lynching, and Racial Boundaries in Southern History: A Mississippi Example*, 100 AM. HIST. REV. 387, 393 n.33 (1995) (defining lynching as "an extra-legal execution, by a group of perpetrators, of one or more persons alleged to have committed a crime or violated important informal norms").

²⁰⁶ HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 31 (1988). For similar descriptions, see also EDWARD L. AYERS, *VENGEANCE AND JUSTICE* 249 (1984) [hereinafter AYERS, *VENGEANCE AND JUSTICE*]; TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 23; WILLIAMSON, *supra* note 201, at 186-88.

lynching—that a black male had raped or otherwise terrorized or insulted a white woman or girl²⁰⁷—indicates a white population gripped by fear of the “black beast”²⁰⁸ and rests on the most malicious of racial stereotypes.²⁰⁹ The fact that many of these allegations were probably false²¹⁰ only underscores the racist ideology to which the mobs adhered. And, whether true or false, in many cases far less serious allegations were sufficient to rouse the mobs to terrifying violence. As Shapiro notes, the most trivial infractions of the de facto code of etiquette that southern whites imposed on the black population were adequate justification for some perpetrators.²¹¹ A listing of the reasons offered for the lynching of blacks shows that mobs could be incited from offenses ranging from rape and murder to “acting suspiciously,” “being obnoxious,” “demanding respect,” “suing a white man,” “trying to vote,” and “unpopularity.”²¹² That whites felt such minor “infractions” by blacks warranted their murders demonstrates the strength of the racist ideology that was in place in the South.²¹³ Furthermore, the mobs’ willingness to lynch “anyone who was black”²¹⁴ if their intended target could not be found shows that they did not view black persons as individuals but instead as “fungible” representatives of their race, interchangeable for the mobs’ purposes.²¹⁵

Undoubtedly to an even greater degree than racial violence today,²¹⁶ lynching had a powerful terroristic effect on the target population. Some black southerners witnessed the violence firsthand,²¹⁷ but even those who did not could hardly escape awareness of the practice. The use of violence was aimed not just at the individual victim but at the black community generally, and the gruesome details of each event were publicized widely through the press and

²⁰⁷ See AYERS, VENGEANCE AND JUSTICE, *supra* note 206, at 240–43.

²⁰⁸ *Id.* at 238; WILLIAMSON, *supra* note 201, at 184.

²⁰⁹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 46.

²¹⁰ See AYERS, VENGEANCE AND JUSTICE, *supra* note 206, at 241–44; *cf.* RAPER, *supra* note 200, at 4–5 (casting doubt on the guilt of the victims).

²¹¹ See *supra* text accompanying note 206.

²¹² TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 47.

²¹³ See MANDLE, *supra* note 202, at 64.

²¹⁴ SHAPIRO, *supra* note 206, at 30.

²¹⁵ See, e.g., WILLIAMSON, *supra* note 201, at 187.

²¹⁶ See, e.g., Lawrence, *supra* note 17, at 345–46; Wang, *supra* note 6, at 119–24.

²¹⁷ See, e.g., Stewart E. Tolnay et al., *Vicarious Violence: Spatial Effects on Southern Lynchings, 1890–1919*, 102 AM. J. SOC. 788, 793–94 (1996) [hereinafter Tolnay et al., *Vicarious Violence*] (explaining how some mobs, to insure that blacks received their terroristic message, “took pains either to carry out their lynchings within the black community or to relocate the corpse afterward so that it could be displayed where blacks were certain to see it”).

word of mouth.²¹⁸ As a result, southern blacks lived with the knowledge that any one of them could be a victim at any time.²¹⁹ They also knew that those unlucky enough to be chosen as targets could not expect protection from the law, for law enforcement officers often acquiesced or even joined in the mob violence.²²⁰ To avoid provoking a violent response, many blacks adopted deferential patterns of conduct toward whites,²²¹ but even the most circumspect behavior could not insure complete safety from the mobs.²²² As one young white man from Mississippi said in a 1908 interview, “You don’t understand how we feel down here; when there is a row, we feel like killing a nigger whether he has done anything or not.”²²³

Evoking as it does images of irrational, uncontrolled, bloodthirsty and relentlessly racist mobs,²²⁴ racial violence during the lynching era would seem to confirm the validity of the prototype and support the view that special harms are contingent upon, and enhanced punishment should be reserved for, those who act in conformance to its assumptions. But the racist mobs of the lynching era were not as single-mindedly hate-driven as they might have seemed. Recent studies examining the historical data on lynching suggest the need to rethink our assumptions about even the archetypal “hate” crime. These studies show that, for many white southerners, lynching was a calculated means by which they sought to further their economic interests and that, far from being “controlled by” an irrational hostility toward and desire to harm the African American population, a significant number of perpetrators and supporters of lynching actually used it in a controlled manner that was designed to attain benefits for themselves.

2. Lynching as Economic Practice: “King Cotton” and Racial Violence

It would be impossible to offer a single, definitive explanation for racial

²¹⁸ See TOLNAY AND BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 23; Tolnay et al., *Vicarious Violence*, *supra* note 217, at 790.

²¹⁹ See EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 158 (1992) [hereinafter AYERS, PROMISE]; SHAPIRO, *supra* note 206, at 32; Tolnay, et al., *Vicarious Violence*, *supra* note 217, at 790.

²²⁰ See SHAPIRO, *supra* note 206, at 31.

²²¹ See Tolnay et al., *Vicarious Violence*, *supra* note 217, at 812; *cf.* MANDLE, *supra* note 202, at 64–65 (describing how blacks infrequently would rebel against the restrictions imposed upon them by whites).

²²² See SHAPIRO, *supra* note 206, at 32.

²²³ WILLIAMSON, *supra* note 201, at 187 (quoting Albert Bushnell Hart, *The Outcome of the Southern Race Question*, 188 NORTH AM. REV. 50, 56 (1908)).

²²⁴ See Tolnay et al., *Vicarious Violence*, *supra* note 217, at 789.

violence in the lynching era,²²⁵ and indeed Historian Edward L. Ayers has cautioned of the dangers of trying to overexplain the phenomenon.²²⁶ A wide range of incidents triggered the violence,²²⁷ and the practice seems to have served various functions under different circumstances.²²⁸ 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.²²⁹ However, lynching 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.²³⁰ In particular, an important body of recent historical sociological scholarship indicates that white southerners' desire to gain economic benefits, and thereby to maintain both economic and social dominance over blacks, played a major role in driving the violence. Specifically, this research suggests that perpetrators often used racial violence as an instrument to obtain or maintain white control over two key economic resources, land and labor. It also provides compelling support for the view that perpetrators often were primarily focused on the benefits to themselves that they perceived might derive from racial violence, and that they modulated their use of lynching to further their interests.

This part of the Article relies heavily on the work of sociologists Stewart E. Tolnay and E.M. Beck, two leading authorities on lynching whose sophisticated, quantitative studies of the historical data have been widely cited.²³¹ Tolnay and

²²⁵ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 56.

²²⁶ See AYERS, PROMISE, *supra* note 219, at 156; AYERS, VENGEANCE AND JUSTICE, *supra* note 206, at 238–41.

²²⁷ See, e.g., TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 47.

²²⁸ A wealth of scholarship has examined the various functions that lynching might have served. In addition to economic functions, scholars have suggested that lynching might have served, *inter alia*, as a way for whites to manage the threat of political competition from blacks, to enforce "popular justice" and to control black crime, or to enforce the race-based caste system. See generally TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 55–82 (describing scholarship). Tolnay and Beck's own research to test those theories, however, led them to conclude that they do not, for the most part, provide significant explanations for lynching. See *id.* at 248–51. Instead, they found economic factors to provide the "most useful" explanations. *Id.* at 251–53 (noting, however, that the status threat model does appear viable).

²²⁹ See *supra* text accompanying notes 207–15.

²³⁰ See generally 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 (1990) [hereinafter Beck & Tolnay, *The Killing Fields*].

²³¹ See, e.g., W. Fitzhugh Brundage, *Introduction* to UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 17 n.16 (W. Fitzhugh Brundage ed., 1997) [hereinafter Brundage, *Introduction*]; Kent Redding, *A Festival of Violence: An Analysis of Southern Lynchings*,

Beck focus their research on the relationship between structural factors and lynching, rather than on a close examination of specific cases.²³² In particular, Tolnay and Beck “have chosen to scrutinize the general contours of mob lynchings—especially their distribution over time and across space—to determine whether interpretable patterns emerge.”²³³ While the statistical patterns do not provide the rich detail that is supplied by narrative accounts of specific incidents, they do provide the “most useful” explanations,²³⁴ because they identify the most significant, broadly explanatory factors behind lynching.²³⁵

Lynching was “a distinctive feature of race relations”²³⁶ in the South from

1882–1930, 74 SOC. FORCES 1450, 1450 (1996) (book review) (describing Tolnay and Beck’s work as “by far the most sophisticated and sustained quantitative analysis to date of the structural correlates of southern lynchings”).

²³² Tolnay and Beck attempted to provide a broad explanation for the phenomenon and chose not to focus on specific incidents for two reasons. First, such a specific focus could lead to inaccurate understandings of the motivations to the extent that one relies on the perpetrators’ own explanations. See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 248. Second, “virtually any explanation” of lynching can be supported if one accepts the reported circumstances of individual cases at face value. *Id.* As Beck and Tolnay have explained, the structural or underlying factors often would not be apparent from the events immediately preceding an incident:

Based on accounts of lynchings, it is clear that whites didn’t congregate at the gin to lament the soft price of cotton, then decide to murder a black to relieve their psychological stress. Lynch mobs reacted to some supposed infraction of the norms governing caste relations, whether it be a minor act of racial imprudence or the major crime of murdering a white man.

Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 537 n.12. The mobs’ immediate reasons often were either merely “triggering incidents” or pretextual explanations. TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 248; see also Jay Corzine et al., *The Tenant Labor Market and Lynching in the South: A Test of Split Labor Market Theory*, 58 SOC. INQUIRY 261, 262 (1988).

For a discussion of the comparative advantages and disadvantages of historical sociologists’ and historians’ differing approaches to the study of lynching see Larry J. Griffin et al., *Narrative and Event: Lynching and Historical Sociology*, in UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 24–47 (W. Fitzhugh Brundage ed., 1997).

²³³ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 248. As a result, the work of Tolnay and Beck is less useful for explaining such things as, for example, the processes by which “lynchings became the established means for controlling the economic threat of blacks to whites, or of how they were sequentially related to one another.” Redding, *supra* note 231, at 1451.

²³⁴ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 248.

²³⁵ See *id.*

²³⁶ Corzine et al., *supra* note 232, at 261.

1880 through 1930, but it neither followed a uniform pattern nor occurred randomly.²³⁷ Instead, levels tended to fluctuate over time and to vary by region.²³⁸ Variations in the economic interests of whites over time and place provide explanations for the temporal variations in, geographic distribution of, and eventual decline of lynching. Broadly speaking, lynching tended to increase during times when or in locations where whites perceived that controlling the black population would be especially helpful to their interests and to decrease when white interests were less dependent on dominance over blacks or could be furthered by more favorable treatment of blacks.

Especially substantial links are seen between white interests and lynching within the cotton-growing region known as the "Black Belt," which included the states of Georgia, Alabama, Mississippi, and Louisiana.²³⁹ In Beck and Tolnay's inventory of black victims of white lynch mobs, 65.9 percent—or 1,500 of 2,314 total victims—were killed in, or by mobs from, cotton-dominant counties.²⁴⁰ In addition, broad temporal variations in the intensity of lynching support a connection between the cotton economy and racial violence:

The broad historical sequence is uncontested: the peak of black lynchings in the early 1890s coincided with a softening demand for southern cotton, the rise of populism and agrarian protest, and the birth of radical racism. The bloody 1890s were followed by several years of ballooning cotton prices and an apparent decline in violence against southern blacks. Following World War I, however, there was a significant reversal of this trend, when an alarming bottoming of the cotton market was accompanied by another wave of radical racism, signaled by the dramatic rebirth of the Ku Klux Klan and the popular acclaim lavished on D.W. Griffith's epic film, *Birth of a Nation*.²⁴¹

A negative relationship between cotton market conditions and lynching—that is, that lynching tended to increase when cotton prices were down—was documented in two separate studies several decades ago.²⁴² In a recent,

²³⁷ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 29–45, 144, 149; W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930, at 18–19 (1993) [hereinafter BRUNDAGE, LYNCHING IN THE NEW SOUTH].

²³⁸ For an overview of the patterns that anti-black lynching exhibited, see TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 29–50.

²³⁹ See BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 106; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 35–36.

²⁴⁰ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 119, 160 n.3.

²⁴¹ Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528.

²⁴² See RAPER, *supra* note 200, at 30–31 (graphing relationship between per acre value of cotton and number of lynchings in nine cotton states from 1900 through 1930, which relationship indicated that "periods of relative prosperity bring reduction in lynching and

sophisticated study,²⁴³ Beck and Tolnay undertook to examine more rigorously the relationship between cotton prices and lynching.²⁴⁴ Beck and Tolnay studied the effect of changes in the price of cotton on the number of black lynching victims in the Deep South for the years 1882 through 1930.²⁴⁵ Consistent with the earlier studies,²⁴⁶ they found that the frequency of black lynchings declined as the nominal price of cotton rose, and vice versa.²⁴⁷ (The strength of the link between cotton prices and lynching diminished after 1900, a fact that is important to consider in examining the motivations behind lynching and is discussed, *infra*, in Part IV.A.2.C.)²⁴⁸

Indeed, Tolnay and Beck's studies have gone beyond merely plotting changes in the incidence of black lynchings following the movement of cotton prices, to explore whether the observed negative correspondence was "something more than coincidence."²⁴⁹ That is, they sought to determine whether conditions in the cotton market played a role in precipitating racial violence.²⁵⁰ First, Tolnay and Beck fine-tuned their study to account for several factors that might be distorting or disguising the true relationship or that might provide an alternative explanation for the observed correspondence.²⁵¹ With these

periods of depression cause an increase."); Carl Iver Hovland & Robert R. Sears, *Minor Studies of Aggression: VI. Correlation of Lynchings with Economic Indices*, 9 J. PSYCHOL. 301, 301-10 (1940) (discussing a study of the relationship between the number of lynchings and two economic indices—the farm value of cotton (i.e., the total value of cotton produced in a given year) and an index of total economic activity in the United States—that showed an even higher negative correlation than that found by Raper). For discussion critical of these studies, see Donald P. Green et al., *From Lynching to Gay Bashing: The Elusive Connection Between Economic Conditions and Hate Crime*, 75 J. PERSONALITY & SOC. PSYCHOL. 82, 82-89 (1998); Alexander Mintz, *A Re-Examination of Correlations Between Lynchings and Economic Indices*, 41 J. ABNORMAL & SOC. PSYCHOL. 154, 154-60 (1946); John Shelton Reed et al., *Too Good to Be False: An Essay in the Folklore of Social Science*, 57 SOC. INQUIRY 1, 2 (1987).

²⁴³ See Brundage, *Introduction*, *supra* note 231, at 17 n.16.

²⁴⁴ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 124-33; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 526.

²⁴⁵ Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528-30.

²⁴⁶ See *supra* note 242 and accompanying text.

²⁴⁷ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 124-25; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 529.

²⁴⁸ See *infra* notes 389-413 and accompanying text.

²⁴⁹ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 125; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 529.

²⁵⁰ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 119-20, 133.

²⁵¹ Specifically, they adjusted their model to distinguish the effect on lynching of the constant dollar price of cotton from the effect of inflationary increases in price, to account for changes in the concentration of black population in the deep South, and to examine the effect

adjustments, Beck and Tolnay's findings confirmed the relationship between distress in the cotton market and lynching.²⁵² In addition, further studies by Beck and Tolnay showed that lynching in response to economic distress in the Cotton South was race-specific, in that the white mobs targeted blacks rather than other whites for their violent attacks. These studies also showed that economic instability played a much greater role in driving black lynchings in the cotton states than in other southern states.²⁵³ The studies therefore suggest that the cotton region's distinctive culture and historical legacy were factors conducive to widespread racial violence.²⁵⁴

The inference that the cotton culture contributed to race-based lynching is further bolstered by subregional differences in the intensity of anti-black lynching. Across the South, there was great inter-county variation in both the extent of "cotton dominance"—the degree to which a county's economy depended on cotton—and the number of black lynching victims. When Tolnay and Beck compared the number of black lynching victims in southern counties

of changes in agricultural production that did not translate into price shifts. See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 125–29; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 529–31.

Tolnay and Beck also explored the effect of black crime on the frequency of lynching and found that, while the black crime rate was positively related to the lynching rate, it cannot serve as an important explanation for lynching because including the black crime rate measure in the model did not diminish or eliminate the net effect of cotton prices on black lynchings. See Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 533; see also TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 129.

²⁵² First, they found that lynchings declined as the constant dollar price of cotton increased, but grew more frequent when inflation was on the rise. This finding shows that hard economic times resulted in more lynchings. Second, Beck and Tolnay found that, independent of the price factors, increases in the concentration of the black population correlated with more frequent black lynchings. This finding is consistent with the theory that whites viewed the presence of a high proportion of blacks in the population as a threat to their dominance and responded with lynching as a means of social control. Third, the researchers found that, independent of price shifts, increases in cotton productivity—which would contribute to total income—resulted in fewer lynchings. This final finding is also consistent with the theory that lynching was a response to economic distress. See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 127–28; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 532–33.

²⁵³ The researchers applied an empirical model similar to that described above to examine the effect of the same variables on three other types of lynchings: (1) white-on-white lynchings in the Cotton South, (2) black-on-black lynchings in the Cotton South, and (3) white-on-black lynchings outside of the Cotton South. In each case, they found that economic conditions had a much weaker effect—indeed, in the case of black-on-black lynchings the effect was not statistically significant—on the rate of lynching. See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 133–37.

²⁵⁴ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 133.

that were more heavily dependent on cotton to the number in regions that were relatively less dependent on cotton, they found that the more heavily cotton-dependent counties experienced more racial violence. While other factors, including the size of the county's black population, the percent of the county population that was black, and the county's historical "proneness" to anti-black violence, were also positively related to the number of black lynching victims, cotton dominance in itself was a significant predictor of racial violence, at least during the period from 1890 to 1909, when the intensity of lynching was more strongly affected by conditions in the cotton market.²⁵⁵

The connection between the cotton-based economy and anti-black lynching raises the question of what functions the violence fulfilled for perpetrators and supporters within the cotton culture. Social scientists have suggested two ways in which lynching might have served perpetrators' interests during times of economic distress. First, lynching might have represented primarily an *emotional* response, triggered by the perpetrators' frustration over their deteriorating status and standard of living.²⁵⁶ Frustrated whites could have used lynching as a way of displacing their aggression onto targets whom they knew they could harm with impunity,²⁵⁷ or as a way of reminding blacks of the superior positions of whites

²⁵⁵ See *id.* at 137–41.

²⁵⁶ See *id.* at 122–23.

²⁵⁷ This theory was first offered by Hovland and Sears, in their 1940 study. See Hovland & Sears, *supra* note 242, at 301–10 (discussing the study). The idea that lynching served this function exemplifies the "frustration-aggression hypothesis," which holds that aggression is the result of the frustration of goal-seeking behavior, and that, when they are concerned about receiving punishment for their aggression, frustrated individuals will displace that aggression away from the frustrating agent to alternative targets. See J. E. Alcock, *Frustration-Aggression Hypothesis*, in 2 *ENCYCLOPEDIA OF PSYCHOLOGY* 42–43 (Raymond J. Corsini ed., 2d ed. 1994). Hovland and Sears reasoned that lynching was an example of frustration-aggression because they believed that whites could not have logically blamed blacks for their economic plight, but at the same time could not aggress against the true causes of their misfortune, which were economic conditions and not actual "objects." A logical target might have been the upper class whites who *represented* their misfortune, but lower class whites knew that they could not aggress against those individuals without suffering serious consequences. Because whites could vent their anger at lower status blacks with impunity, they may have chosen to displace their aggression onto blacks through lynching. See Hovland & Sears, *supra* note 242, at 307–08. However, the reasoning applied by Hovland and Sears in reaching this conclusion is questionable. First, apparently Hovland and Sears rejected out of hand and, therefore, failed to look for any instrumental explanation for lynching, for they chose to study lynching on the stated assumption that "lynchings do not arise out of an attempt to improve one's economic position during times of economic stress . . ." *Id.* at 302. Second, while Hovland and Sears may be correct as to the illogic of poor whites' blaming black Southerners for their plight, later scholars have pointed out that its irrationality does not eliminate the likelihood that such a view was held by white Southerners. For example, Beck and Tolnay state, "Clearly, Hovland and

in society during a time when the two groups' economic conditions were becoming more comparable.²⁵⁸ An alternative explanation is that the violence was *instrumental* in nature—that is, it was intended to achieve desired ends, including economic goals such as reducing competition from blacks for land and jobs.²⁵⁹

Both explanations find support in the historical evidence. However, the studies conducted by Tolnay and Beck, discussed in the following sections, provide compelling support for the instrumental model and therefore for the view that lynching was more "rational" than previously had been supposed. These studies provide strong evidence that southern whites of both upper and lower economic classes used lynching as an instrument to maintain control over their most important productive resources—land and labor—and that they regulated the intensity of the violence in accordance with its usefulness to their interests. The eventual decline of lynching also was consistent with white interests, for the end of the lynching era coincided with the end of its usefulness to influential whites.

a. *Maintaining White Dominance: Controlling Land and Labor*

It is no coincidence that the "festival of violence"²⁶⁰ began following the collapse of slavery, for that event marked the beginning of a period when racial violence became useful to protecting and furthering white southerners' economic interests in ways that in the past would have been neither necessary nor rational.²⁶¹ After slavery ended, cotton-growing whites began to lose their grip over the key resources in that agriculture-dependent region: labor and land. The loss of their property rights in slaves translated into a loss of the total control that landowners had formerly exercised over the labor supply,²⁶² and financial troubles resulting from the weakening of the cotton market and their perennial indebtedness caused many southern whites to lose their land, as well.²⁶³ At the

Sears had rather limited imaginations, since Southern whites had a well-documented history of blaming blacks for social and economic problems for which they were not responsible." Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 527. In addition, a recent re-analysis of Hovland and Sears's study has found no support for their thesis. See Green et al., *supra* note 242.

²⁵⁸ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 122.

²⁵⁹ See *id.* at 122–23; RAPER, *supra* note 200, at 31; WILLIAMSON, *supra* note 201, at 441–42.

²⁶⁰ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198.

²⁶¹ See *id.* at 246–47.

²⁶² See *infra* notes 267–76 and accompanying text.

²⁶³ See *infra* notes 277–82 and accompanying text.

same time, the greater freedom accorded to African Americans allowed them to make limited progress toward increased economic status and lessened the ability of white landowners to exert control over them.²⁶⁴ In addition to threatening the economic interests of whites, these small improvements in black southerners' lives threatened the cotton culture's caste system, which marked whites as the superior race and blacks as inferior.²⁶⁵ The cotton-dependent South in the lynching era thus was characterized by a "constellation of factors"²⁶⁶ that converged to create an environment conducive to widespread racial violence.

The end of slavery was a devastating blow to cotton planters, who had been heavily dependent on the abundant supply of cheap and dependable labor that slavery provided.²⁶⁷ To secure the labor needed to carry on agricultural production, slavery was replaced by the plantation tenancy system.²⁶⁸ Described in very general terms, this system comprised two interdependent economic classes: the upper class landowners, who controlled access to land and capital, and the lower class workers, who provided labor but controlled no other resource.²⁶⁹ Laborers contracted with landowners under a variety of arrangements,²⁷⁰ but generally their compensation was in the form, not of wages,

²⁶⁴ See generally MANDLE, *supra* note 202, at 21–24.

²⁶⁵ See, e.g., TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 123.

²⁶⁶ *Id.* at 159.

²⁶⁷ To gain an idea of how great a loss the end of slavery represented to southern plantation owners, one need only consider the fact that, "[in] five southern states (Alabama, Georgia, Louisiana, Mississippi, and South Carolina), the market value of slaves in 1860 had accounted for nearly 60 percent of the total amount of capital invested in agriculture and was an amount far in excess of the total investment in manufacturing present in those states." MANDLE, *supra* note 202, at 6–7.

²⁶⁸ See MANDLE, *supra* note 202, at 13; Corzine et al., *supra* note 232, at 264–65.

²⁶⁹ See Corzine et al., *supra* note 232, at 264.

²⁷⁰ Large areas of land were divided into small tracts that could be farmed by one person and were worked by farmers who did not own land under various contractual arrangements. The laborers were of three types:

- (1) *renters* who supplied everything but land and paid for its use with cotton of a specified value after harvest,
- (2) *tenants* who supplied some of the means of production but obtained the use of land and other provisions on a share contract, and
- (3) *croppers* who owned little or nothing but their labor power and worked for shares on a less favorable basis than tenants. In practice, tenants and croppers were little more than piece-rate wage laborers, a position consistently upheld by southern courts.

Corzine et al., *supra* note 232, at 264 (emphasis in original) (citing RUPERT B. VANCE, HUMAN FACTORS IN COTTON CULTURE (1929)). For further discussion of the tenancy system, see generally MANDLE, *supra* note 202, at 39–43.

but of a share of the harvested crop.²⁷¹

Despite the institution of the tenancy system, planters were assured of neither the availability nor the compliance of black workers, for the freedmen sought to improve their positions by purchasing land or seeking opportunities outside of agriculture.²⁷² When they did continue working for plantation owners, the former slaves pressed for more favorable compensation and for freedoms that made their labor more costly for the planter.²⁷³ In order to maintain a large and inexpensive supply of labor, therefore, landowners needed to insure that the options available to southern blacks—whether to move on to other areas or to work under better conditions—were limited.²⁷⁴ The planters' desire to maintain control over the black population, however, was no longer tempered with the self-interested paternalism that they had exhibited during slavery.²⁷⁵ Methods of control that would not have been rational during slavery because of their tendency to reduce the value of the landowner's property (or, when committed by poor whites, to incur the planter's anger), such as violence and terrorism, became useful once the planter no longer owned the worker.²⁷⁶

The complete control that whites had exercised over land weakened as well. Increasing numbers of farmers—especially those who had overcommitted their land to cotton production—found themselves unable to escape a "perpetual cycle of indebtedness,"²⁷⁷ losing their land, and descending into tenancy.²⁷⁸ This situation prevailed across the South throughout the lynching era, but the decline in landownership—as measured by the percentage of farms that were owner-operated and by the average size of farms—was especially steep in the Cotton South.²⁷⁹ At the same time, the racial gap in economic status was narrowing

²⁷¹ See MANDLE, *supra* note 202, at 22.

²⁷² See *id.* at 14, 21, 23 (noting, however, that despite these attempts, the mobility of blacks was significantly circumscribed).

²⁷³ See *id.* at 14–15.

²⁷⁴ See *id.* at 21, 65–66.

²⁷⁵ Telling of white planters' changed attitudes toward their laborers once they no longer owned them is the statement of a Louisiana planter: "When I owned niggers, I used to pay medical bills. I do not think I shall trouble myself." *Id.* at 61 (quoting deposition testimony in EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: *THE WORLD THE SLAVES MADE* 111 (1974)).

²⁷⁶ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 246–47.

²⁷⁷ William F. Holmes, *Whitecapping in Mississippi: Agrarian Violence in the Populist Era*, 55 *MID-AMERICA: HIST. REV.* 134, 135 (1973) [hereinafter Holmes, *Whitecapping in Mississippi*].

²⁷⁸ See AYERS, *PROMISE*, *supra* note 219, at 93–94; Holmes, *Whitecapping in Mississippi*, *supra* note 277.

²⁷⁹ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 149–51. In non-cotton states, the percentage of farms that were owner-operated declined an average of 3.11 percentage points per decade, while in the cotton states the percentage fell an average of 4.62

because black landownership and the size of black-owned farms in the Cotton South remained relatively stable while white landownership and farm size declined precipitously.²⁸⁰ These changes in land ownership patterns brought about changes in the labor market and in the social structure. Nearly all tenant labor had been supplied by blacks in the late 1860s.²⁸¹ However, as white farmers lost their own land, they began entering into farm tenancy and sharecropping.²⁸² This period was the first in which black and white labor competed directly on a large scale.²⁸³

The small improvements in the lives of black southerners that coincided with the decline in the economic status of whites rankled their white neighbors, both because these changes were perceived by whites as representing a direct danger to their economic interests and because they caused “erosion in the apparent status advantage of being white.”²⁸⁴ White farmers grew resentful of even the limited degree of independence and economic gain enjoyed by blacks,²⁸⁵ because they flew in the face of the historical ideology of white superiority.²⁸⁶ The situation was ripe for racial conflict.²⁸⁷

percentage points per decade. In non-cotton states, the average size of farms decreased from 136 acres in 1880 to 71 acres in 1930, while in cotton states the average size went from 152 acres in 1880 to 68 acres in 1930. *See id.*

²⁸⁰ *See id.* at 153 (citing ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 283–94 (1977)). The percentage of black, owner-operated farms declined only slightly between 1900 and 1930, from 17.8% to 14.9%, but that of white, owner-operated farms fell more dramatically, from 61.5% to 46.3%, during the same period. The average size of black-owned farms fell from 51 acres in 1900 to 40 acres in 1930, while white-owned farms averaged 131 acres in 1900 and only 89 acres in 1930. *See id.* at 151–53. While race-specific census data on farm ownership are not available for the years prior to 1900, Tolnay and Beck examined data on farm ownership from the 1880 manuscript census that included the race of farm operators and speculated that the data

suggest that the decline in the relative status of agrarian whites in the Cotton South was well underway before 1900. In fact, [the data] imply that a massive reorganization of agriculture in the Cotton South occurred throughout the lynching era, and that the restructuring involved the downward slide of many whites into tenancy and sharecropping.

Id.

²⁸¹ *See* Corzine et al., *supra* note 232, at 264.

²⁸² *See id.*

²⁸³ *See* Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 527.

²⁸⁴ TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 153.

²⁸⁵ *See id.*; Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 136.

²⁸⁶ *See* TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 153.

²⁸⁷ *See id.*; *see also* Corzine et al., *supra* note 232, at 266 (noting that economic

Some whites responded to the changing environment by adopting lynching as a means of maintaining their economic—and, as a derivative, their social—dominance by exerting control over those key resources of land and labor. First, the desire to maintain white control over land appears to have been a significant cause of lynching. When Beck and Tolnay tested the relationship between white landlessness and lynching, they found that, once the percentage of white farm tenancy in a given area reached a particular level, the number of black lynchings increased. Specifically, Beck and Tolnay found that, for the periods from 1900–1909 and 1920–1929, once the level of white tenancy reached thirty-two percent and thirty-eight percent respectively, further increases in white tenancy were associated with more lynchings.²⁸⁸

The relationship between white landlessness and anti-black lynching may have reflected emotional or expressive responses in some cases. For example, Tolnay and Beck suggest that some whites used racial violence as a way of reasserting their presumed racial superiority: "Every time white mobs were able to kill offending blacks with impunity—if not commendation—their act highlighted and reinforced the dominance of the white caste and the inferiority of the black caste, thus emphasizing the status differences."²⁸⁹ However, strong evidence exists to indicate that racial violence was often used in an instrumental way as well. Prospective black purchasers of land, as well as the whites who might sell to them, sometimes were threatened with violence.²⁹⁰ Blacks who had acquired land of their own received warnings to leave their farms, some in the form of nighttime visits or written messages, and some through the destruction of their property or livestock.²⁹¹ Those who failed to heed the warnings were

competition in the form of a split labor market was part of the cause of lower-class whites' hostility towards blacks).

²⁸⁸ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 154–55 (noting, however, that at lower levels of white tenancy, increases in white tenancy were associated with fewer black lynchings). For the period from 1910–1919, white tenancy and black lynching did not appear to be related. *See id.* at 154. These relationships were statistically significant for the two periods even when the researchers controlled for cotton dominance, the percent of the black population, the size of the black population, and the county's proneness to anti-black violence—variables that also had significant effects on black lynchings. *See id.* at 156.

²⁸⁹ *Id.* at 157. *Cf.* Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 139 (explaining that whitecaps used a variety of terrorist tactics to attack both black landowners and blacks working for merchants and lumber companies).

²⁹⁰ See SHAPIRO, *supra* note 206, at 10 (citing ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 87 (1977)).

²⁹¹ *See e.g.*, William F. Holmes, *Whitecapping: Agrarian Violence in Mississippi, 1902–1906*, 35 *J.S. HIST.* 165, 171–72 (1969) [hereinafter Holmes, *Whitecapping*]; Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 139.

sometimes killed.²⁹² In addition, in some areas poor whites who had lost their land habitually used violence as a way of displacing black tenants from the most productive and desirable land.²⁹³

Cotton-dependent whites also appear to have used racial violence as a means of controlling their other key resource, cheap black labor—both to maintain the supply and to insure workers' obedience to the demands of the production cycle. First, the violence was useful as a means of “trapping” blacks in positions as agricultural laborers when it was wielded—as it often was—against blacks who sought to buy land²⁹⁴ or to receive an education²⁹⁵ or against those who would assist them in those missions.²⁹⁶ In addition, lynching appears to have served as a seasonally modulated, though indirect, means of labor control, designed to keep black workers “in line” when the need for their labor was most intense.

Mob violence against blacks exhibited a marked seasonality, peaking during the summer months and declining during the colder winter months.²⁹⁷ Here again, cotton-dependent areas displayed distinctive characteristics with respect to lynching, with cotton states exhibiting a greater monthly variation in lynching and a clearer pattern of seasonality than non-cotton states.²⁹⁸ Beck and Tolnay analyzed the seasonal variations in lynching from 1882 through 1930 and found that the monthly variations in the Cotton South reflected the production cycle for cotton. In the annual cycle, two periods required the most intensive labor: the early summer, when cotton plants were “chopped out” and weeded, and the fall harvest, when the cotton would be picked, ginned, and baled for market.²⁹⁹ Beck

²⁹² See e.g., TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 24 (describing the murder of a black landowner); Holmes, *Whitecapping*, *supra* note 291, at 175 (explaining that violence in late 1903 and early 1904 in Lincoln County, Mississippi became so severe that many blacks left the area).

²⁹³ See WILLIAMSON, *supra* note 201, at 114.

²⁹⁴ See *supra* notes 290–93 and accompanying text.

²⁹⁵ See SHAPIRO, *supra* note 206, at 9.

²⁹⁶ See *id.* at 9–10.

²⁹⁷ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 145; E.M. Beck & Stewart E. Tolnay, *A Season for Violence: The Lynching of Blacks and Labor Demand in the Agricultural Production Cycle in the American South*, 37 INT'L REV. SOC. HIST. 1, 8–12 (1992) [hereinafter Beck & Tolnay, *A Season for Violence*].

²⁹⁸ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 145–47.

²⁹⁹ *Id.* at 143; see also Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 5–6. Tolnay and Beck have described the full cycle:

The agricultural production cycle for cotton set the pace for much of life in the South. In winter, field hands would break land with mule-driven plows, clear last season's cotton stalks, start compost heaps, and prepare the soil for planting. As warmer days arrived in late March and April, cotton seed would be planted. Then, after the seeds

and Tolnay's study showed that the peak period for black lynching in the Cotton South occurred during the early summer.³⁰⁰ Lynching did not peak as sharply, however, during the labor-intensive fall harvest. A small, much less dramatic than expected peak was seen in September.³⁰¹

The early summer peak appeared even when Beck and Tolnay adjusted the data to account for a conventional explanation which held that the seasonality of black lynching followed the seasonal patterns for violent crime generally.³⁰²

sprouted in May, field-workers would be set to "chop out" (thin) cotton plants and weeds with a hoe, a highly labor-intensive process that continued until the "lay-by" in midsummer. May was the most repetitive and costly part of farm cultivation, not only because of cotton "chopping," but also because the corn and other crops demanded attention as well.

By late July or early August, the most intensive work was completed, and the cotton crop would be laid-by, meaning that the bulk of the fieldwork was finished until early fall, and there was now time for more relaxed activities. In September the handpicking would begin and continue through November until all bolls had burst and the fields had been stripped. After each picking, raw cotton was carted to the gin to be cleaned of seed and baled for market. During the early winter, the fields would again lay fallow until it was time to start the next season's plowing. Thus, in the cotton culture there were two periods of intense work activity: The first was in the early summer, when the cotton had to be chopped and weeded, and the second fell during the fall harvest.

TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 143.

³⁰⁰ Relatively few lynchings occurred between January and April, but from May through August lynching increased significantly. It declined after the summer and through the winter. See Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 8-9 (reporting results before adjusting for seasonal variations in crime generally, see *infra* note 302), 12-16 (reporting results after adjusting for seasonal variation in crime generally); TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 145-147 (before adjusting), 148-149 (after adjusting).

³⁰¹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 148-49. *But see* Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 16 (reporting no September peak). For an explanation of the lack of a significant fall harvest peak, see *infra* note 314.

³⁰² See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 142-43; Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 2-5. The seasonality of lynching has been explained as reflecting the seasonality of crime in general. That is, it has been asserted that lynching simply followed the more generalized pattern that had been observed with respect to all violent crime, which tended to peak during the hot and humid summer months between periods of heavy work, when rural laborers were idle and people generally tended to congregate and engage in conflict more frequently. To determine whether the seasonality of black lynching could be explained in this way or, instead, was unique in its monthly patterns, Beck and Tolnay adjusted their data to remove the effect of a generalized pattern of violent crime. After they controlled for two indicators of generalized violence (the seasonal pattern of homicides in the ten states studied for the years 1945-1950 and the seasonality of lynchings with white victims over the 1882-1930 period), they observed a monthly pattern for black lynchings over and above the generalized seasonal effects of violence. TOLNAY & BECK, A

Thus, the pattern must reflect factors unique to lynching.³⁰³ In addition, because the peak appeared in the early summer, the pattern contradicted another conventional explanation, which suggested that increases in the level of lynching coincided with the time in the production cycle when work was more slack and workers more unruly and in need of discipline.³⁰⁴ It is interesting to note that, when they studied the pattern of black lynchings in areas that were dependent on *tobacco* production—an even more labor-intensive enterprise than cotton farming that saw its strongest demand for labor in the *late* summer³⁰⁵—Beck and Tolnay similarly found that a strong peak in black lynching appeared during the heaviest work period.³⁰⁶

The striking correspondence between the cyclic demand for labor and the seasonal variations in lynching provides support for a “labor control” model of lynching under which landlords and planters employed lynching as a way of dominating and controlling the black laborers on whom their fortunes depended.³⁰⁷ Cases in which racial violence was used as a *direct* means of labor control—for example, to silence or eliminate labor organizers³⁰⁸ or to stifle

FESTIVAL OF VIOLENCE, *supra* note 198, at 147–48; Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 12–16.

³⁰³ See Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 15–16.

³⁰⁴ This view held that landowners needed to “supervise” their workers more closely during the slack months of the summer because the workers, by that time in the season having secured the job and owing the landlords almost all of their equity in the crop, had no incentive to work hard. See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 142 (quoting SOUTHERN COMM’N ON THE STUDY OF LYNCHING, LYNCHINGS AND WHAT THEY MEAN 12 (1932)); Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 3, 5 (quoting SOUTHERN COMM’N ON THE STUDY OF LYNCHING, LYNCHINGS AND WHAT THEY MEAN 12 (1932)). Beck and Tolnay have pointed out that this explanation rests on the incorrect assumption that the summer months were slack work months. See Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 5; see also *supra* note 299.

³⁰⁵ See Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 20–22.

³⁰⁶ See *id.* at 22–23. They also found an inexplicable January peak in lynchings. See *id.* at 22.

³⁰⁷ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 148–49 (noting, however, that a corresponding increase during the fall harvest season did not appear); Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 16, 22 (noting, however, that support for the model was not as clear as the authors had hoped). Historian Herbert Shapiro has noted that planters did not hide their willingness to use violence against black laborers, citing an episode where Alabama planters printed and distributed 10,000 copies of a vagrancy statute that allowed authorities to “cause to be inflicted on such vagrant 39 lashes upon his or her bare back” so that the statute could be read to laborers. SHAPIRO, *supra* note 206, at 9.

³⁰⁸ See, e.g., TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 143–44 (giving several examples of such racial violence).

workers who reported the ill treatment that they received³⁰⁹—have been documented, but Beck and Tolnay point out that such cases were rare.³¹⁰ A more common and effective way of controlling larger groups of workers would be to implement a program of racial violence that would tighten white control over not just those who identified themselves as agitators, but the workforce as a whole.³¹¹ A generally compliant workforce could be achieved if blacks were lynched for the usual alleged infractions of the criminal code or the "de facto" code of social etiquette, because such violence had the effect of reinforcing white control over "the entire local black population."³¹² (The ability of landowners to control black laborers through the threat of violence most likely was enhanced by the workers' limited mobility during the relevant period.)³¹³ This use is consistent with the means by which southern whites used lynching to maintain dominance over the black population generally. As Historian Jay R. Mandle has explained:

Violence . . . was employed in reaction to a violation of approved behavioral norms, particularly attempts to escape deferential patterns by southern blacks. Furthermore, this use of violence was aimed not only at the individual transgressor, but also possessed symbolic importance for the other members of the black community. The ability to inflict violence on one individual acted as a deterrent against attempts to introduce more egalitarian behavioral patterns.³¹⁴

b. *A Convergence of Class Interests: Managing Labor Competition*

While southern whites seemed to be united in their belief in white

³⁰⁹ See AYERS, *VENGEANCE AND JUSTICE*, *supra* note 206, at 160.

³¹⁰ See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 144.

³¹¹ See *id.*

³¹² *Id.* Cf. BRUNDAGE, *LYNCHING IN THE NEW SOUTH*, *supra* note 237, at 62–63, 111–13 (citing cases in which allegations of rape and killing of white planter appeared to have been used as pretextual reasons for lynching black victims who had been involved in labor disputes and unrest).

³¹³ Cf. MANDLE, *supra* note 202, at 65. See also *infra* notes 383–400 and accompanying text (discussing effects of southern blacks' increased mobility after 1900).

³¹⁴ MANDLE, *supra* note 202, at 64. Even the lack of a significant peak in lynching during the fall harvest can be explained consistent with the labor control model. Beck and Tolnay have suggested that landlords may have found their dominance to be secure through the remainder of the production cycle if the terrorizing effect of the summer lynchings "carried over" through the fall. In addition, a second wave of violence might not have been necessary because laborers would have greater incentive to work hard during the fall when their compensation for the year was nearly due, and therefore landowners would perceive less of a need to control them through violence. See TOLNAY & BECK, *A FESTIVAL OF VIOLENCE*, *supra* note 198, at 149; Beck & Tolnay, *A Season for Violence*, *supra* note 297, at 16 n.34.

supremacy, they were not a monolithic group when it came to their economic interests. A great gulf divided the interests of white landowners from those of white tenants—especially with respect to black labor. The landowning upper class benefited from and sought to maintain an abundant supply of the cheap labor that blacks provided, while the laboring lower class was harmed by competition from blacks and sought to curtail it.³¹⁵ Despite the general divergence between their interests, however, whites of both classes could have benefited from racial violence, particularly during times of economic distress. Here again studies conducted by Beck and Tolnay and other sociologists indicate that the frequency of lynching was at least partially related to the economic interests of whites of both classes. Moreover, these studies also indicate that the violence often was instrumental and “rational” in nature, as opposed to being driven by irrational or emotional forces.

As white farmers lost their land and descended into tenancy, they found themselves for the first time in direct competition with blacks for employment.³¹⁶ This situation was problematic on a social level, for southern whites were accustomed to viewing themselves as superior to blacks and took it for granted that they were entitled to a higher level of financial comfort.³¹⁷ The competition was problematic for white laborers on a practical level as well. Black workers were a cheaper source of labor than whites,³¹⁸ resulting in a “split labor market.”³¹⁹ The comparative cheapness of black laborers was not so much the result of their being paid lower wages—which they sometimes were—but of their inferior legal and social status.³²⁰ Black workers did not have access to the legal protections that were available to white workers, and therefore easily could be defrauded and deprived of benefits due them.³²¹ In addition, blacks were

³¹⁵ See *infra* notes 318–25 and accompanying text.

³¹⁶ See Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 527; Corzine et al., *supra* note 232, at 264–65.

³¹⁷ See Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528.

³¹⁸ See *id.* at 527; Corzine et al., *supra* note 232, at 265; see also Edna Bonacich, *Abolition, the Extension of Slavery, and the Position of Free Blacks: A Study of Split Labor Markets in the United States, 1830–1863*, 81 AM. J. SOC. 601, 614–15 (1975).

³¹⁹ Corzine et al., *supra* note 232, at 263–64. A split labor market “consists of two or more groups of workers whose labor-price varies for the same work.” *Id.* at 263.

³²⁰ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 70; cf. Corzine et al., *supra* note 232, at 265 (noting that contract terms usually were the same for black and white workers but that planters still found black workers to be cheaper due to other factors).

³²¹ See Corzine et al., *supra* note 232, at 265. As Corzine et al., explain, landlords kept the books in which they recorded the costs, such as supply and equipment costs, that were to be billed to tenants and deducted from the share due them at harvest. This arrangement gave landlords the opportunity to defraud tenants, and they frequently did so. Unlike white tenants, black tenants were not permitted to sue landlords in the courts. The higher rate of illiteracy

more susceptible to being coerced into working longer hours or providing additional services by the use of threats or physical force, because caste restrictions limited the ways in which they could respond to such abuse.³²² As a result, black workers were viewed as less expensive and more compliant than whites, and, contrary to the usual effect of the color line,³²³ white landowners generally preferred them.³²⁴ The split labor market led generally to a divergence of interests between elite or upper class whites and poor or lower class whites. Specifically, the elites had an interest in maintaining the supply of cheap black labor, which enabled them to reap higher profits, while poor whites had an interest in minimizing the competitive threat presented by black workers who could displace them.³²⁵

Several scholars have suggested that competition between white and black labor served as a significant motivation for lower class whites to engage in racial

among black tenants also contributed to their susceptibility to being defrauded. *See id*; *see also* AYERS, VENGEANCE AND JUSTICE, *supra* note 206, at 166; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 70.

³²² *See* Corzine et al., *supra* note 232, at 265–66; *see also* TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 70 (noting that blacks had little legal protection because of discrimination in the Southern legal system).

³²³ *See* Corzine et al., *supra* note 232, at 265.

³²⁴ Corzine et al., note that white landowners recognized this benefit of black labor, and quote an Alabama planter who said, "Give me Negroes everytime. I wouldn't have a low-down white tenant on my place. You can get work out of any Negro if you know how to handle him; but there are some white men who won't work and can't be driven, because they are white." *Id.* (quoting RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 78 (1964)); *see also* WILLIAMSON, *supra* note 201, at 114 (noting also that white farmers feared competition because black farmers worked the land more intensively). White merchants and saw millers also preferred black workers. *See* Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 139 n.14 (citing ALLISON DAVIS ET AL., A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS 234, 258–63, 260–69 (1941)).

³²⁵ *See* Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 527. This divergence of interests, and its association with lynching is consistent with split labor market theory, which holds that an important stimulus of racial and ethnic antagonism can be found in the competitive threat that cheap labor poses to higher-priced labor. *See* Corzine et al., *supra* note 232, at 263–64. Corzine et al. explain that

[the] division in the labor pool produces three groups—employers, high-priced labor, and cheap labor—each attempting to further its economic interests. Employers strive to replace high-priced labor with cheap labor to maximize profits; in response, high-priced labor attempts to eliminate or at least reduce the threat to its jobs posed by cheap labor. Cheap labor has fewer power resources than either employers or high-priced labor and usually plays a secondary role in the struggle.

Id. at 263.

violence.³²⁶ The relationship between labor competition and black lynching was confirmed empirically in a study by sociologists Jay Corzine, Lin Huff-Corzine, and James C. Creech.³²⁷ Their study found that the rate of black lynchings in southern counties was significantly related to the size of the threat that cheap labor presented to white workers and that this relationship was especially strong in cotton-dominated areas.³²⁸ Indeed, the magnitude of the “cheap labor threat”³²⁹ was the most powerful of several tested predictors of the lynching rate.³³⁰

These results are consistent with the theory that split labor markets account for much economic-based conflict between ethnic and racial groups and lead to violence between higher- and lower-priced labor.³³¹ The threat that black workers posed to higher-priced white labor could have led to increased rates of lynching through two mechanisms. First, the competition for work sometimes was a *direct* cause of violence.³³² That is, poor whites sometimes used lynching to reduce competition from black laborers by, for example, driving them off of desirable farms so that white workers could replace them.³³³ Second, the tensions created by the split labor market probably increased the level of tension and “violence prone-ness”³³⁴ in the community, making it more likely that minor infractions of the caste code would loom large enough to result in violence.³³⁵ In other words, their deteriorating economic positions might have led poor whites to use lynching as a way of displacing blacks from desirable positions, expressing frustration over the relative similarity in their economic situations, and

³²⁶ See, e.g., TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 122–23; Bonacich, *supra* note 318, at 615; Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 136–39.

³²⁷ Corzine et al., *supra* note 232.

³²⁸ See *id.* at 273.

³²⁹ *Id.* The study’s measure of the “cheap labor threat” was the ratio of black tenants to white tenants (number of black tenants/number of white tenants). This ratio was used because, based on past studies that had shown that intergroup tension increases as the size of the cheap labor group increases, the researchers reasoned that the magnitude of the threat to higher-priced labor is best indicated by the size of the cheap labor pool relative to the higher-priced labor pool. See *id.* at 267. Tolnay and Beck have criticized this measure as being “conceptually debatable.” TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 84 n.43.

³³⁰ See Corzine et al., *supra* note 232, at 270–74.

³³¹ See *id.* at 263–64, 266.

³³² See *id.* at 266.

³³³ See, e.g., WILLIAMSON, *supra* note 201, at 114.

³³⁴ Corzine et al., *supra* note 232, at 266.

³³⁵ See *id.*; see also TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 123.

"reminding" blacks of their inferior status.³³⁶

For elite whites, it was their desire to maintain a cheap and compliant workforce that led them to see advantages in racial violence. As discussed in Part IV.A.2.a, *supra*, it appears from the seasonal patterns of lynching that landowning whites made use of lynching as a labor control device. In addition to helping them to control their laborers, lynching also may have helped upper class whites to maintain their *supply* of cheap labor.

Racial violence could have served the white landowners' needs for labor in several ways. First, similar to the way in which poorer whites used violence to drive black workers from more productive land and replace them as tenants, some white farmers used violence to drive black workers off of land owned by Jews and other blacks and onto land owned by whites.³³⁷ Second, lynching maintained racial tensions in a way that was beneficial to the interests of elite whites. Upper class whites were aware that a coalition between black and white labor would be harmful to their economic interests because it would increase the strength of the labor class relative to that of the landowners.³³⁸ Racial violence could prevent the two groups of laborers from joining forces simply by perpetuating the hostility between them.³³⁹ At the same time that it emphasized the differences between white and black workers, racial hostility reduced the social and class differences, and thereby enhanced the feelings of solidarity, between the upper and lower classes of whites.³⁴⁰ This theory is consistent with the demonstrated relationship between economic distress and lynching, discussed in Part IV.A.2, *supra*, for the threat of black and white workers joining forces—and hence the desirability to white elites of maintaining the hostility between the two groups that lynching exacerbated—was greater when both groups of workers were suffering from depressed cotton prices.³⁴¹

c. Calibrating "Hate": Managing the Violence

Especially supportive of the view that lynching often served instrumental functions are studies by Beck and Tolnay that indicate that whites controlled the

³³⁶ See Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528.

³³⁷ See Holmes, *Whitecapping*, *supra* note 291, at 167–68, 179; Holmes, *Whitecapping in Mississippi*, *supra* note 277, at 138–39.

³³⁸ See Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528.

³³⁹ See *id.*

³⁴⁰ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 25–27, 59; see also RAPER, *supra* note 200, at 47 (noting that lynchings tend to minimize social and class distinctions between white landowners and white tenants).

³⁴¹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 72; Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 528.

level and timing of the violence as suited their interests. These studies show that lynching increased in intensity when its use was more consistent with white economic interests and abated when racial violence either was not necessary to further or would more likely hinder those interests. This type of regulation was evident in the seasonal patterns of lynching discussed in Part IV.A.2.a., *supra*, which indicated that violence was used as a form of labor control, to tighten landowners' hold on workers during the time in the agricultural production cycle when the need for their labor was most intense.

Perhaps even more revealing is Tolnay, Deane and Beck's study of the spatial effects of lynching—that is, the way in which lynching in one area was influenced by lynching in neighboring areas.³⁴² The results of that study run counter to the conventional view because they strongly suggest that, rather than being “swept up in the hysteria of lynching,”³⁴³ whites utilized lynching as a form of “calculated terrorism” in which they engaged when they deemed it necessary to do so and from which they refrained when they did not.³⁴⁴

The researchers believed that learning how southerners responded to lynchings in surrounding communities could be highly instructive because of the likelihood that events in one area were not independent of events in other areas.³⁴⁵ Consistent with the intended terroristic function of the violence, news of lynchings was broadcast widely through the detailed descriptions reported by the southern press and the word-of-mouth accounts shared by travelers.³⁴⁶ In addition, lynching had been assumed to spread in a “contagious” fashion.³⁴⁷ According to Historian Edward L. Ayers, “Thanks to the speed and thoroughness with which news of lynchings were spread by the press of the late nineteenth-century South, the crisis of one isolated county could soon fuel the fears and anger smoldering in a county hundreds of miles away.”³⁴⁸

Tolnay, Deane, and Beck sought to examine empirically whether lynching did indeed have a “contagious” effect, whereby residents of a community were moved to imitate lynchings in other areas, or whether lynching instead exhibited the opposite, “deterrent” effect or had no spatial influence whatsoever.³⁴⁹ The researchers examined the effect of a county's “lynching exposure”—the number

³⁴² See Tolnay et al., *Vicarious Violence*, *supra* note 217, at 812.

³⁴³ *Id.* at 812.

³⁴⁴ *Id.*

³⁴⁵ See *id.* at 790.

³⁴⁶ See *id.* at 790, 793–94.

³⁴⁷ *Id.* at 792.

³⁴⁸ AYERS, VENGEANCE AND JUSTICE, *supra* note 206, at 243.

³⁴⁹ Tolnay et al., *Vicarious Violence*, *supra* note 217, at 796.

of lynching incidents in all other counties³⁵⁰—on the intensity³⁵¹ of white-on-black lynching in that county³⁵² for three time periods: 1895–1899, 1905–1909, and 1915–1919.³⁵³ When they controlled for variables that had been shown in previous studies to be correlated with lynching,³⁵⁴ the researchers found that, rather than the assumed “contagion” effect, lynching in each period actually showed a strong *deterrent* effect.³⁵⁵ In other words, “more intensive lynching activity in surrounding areas actually *decreased* the frequency of lynching incidents in southern counties.”³⁵⁶ The study also found evidence of a *temporal* deterrent effect *within* counties—that is, that “there were *fewer* lynchings in counties that had experienced more lynchings during the previous five years.”³⁵⁷

The researchers offer one explanation as being the most plausible reason why lynchings in other counties would dampen, rather than fuel, the perpetration of lynching locally: local whites may have been satisfied that lynchings elsewhere would be sufficient to terrorize and subdue blacks in their own community, thereby relieving them of the need to engage in violence of their

³⁵⁰ The term used in the study to represent “lynching exposure” was adjusted to take into account a number of “complexities.” Specifically, the study considered “the potential impact of incidents in *all* counties on the frequency of incidents in *every other* county,” incorporating into the model the distance between counties (to account for the likelihood that the impact weakened as the distance between counties increased). *Id.* at 796 (emphasis in original). In addition, the study included a variable to account for social, economic, and cultural characteristics shared by counties that might influence the frequency of lynching. *See id.* at 797.

³⁵¹ The study measured intensity based upon the number of lynching *incidents* rather than the number of victims, because “the type of ‘diffusion’ processes described [with respect to other social phenomena] were more likely to be triggered by the mere occurrence of lynching events, rather than the number of victims claimed in each event.” *Id.* at 800.

³⁵² The study used county-level data for ten southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. *See id.* at 799 & n.11.

³⁵³ *See id.* at 799.

³⁵⁴ The control variables included the relative size of the black population in the county, the percentage of white farmers in the county who were tenants, the county’s level of “cotton dominance,” the county’s prior history of white lynchings and prior history of black lynchings, and the geographic location of the county (*i.e.*, whether it bordered a northern state, bordered a southern state not included in the analysis, or bordered only counties in the ten states included in the study). *See id.* at 802–04.

³⁵⁵ *See id.* at 807–10. The deterrent effect was strongest for the period 1905–1909 and weakest for the period 1915–1919, but for each period the effect of lynching exposure on lynching incidents was significantly negative. *See id.* at 807.

³⁵⁶ *Id.* at 807 (emphasis in original).

³⁵⁷ *Id.* at 810 (emphasis in original).

own.³⁵⁸ This explanation is consistent with southern whites' obvious belief that lynching was a highly effective means of deterring "inappropriate" behavior in the black population.³⁵⁹ (This view was evidenced by the explicit warnings to other blacks that some mobs actually pinned to the bodies of their victims, the quantities of ink the southern press devoted to descriptions of lynchings and reminders to the black community against unacceptable behavior, and southern leaders' statements to the effect that lynching was needed periodically [to keep blacks in line].)³⁶⁰

Whether or not this interpretation alone explains the study's results, the researchers emphasized the "significant implication" of their finding that lynching in one area was deterred by lynching in neighboring communities.³⁶¹ This finding indicates that—contrary to conventional assumptions—southern whites were "not swept up in the hysteria of lynching"³⁶² but instead that the use of lynching was calculated and measured, meted out to the extent deemed necessary to further and protect white interests. As Tolnay, Deane, and Beck explain:

When they felt it was required, whites were quite willing to get out the rope and faggot to send a threatening message to their black neighbors. However, when they believed that the message had already been sent by lynch mobs in other areas, they were content to forgo the violent ritual. These findings are a testimonial to the potential effectiveness of state-tolerated terrorism as a strategy for maintaining the status quo. In this case, that meant the perpetuation of caste-based social relations that virtually guaranteed the social and economic

³⁵⁸ *See id.* at 811 ("In other words, even whites in counties that did not lynch or lynched less frequently participated in vicarious violence through the activities of white mobs in other areas.").

An alternative explanation is that local blacks responded to news of lynchings in other areas by becoming more deferential and circumspect in their dealings with whites, thereby reducing the opportunities for violent response. *See id.* While they found it "impossible to adjudicate between" the two explanations, the authors assert that this second explanation is less persuasive than the first because it is inconsistent with the nature of race relations during the lynching era. *Id.* at 812. While it is true that blacks modified their behavior in an attempt to avoid provoking the mobs, blacks were constantly aware of their vulnerability to mob violence, even without being reminded of it periodically. In addition, given the wide range of trivial offenses for which they might be lynched, it is unlikely that blacks could have guaranteed their own safety from violence by behaving more cautiously if the white mobs were inclined to lynch. *See id.* at 811–12.

³⁵⁹ *See id.* at 793.

³⁶⁰ *See id.* at 793–94.

³⁶¹ *Id.* at 812.

³⁶² *Id.*

subordination of African-Americans in the South.³⁶³

Finally, an examination of the forces that brought the lynching era to an end brings forth further evidence that lynching was linked to white economic interests and that its use was often regulated to further or protect those interests.³⁶⁴ While lynching was common throughout the period from 1880 to 1930, the last three decades were a time of decline, with a rapid drop in the number of incidents after the mid-1920s.³⁶⁵ During the latter period, Beck and Tolnay found that the relationship between distress in the cotton market and black lynching³⁶⁶ diminished substantially as well.³⁶⁷ The decline in lynching coincided with a number of changes in the economic and social environment of the South. Among these changes was an increase in the measures that southern whites used to disenfranchise blacks.³⁶⁸ In addition, the profile of the southern economy was changing, as the percentage of workers employed in agriculture dropped dramatically while the percentage employed in manufacturing exploded.³⁶⁹ The sharp decline in lynching also coincided with the "Great Migration" of blacks out of the southern United States.³⁷⁰

With emancipation, southern blacks were for the first time free to relocate in order to escape unfavorable conditions or to seek more promising ones.³⁷¹ For the first few decades, most of the blacks who took advantage of this opportunity

³⁶³ *Id.*

³⁶⁴ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 222–33; see generally Stewart E. Tolnay & E.M. Beck, *Racial Violence and Black Migration in the American South, 1910 to 1930*, 57 AM. SOC. REV. 103 (1992) [hereinafter Tolnay & Beck, *Racial Violence and Black Migration*].

³⁶⁵ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 202. The number of black lynching victims fell from 799 in the 1890s to 206 in the 1920s and 88 in the 1930s. See *id.*

³⁶⁶ See *supra* notes 244–54 and accompanying text.

³⁶⁷ Specifically, they found that the effect of cotton prices on lynching was seven times stronger and the effect of inflation two times stronger before 1900 than after. See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 130.

³⁶⁸ See *id.*

³⁶⁹ See *id.* at 132 & tbl.5-2 ("The percent of all workers employed in agriculture dropped from 82.4 percent in 1880 to 51.9 percent in 1930. The number of wage-earners in manufacturing grew from 55,600 in 1880 to more than 459,100 in 1930, far out-stripping the overall growth in the southern labor force.").

³⁷⁰ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 132, 222; see also *infra* text accompanying note 389.

³⁷¹ See Tolnay & Beck, *Racial Violence and Black Migration*, *supra* note 364, at 103. Lynching was sometimes used to discourage this movement. See *supra* note 337 and accompanying text.

were farm laborers who moved only short distances within the rural South seeking better arrangements with landlords.³⁷² After 1900, however, a “demographic revolution”³⁷³ occurred, as dramatically greater numbers of southern blacks left the rural South for the North and for urban areas in the South. While many blacks might have wished to leave southern plantations earlier, their opportunities to do so were limited until World War I.³⁷⁴ Among the changes that the war brought was the serious restriction of international immigration, which cut off an alternative supply of labor for northern employers who, due to their own racism, had preferred to hire immigrants from Europe.³⁷⁵ The “Great Migration” has been attributed primarily to the increased economic opportunities for blacks outside of the rural South that resulted.³⁷⁶ A desire to escape the racial violence of the South also figured in the decisions of at least some blacks.³⁷⁷ Tolnay and Beck quote one migrant who wrote:

After twenty years of seeing my people lynched for any offense from spitting on a sidewalk to stealing a mule, I made up my mind that I would turn the prow of my ship toward the part of the country where the people at least made a pretense at being civilized.³⁷⁸

As a result of the extensive out-migration, many southern states lost huge

³⁷² See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 214; Tolnay & Beck, *Racial Violence and Black Migration*, *supra* note 364, at 103.

³⁷³ Tolnay & Beck, *Racial Violence and Black Migration*, *supra* note 364, at 103; see generally MANDLE, *supra* note 202, at 69 (explaining various reasons for the “Great Migration”).

³⁷⁴ See MANDLE, *supra* note 202, at 69. That war “marked the beginning of the end of African American confinement to the South and its plantation economy.” *Id.*

³⁷⁵ See *id.* at 68–69. Other factors operated to “push” black workers from the South, including the 1915 boll weevil infestation that devastated the cotton crop, but Mandle cites the pull of jobs in the North as the principal reason for the magnitude of the “Great Migration.” *Id.* at 69.

³⁷⁶ See *id.* at 69–72; see also Stewart E. Tolnay & E.M. Beck, *Black Flight: Lethal Violence and the Great Migration, 1900–1930*, 14 SOC. SCI. HIST. 347–55 (1990) [hereinafter Tolnay & Beck, *Black Flight*] (expanding on different motivations for the “Great Migration” North). Secondary factors for the exodus from the South included social factors such as limited educational opportunities, racial violence, and voter disenfranchisement. See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 218–19.

³⁷⁷ See BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 228; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 218–19; Tolnay & Beck, *Black Flight*, *supra* note 376, at 356–66.

³⁷⁸ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 219 (quoting FLORETTE HENRI, *BLACK MIGRATION: MOVEMENT NORTH, 1900–1920*, at 130 (1975)).

numbers of their black population.³⁷⁹ The greatest losses occurred in the "Black Belt" area that was dominated by the cotton plantation economy and was, therefore, heavily dependent upon black labor.³⁸⁰ A scarcity of black labor and the enhanced bargaining power that the remaining workers would wield had the potential to seriously disrupt the southern plantation economy.³⁸¹ Concern over the massive loss of black residents—as well as other forces that pressed for improved race relations in the South³⁸²—prompted whites in some areas to exhibit marked changes in their attitudes toward the treatment of blacks.³⁸³ Some prominent whites began to advocate and implement improvements in conditions for blacks, such as increased wages and better schools.³⁸⁴ The views of some whites began to change with respect to lynching, as well.³⁸⁵ Around this time, the press began to back off from its former practice of publishing pieces supporting or at least excusing the actions of lynch mobs, and began explicitly to oppose lynching,³⁸⁶ while large segments of the public began for the first time to express support for anti-lynching legislation.³⁸⁷ The new, anti-lynching attitude of some whites is reflected in the fact that much of the decline in black lynchings during the period was attributable to an appreciable increase in the number of attempted lynchings that were prevented by members of the community.³⁸⁸

³⁷⁹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 214–15. However, the experience of southern states was not uniform. Some states sustained smaller net losses than others, and Florida actually gained in black population through net in-migration. *See id.*, tbl.7-1.

³⁸⁰ This area cut "a swath running roughly through the middle of Georgia and South Carolina . . ." *Id.* at 215.

³⁸¹ See MANDLE, *supra* note 202, at 75 (explaining how continued migration North could have caused a collapse of the plantation system). This situation did not materialize, "[b]ut in this instance, the appearance of change was every bit as important as the far less revolutionary reality." BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 229.

³⁸² See generally BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 209–44; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 203–13 (explaining the impact of various factors on the demise of lynching).

³⁸³ See BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 228–30, 243–44; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 219–22.

³⁸⁴ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 220.

³⁸⁵ Tolnay and Beck point out that the initial response of whites to the exodus of black workers was to *increase* their use of coercive measures, but (perhaps because the North was exerting a stronger "pull" to leave) these tactics were not an effective means of stanching the flow. *Id.*

³⁸⁶ *See id.* at 204; BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 224–25.

³⁸⁷ *See* TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 212.

³⁸⁸ *See id.* at 203. Statistics from the Commission on Interracial Cooperation—which Tolnay and Beck warn are of "questionable accuracy and must be considered only suggestive

A relationship between the concern over black out-migration and the decline in lynching seems to be well-founded when one compares their patterns over the relevant period. As Tolnay and Beck have documented:

The decade-by-decade totals of migration and lynching reveal quite clearly that the number of black lynch victims declined steadily as the intensity of black out-migration accelerated. For instance, the number of black lynchings by white mobs dropped from 604 between 1900 and 1909, to 444 between 1910 and 1919, and continued falling to 206 between 1920 and 1929. The net loss of black population rose from 179,100 between 1900 and 1910, to 474,000 between 1910 and 1920, then increased further to 677,700 during the 1920s.³⁸⁹

While their temporal patterns suggest a relationship, Tolnay and Beck sought to test more rigorously the link between black out-migration and lynching through a study of the *spatial* effects of the two phenomena.³⁹⁰ In particular, they wanted to learn what effect out-migration from a region had on the frequency of lynching in that region.³⁹¹ They also wanted to study how the class structure in a given area influenced the response to out-migration,³⁹² because members of the white upper and lower classes would be expected to have divergent interests with respect to the exodus of black laborers.³⁹³ The upper class whites who depended on blacks as a source of cheap labor presumably would be harmed by and therefore want to reduce the loss of black workers through migration, while the lower class whites who competed with blacks for jobs would benefit from and perhaps encourage the migration-induced decrease in the supply of black workers.³⁹⁴

Tolnay and Beck designed their study to test, at the county level, the effect

of general patterns and trends,"—show that 39% of attempted lynchings were prevented between 1916 and 1920 but 77% were prevented during the 1920s and 84% during the 1930s. *Id.* See also Griffin et al., *supra* note 232, at 26 (citations omitted) ("Estimates of the number of prevented lynchings range from 648 during the years 1915–32 to 762 for the 1915–42 period.").

³⁸⁹ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 222–24.

³⁹⁰ Tolnay and Beck were not satisfied with the exactitude of the temporal evidence because, given the lack of annual estimates of black migration and the relative brevity of the period under consideration, they could not apply the more sophisticated time-series analyses that they had used in studying other issues related to lynching. See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 224; see also Tolnay & Beck, *Racial Violence and Black Migration*, *supra* note 364, at 106 (distinguishing between temporal and spatial variation in racial violence and migration).

³⁹¹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 222.

³⁹² See *id.*

³⁹³ See *id.*; see also *supra* notes 315–25 and accompanying text.

³⁹⁴ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 222.

of the intensity of lynching on the net rate of black migration,³⁹⁵ as well as the reciprocal effect of the rate of black migration on the intensity of lynching, for two time periods within the lynching era that correspond with the "Great Migration": 1910–1920 and 1920–1930.³⁹⁶ In order to avoid being misled by false or suppressed relationships, the researchers controlled for several variables that had been associated with either lynching or migration.³⁹⁷ To test the effect of class structure on the relationship between lynching and black migration, and on the assumption that land ownership correlated with class status, the study incorporated a variable based on the percent of white farm operators who were tenants.³⁹⁸

The results of Tolnay and Beck's study for both periods supported their expectation of a *reciprocal* relationship between racial violence and migration.³⁹⁹ It provided the first empirical evidence that—in addition to the economic and social factors cited by others⁴⁰⁰—racial violence was a significant factor in black migration.⁴⁰¹ Independent of the other variables, the number of black lynching victims in a county had a statistically significant positive effect on the rate of black migration out of that county.⁴⁰²

More illuminating as to the motivations behind lynching were the findings

³⁹⁵ See *id.* at 225. This variable was estimated using a "forward census survival rate method," which the researchers describe as follows:

An observed population at some point in time is compared with the expected population for the same period. The expected population is estimated by surviving the population at some earlier point in time forward. The difference between the two represents net migration. If the observed population is larger, then the county has experienced net in-migration; if the expected population is larger, then net out-migration has occurred.

Id.

³⁹⁶ See *id.*

³⁹⁷ Specifically, they included as predictors of lynching variables that represented the level of threat that whites likely perceived from co-resident blacks, the absolute size of the black population, and the extent to which the area had been settled. As predictors of black migration, they included variables to represent the level of opportunity for black farm ownership in the county, the level of access to education for blacks in the county, and the extent to which the county could be characterized as urban, as well as the rate of white out-migration (this variable was intended to account for factors that contributed similarly to white and black out-migration). See *id.* at 226–27.

³⁹⁸ See *id.* at 227.

³⁹⁹ See *id.* at 229–30 (discussing results for 1910–1920); *id.* at 231 (discussing results for 1920–1930).

⁴⁰⁰ See *id.* at 231; see also *supra* notes 368–76 and accompanying text.

⁴⁰¹ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 229–30.

⁴⁰² See *id.* at 229 tbl.7-2.

with respect to the effect that out-migration had on the frequency of lynching and the way in which a county's class structure influenced the direction of the response. Overall, an increase in the rate of black out-migration appeared to have "an ameliorative effect"⁴⁰³ on lynching, for the black migration rate had a significant negative effect on the number of black lynching victims.⁴⁰⁴ As predicted, however, the response appears to have been split along class lines. Specifically, Tolnay and Beck found that black migration had a stronger negative effect on lynching in counties where the upper class dominated.⁴⁰⁵ With increasing levels of white tenancy, the negative effect steadily weakened, until, at above forty percent white tenancy, black out-migration actually had an increasingly *positive* effect on the frequency of lynching.⁴⁰⁶

Tolnay and Beck's study of the effect of class structure on the relationship between black out-migration and lynching suggests that, faced with the prospect of losing their supply of cheap labor through migration, white landowners were motivated to reduce the level of racial violence in order to stop the out-flow. That the white upper and lower classes did not respond to the loss of black population in the same way is evident from both the relationship between white tenancy and the response to black migration cited above, and the fact that the period of the "Great Migration" was one in which the number of *prevented* lynchings rose sharply.⁴⁰⁷ Tolnay and Beck have speculated that the rise in prevented lynchings demonstrates the diversity of white interests with respect to race relations, or that some members of the white community "were still willing to get out the rope and faggot when it served their interests" while others "became increasingly willing to thwart the efforts of would-be lynch mobs to consummate their grisly deeds."⁴⁰⁸

Of course, a variety of forces contributed to the rather rapid decline in lynching after the mid-1920s—among them the work of political, religious, and academic reformers,⁴⁰⁹ southern embarrassment at the national and international attention that was focused on racial violence in the region,⁴¹⁰ and the fear that the federal government would impose anti-lynching legislation on the South if it did

⁴⁰³ *Id.* at 230.

⁴⁰⁴ *See id.* at 229 tbl.7-2, 230-31.

⁴⁰⁵ *See id.* at 230-31.

⁴⁰⁶ *See id.* at 230-31 fig.7-7.

⁴⁰⁷ *See supra* note 388 and accompanying text.

⁴⁰⁸ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 203.

⁴⁰⁹ *See* BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 208-44; TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 203-13.

⁴¹⁰ *See* BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 211-15.

not end the practice itself.⁴¹¹ However, Tolnay and Beck's study of the effects of black migration on lynching indicates that a significant explanation for the demise of the lynching era was the judgment of southern whites, in response to the loss of black population, that ending the practice would better serve their economic interests.⁴¹² Consistent with this interpretation, Historian W. Fitzhugh Brundage has written with respect to the importance of economic considerations to the end of lynching: "As blacks streamed northward, planters felt compelled to promise improvements in the treatment of those who remained behind. Economic exigencies seemed to demand that whites no longer acquiesce to mob violence against blacks."⁴¹³

3. "The Deepseated Utility of Racial Terror"⁴¹⁴

The series of empirical studies by Tolnay and Beck demonstrate that—contrary to conventional assumptions about bias crimes generally and lynching in particular—racial violence in the lynching era cannot be explained as the simple result of white southerners' racial hostility, and lynching was not just an irrational and purposeless activity. Rather, Tolnay and Beck have shown that a significant motivation behind lynching was the desire of both upper and lower class whites to secure economic benefits for themselves. They also have shown that temporal and spatial variations in patterns of lynching reflected "rational," controlled use, for lynching intensified at times when and in places where the terror and subjugation it produced in the black population or the racial division that it exacerbated would be useful to furthering white interests, while the number of lynchings lessened when and where it was either not necessary or even harmful to white interests.⁴¹⁵

⁴¹¹ See Griffin et al., *supra* note 232, at 40.

⁴¹² See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 232.

⁴¹³ BRUNDAGE, LYNCHING IN THE NEW SOUTH, *supra* note 237, at 244.

⁴¹⁴ TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 256.

⁴¹⁵ See *id.* at 256–57. In the concluding section of their book, Tolnay and Beck attempt to provide a "sound bite" to capture the contents of their studies as discussed in the book. Among other points, their sound bite includes this summary:

[Southern whites] used lynchings as a tool for maintaining dominance in a society that was forced to accept a revolutionary change in the status of blacks—from slaves to freedmen. Although a free black population threatened southern whites in many different ways, our findings suggest that economic forces were clearly the most important undercurrent that carried southern society to such outrageous extremes of brutality. Economic forces also turned the tide against mob violence during the 1920s and 1930s, as employers agonized over the exodus of their cheap black workers. This leads to a final observation: Blacks were most vulnerable to the rope and faggot when lynching had the

Tolnay and Beck do not, of course, contend that the racist ideology and rigid caste system of the South played *no* role in the prevalence of lynching. Indeed, they explicitly point out the ways in which southern racism both allowed and encouraged racial violence. What is important to recognize for purposes of understanding the motivations behind lynching, however, is that given the racially hostile climate of the South during the lynching era, one did not *need* to harbor racial animus in order to have reason to lynch. A variety of interests could be served through violence against blacks, including economic interests—such as maintaining white dominance over land and labor, and related social or emotional interests—such as reminding blacks (and oneself) of the race-based caste system that dictated white supremacy despite advances toward economic equality, and releasing feelings of frustration on targets who were not likely to fight back.

Whether or not individual perpetrators “hated” blacks, the cultural ideology in place in the South enabled them to take advantage of the racial terror that lynching created. The racist views of southerners in general identified African Americans as acceptable targets for violence and allowed such violence to continue. Tolnay and Beck have explained that “[g]iven 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.”⁴¹⁶ In other words, even if a perpetrator might otherwise have directed violence against other whites, blacks were easier and more attractive targets because one could both obtain benefits from the violence inflicted upon them and get away with it.⁴¹⁷ At the same time that whites recognized blacks as suitable targets for violence and understood that they would suffer no consequences for directing violence against them, blacks also understood this to be the state of affairs. Though some resisted the ill treatment or eventually left the South,⁴¹⁸ many blacks had little choice but to comply with the desires of whites in order to avoid the murderous mobs.⁴¹⁹ Thus, perpetrators were able to

potential to benefit most of white society, for example, during periods of economic distress. They were least vulnerable where cleavages developed in white society, as where strong opposition political groups existed or where well-to-do whites suffered from the loss of cheap labor. However, at no time between 1880 and 1930 could southern blacks assume that they were totally immune from mob violence.

Id.

⁴¹⁶ Beck & Tolnay, *The Killing Fields*, *supra* note 230, at 537.

⁴¹⁷ See, e.g., *supra* note 257 and accompanying text (providing explanation of the “frustration-aggression hypothesis”).

⁴¹⁸ See TOLNAY & BECK, A FESTIVAL OF VIOLENCE, *supra* note 198, at 209–11; *supra* notes 378, 401 and accompanying text.

⁴¹⁹ See, e.g., *supra* note 221 and accompanying text (describing the deferential attitude

use violence against blacks to fulfill various needs.

This theme—of perpetrators' preying upon groups that the cultural ideology has identified as "suitable victims" in order to fulfill their own self-interest—continues to be carried out in group-based violence today. As the following part examining anti-gay crime and violence reveals, contemporary cultural ideology also marks certain social groups as "safe" or "acceptable" targets. A wide range of motivations other than or in addition to group-based hostility can drive violence against such groups. Among these motivations may be the desires for excitement, social bonding, self enhancement, or even monetary gains. Perpetrators are able to reap the rewards that they seek in part because those benefits are tied to society's recognition that members of the victims' groups have been designated as acceptable targets.

B. *Anti-Gay Crime and Violence Today*

1. *The Modern Prototype*

As the graphic terms by which it is known suggest, "gay-bashing" or "anti-gay violence" is violence or harassment directed at lesbians or gay men because of their sexual orientation.⁴²⁰ The practice is not uncommon.⁴²¹ A substantial percentage of persons who identify themselves as gay or lesbian have reported being punched, hit, kicked, beaten, threatened with physical violence, verbally abused, spat upon, sexually assaulted, chased or followed, pelted with objects, or having their property vandalized because of their sexual orientation.⁴²² Anti-gay

some blacks adopted toward whites).

⁴²⁰ COMSTOCK, *supra* note 196, at 2; *see also* Joseph Harry, *Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546, 549 (1982) ("Fag-bashing is defined as assault on homosexuals by heterosexuals because the former are homosexual."). Perpetrators of anti-gay crimes are not always heterosexual. *See id.* at 551–52.

⁴²¹ *See, e.g.*, COMSTOCK, *supra* note 196, at 94 (quoting defense attorney in a gay-bashing case who observed in an out-of-court interview that "queer-bashing [was] common practice in the area not only for the defendants, but in general for teenage boys: '[They] go down to the park, roll the queers down the hill and have a good laugh and so on. It's a phenomenon.'"); Karen Franklin, *Psychosocial Motivations*, *supra* note 53, at 2–3, 10 tbl.2 (reporting that, among male respondents in a diverse sample of 484 noncriminal young adults in the greater San Francisco Bay Area, 18% admitted to engaging in anti-gay violence or threats, and 32% admitted to anti-gay name-calling). The practice is also well-established in history. *See generally* COMSTOCK, *supra* note 196, at 14–20 (summarizing the history of anti-gay/lesbian violence—some of it legally sanctioned—in Western civilization).

⁴²² *See* Berrill, *An Overview*, *supra* note 196, at 19–25; *see generally* Laura Dean et al., *Trends in Violence and Discrimination Against Gay Men in New York City: 1984 to 1990*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 22, at

violence also includes murder.⁴²³ Many gay men and lesbians report multiple experiences with anti-gay violence.⁴²⁴ In fact, “[w]hen the rate of anti-gay/lesbian violence in the lives of lesbians and gay men is compared to the rate of criminal violence experienced by the general population, the former is disproportionately higher.”⁴²⁵ Individuals who are not gay, but who associate with gays or are perceived as gay because they conform to commonly held stereotypes,⁴²⁶ are also vulnerable to anti-gay violence.⁴²⁷ These acts create a “climate of fear”⁴²⁸ for those who see themselves as potential targets, and living with that fear “extract[s] a gruesome toll on [their] daily lives.”⁴²⁹

Anti-gay violence provides a useful vehicle for examining the motivations of bias crime perpetrators, because conventional representations and empirically observed attributes of the practice conform well to the “prototype” of a hate crime.⁴³⁰ Indeed, popular conceptions of gay-bashing place the crime squarely

46; Beatrice von Schulthess, *Violence in the Streets: Anti-Lesbian Assault and Harassment in San Francisco*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 22, at 65; COMSTOCK, *supra* note 196, at ch. 2 (summarizing studies).

⁴²³ See, e.g., COMSTOCK, *supra* note 196, at 47; see generally Brian Miller & Laud Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC. 169 (1980).

⁴²⁴ See Berrill, *An Overview*, *supra* note 196, at 20, 29.

⁴²⁵ COMSTOCK, *supra* note 196, at 55. In addition, Comstock’s survey of anti-gay violence indicated “that lesbians and gay men of color are more frequently the victims of anti-gay/lesbian violence than are white lesbians and gay men.” *Id.*

⁴²⁶ Such individuals might include, for example, men who seem effeminate and persons who associate with or support the rights of gay men and lesbians. See Berrill, *An Overview*, *supra* note 196, at 40; Harry, *supra* note 420, at 556.

⁴²⁷ See, e.g., Berrill, *An Overview*, *supra* note 196, at 40; Harry, *supra* note 420, at 560.

⁴²⁸ Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. INTERPERSONAL VIOLENCE 366, 373–74 (1990).

⁴²⁹ Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159, 173 (1994); see also Wang, *supra* note 6, at 116–24.

⁴³⁰ Ironically, however, many hate crime statutes still do not include “sexual orientation” as a prohibited basis for victim selection, and the issue of whether to include sexual orientation—even in statutes that simply call for the reporting of statistics and do not criminalize the targeting of victims based on sexual orientation—is often highly controversial and politicized. See, e.g., Herek & Berrill, *Introduction to HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN*, *supra* note 196, at 6 (discussing history of inclusion of “sexual orientation” in the federal Hate Crimes Statistics Act of 1990); Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 214–223 (describing controversy in Utah legislature over extending hate crimes protection to lesbians and gay men, which controversy resulted in amendment of hate crimes act “to eliminate all references to any minority group”) (emphasis added); Clay Robison, *Texans Support Hate-Crimes Law by a Wide Margin, Poll Indicates*, HOUS. CHRON., Apr. 26, 1999, at

within the "animus" model of victim selection. Gay-bashing is often perceived as being motivated by an emotional state akin to hatred, specifically the perpetrator's aversion to or repulsion at the sexual preferences and practices of its victims.⁴³¹ This view accords with the conventional view of hate crimes in that it posits a perpetrator who acts out of emotion rather than reason, and who is to some degree "controlled by" his aversion to the target group.⁴³² In other words, gay-bashing, like anti-gay prejudice generally, is often conceived of as being "unidimensional" and based on "irrational fears" of the target group.⁴³³ The commonly used term "homophobia" conveys this sense of intense and irrational fear.⁴³⁴

In addition—and consistent with the notion that hate crimes are committed not for the purpose of obtaining personal benefits but simply for the sake of the violence itself and the harm it inflicts on its victims⁴³⁵—anti-gay attacks often involve extreme brutality, including "torture, cutting, mutilation, and beating."⁴³⁶ Other factual circumstances of reported cases of gay-bashing also tend to conform to the prototype for "hate" crimes.⁴³⁷ For example, the perpetrators are

1 (describing controversy over inclusion of "sexual orientation" in Texas hate crimes bill and noting that the Texas "House has never approved a hate-crimes bill that specifically covers sexual orientation").

⁴³¹ See, e.g., Michael Collins, *The Gay-Bashers*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 22, at 191, 193–94, 197.

At the extreme, defendants who have killed gay victims sometimes attempt to defend against murder charges by claiming they were overtaken by "homosexual panic." See generally, e.g., Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992).

⁴³² See *supra* Parts III.A & B.

⁴³³ Herek, *Beyond "Homophobia," supra* note 143, at 1. See also *id.* at 4–5 (describing conclusions of earlier theorists as to the causes of anti-gay prejudice).

⁴³⁴ Herek, *Psychological Heterosexism, supra* note 53, at 167–68 n.4.

⁴³⁵ See *supra* Part III.C.

⁴³⁶ Berrill, *An Overview, supra* note 196, at 25; see also, e.g., Paul Cotton, *Attacks on Homosexual Persons May Be Increasing, But Many "Bashings" Still Aren't Reported to Police*, 267 J. AM. MED. ASS'N 2999 (1992); Miller & Humphreys, *supra* note 423, at 179–80.

⁴³⁷ For example:

The popular gay media such as *The Advocate* typically depict fag-bashing as occurring between strangers in areas where many gay men live or in areas known to be frequented by gay men for cruising purposes. . . . The most common forms of fag-bashing involve

more often strangers than persons the victim knows;⁴³⁸ perpetrators tend to be male and young;⁴³⁹ and perpetrators tend to outnumber their victims.⁴⁴⁰ Further, consistent with the prototypical perpetrator's presumed view that group members are "fungible" or "interchangeable,"⁴⁴¹ the violence most often occurs under circumstances that "provide and identify for potential victimizers a supply of suitable targets."⁴⁴² For instance, gay-bashing usually occurs in settings where lesbians and gay men are known to live and socialize, such as lesbian/gay bars, cruising areas, streets in predominantly lesbian/gay neighborhoods, and the victims' homes,⁴⁴³ and the most likely victims are individuals who appear to be gay,⁴⁴⁴ perhaps because they conform to stereotypes of gay persons,⁴⁴⁵ associate with others who do,⁴⁴⁶ or are active in the gay community.⁴⁴⁷

Because the empirical attributes of anti-gay violence so closely conform to the features of the prototype, it is easy to conclude that perpetrators' motivations are the same as those imputed to the prototypical perpetrator as well. However, the research of social scientists belies conventional explanations of the motivations behind gay-bashing. These researchers have shown—sometimes through the words of perpetrators themselves—that, in many cases, anti-gay violence is committed not simply because of the perpetrator's hatred toward or dislike for the gay victim's sexual orientation,⁴⁴⁸ but also because, in our society, such violence can be rational or "functional" for the perpetrator.⁴⁴⁹ Perpetrators

several heterosexual young males assaulting one or two gay men or assault combined with robbery.

Harry, *supra* note 420, at 549–50.

⁴³⁸ See COMSTOCK, *supra* note 196, at 58. *But see* Berrill, *An Overview*, *supra* note 196, at 34–35 (noting that gay men and lesbians commonly suffer anti-gay violence at the hands of family members); Franklin, *Psychosocial Motivations*, *supra* note 53, at 3 (suggesting that this perception may be "an artifact of underreporting by victims who know their assailants").

⁴³⁹ See COMSTOCK, *supra* note 196, at 59; Berrill, *An Overview*, *supra* note 196, at 30.

⁴⁴⁰ See COMSTOCK, *supra* note 196, at 63; Berrill, *An Overview*, *supra* note 196, at 30. Victims are most often alone at the time of the attack. See COMSTOCK, *supra* note 196, at 65.

⁴⁴¹ See *supra* notes 17–18 and accompanying text (describing the prototypical perpetrator).

⁴⁴² Harry, *supra* note 420, at 551.

⁴⁴³ See COMSTOCK, *supra* note 196, at 52; *see also, e.g.*, Harry, *supra* note 420, at 555–56; Miller & Humphreys, *supra* note 424, at 179.

⁴⁴⁴ Exceptions to this statement are noted in *infra* Part IV.B.3.

⁴⁴⁵ See Harry, *supra* note 420, at 555–56 (*e.g.*, effeminacy for men).

⁴⁴⁶ See *id.* at 556.

⁴⁴⁷ See Berrill, *An Overview*, *supra* note 196, at 40; Harry, *supra* note 420, at 556.

⁴⁴⁸ See COMSTOCK, *supra* note 196, at 94.

⁴⁴⁹ See Herek, *Psychological Heterosexism*, *supra* note 53, at 164; *cf.* COMSTOCK, *supra*

who engage in gay-bashing often reap psychological, social, and even material rewards. In choosing to commit the offense, perpetrators often are strongly motivated by the desire to obtain those anticipated benefits. As forensic psychologist Karen Franklin has discovered through her interviews with admitted assailants, "[P]eople who have assaulted homosexuals typically do not recognize themselves in the stereotyped image of the hate-filled extremist."⁴⁵⁰ Rather, some gay bashers seek to obtain thrills, recognition, social bonding, or a combination of these rewards and see gay men as "fundamentally a dramatic prop" suitable for use in that quest.⁴⁵¹ Some desire material rewards, such as money, and are able to use society's general disapproval of and disregard for gays to their advantage.⁴⁵² Common to all of these perpetrators is their expectation that they can reap particular benefits that are contingent on their selecting a gay victim, for they perceive that gay persons have been designated "suitable victims" for those purposes.

The following sections examine two common categories of anti-gay crime: gay-bashing that groups of young men engage in together in order to reap social, psychological, and emotional rewards, and anti-gay crimes in which the perpetrator seeks pecuniary gain.⁴⁵³

2. Excitement, Conformity, Solidarity, and Self-Enhancement: Anti-Gay Violence as Social Practice

For some perpetrators, especially young men, gay-bashing is a social practice. It is a "rite of passage"⁴⁵⁴ that helps to establish their place in the

note 196, at 2. As Comstock explains, "the data show that perpetrators are predominantly average young men whose behavior is socially sanctioned rather than intrapsychically determined . . ." *Id.* at 94.

⁴⁵⁰ Karen Franklin, *Unassuming Motivations: Contextualizing the Narratives of Antigay Assailants*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 1, 20 (Gregory M. Herek ed., 1998) [hereinafter Franklin, *Unassuming Motivations*].

⁴⁵¹ *Id.* at 12; see also *infra* Part IV.B.2.

⁴⁵² See *infra* Part IV.B.3.

⁴⁵³ The discussion focuses on crimes that are more often directed at gay men than at lesbians. While lesbians are also vulnerable to anti-gay crime and violence, those crimes may differ from the crimes to which gay men are most susceptible. For example, lesbians tend to suffer a higher proportion of harassment and violence from family members and to be victimized in *non-gay-identified* public settings and at home. See Berrill, *An Overview*, *supra* note 196, at 25–28. Lesbians also do not appear to be vulnerable to the "shakedown" as described in *infra* Part IV.B.3.a, and when they are victims of extortion it appears to be more "intimate relationship-dependent." Harry, *supra* note 420, at 550.

⁴⁵⁴ COMSTOCK, *supra* note 196, at 76, (quoting LEE ELLENBERG, *MENTAL HEALTH*

community and cement their bonds with peers.⁴⁵⁵ Despite the often terrifying and sometimes gruesome nature of the incidents, in our society the practice seems to be neither uncommon nor particularly deviant.⁴⁵⁶ Indeed, it is encouraged by society's general disapproval of gay men and lesbians.⁴⁵⁷

In 1978, in the magazine *Christopher Street*, Eric Weissman told of what seems to be a typical incident of gay-bashing:⁴⁵⁸

Maybe it was the heat, maybe it was just restlessness. Or maybe it was that certain type of craziness that attacks all of us at one time or another in our lives. Victor, Gerry, Carl, Allen, Mitch, and Sam had nothing to do, so they were driving around Manhattan. Finally, they found themselves on Christopher Street, a few blocks from their home turf (despite the influx of gays, the old-time Italian presence remains strong in parts of Greenwich Village). They passed a deli; on the sidewalk outside lay a crate of oranges and a box of eggs, an after-hours delivery. Someone said, "Let's take them and throw them at the fags!"

Soon the eggs and oranges were in their possession. Tension was mounting, buzzing in the air; each guy felt it. Some of them were having second thoughts, but there could be no backing out now.

Gerry drove along under the West Side Highway and parked by one of the ramps. Once up on the abandoned roadway, they walked downtown a bit to a place just above West Street where the action occurred—faggots walking around, holding hands, even kissing openly on the promenade below. It was dark and hard for them to see; there were a lot of trees in the way. The guys found a good spot, took up positions, and stood ready to fire. Each of them had two eggs.

They spotted a bunch of fags, threw the eggs, then ran like hell back to the safety of the car. They were sure they had hit someone. After driving past the scene to inspect the damage they let fly with the oranges, shattering a bar window as they sped off into the night.⁴⁵⁹

DEP'T OF FENWAY COMMUNITY HEALTH CTR., COUNSELING SERVICE FOR GAY AND LESBIAN VICTIMS, 2 (1986)).

⁴⁵⁵ See *infra* notes 512–25 and accompanying text.

⁴⁵⁶ See *infra* notes 490–94 and accompanying text.

⁴⁵⁷ See *infra* notes 495–505 and accompanying text.

⁴⁵⁸ See COMSTOCK, *supra* note 196, at 71 ("Because the attack did not produce consequences severe enough to attract the media or police, [the remarks made by Weissman's subjects] provide insight into anti-gay/lesbian violence that is perhaps more ordinary, more frequent, and less likely to come to the public's attention than the incidents [collected and reported by Comstock in his book].").

⁴⁵⁹ Eric Weissman, *Kids Who Attack Gays*, CHRISTOPHER STREET, Aug. 1978, at 9, 9–13, reprinted in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 22, at 170, 170–71. These interviews are discussed and the responses of the interviewees analyzed in COMSTOCK, *supra* note 196, at 71–77.

When Weissman interviewed the youths a year later,⁴⁶⁰ some expressed regret at having participated in the attacks,⁴⁶¹ and a few indicated their disapproval of prejudice and discrimination against gay men and lesbians in general.⁴⁶² When asked why they had participated, a few of the interviewees indicated that they had been reluctant to do so, but "went along" with the group nevertheless.⁴⁶³ Significantly, for these young men the desire to hurt gay men was not among their expressed motivations.⁴⁶⁴ Instead, they reported that their concerns at the time centered on the pressure they felt their peers were placing on them to participate⁴⁶⁵ and their desires to "prove" themselves to the others.⁴⁶⁶ A few even characterized the incident as a sort of amusement or "game." One participant, "Mitch," described the events as follows:

Before, we were in a joking mood. It was Friday and we were feeling good, and this seemed like a good practical joke. During, it seemed like a game—a little tense, but fun just the same. . . . We weren't trying to hurt anyone, we were just out for some fun.⁴⁶⁷

"Gerry" also described the incident as "a little game," though he perceived the game as being in the nature of a "dare."⁴⁶⁸

⁴⁶⁰ See Weissman, *supra* note 459, at 171.

⁴⁶¹ For example, "Victor" said he thought what he had done was wrong and that he would not do it again. *Id.* "Mitch" said he would never do it again because "[i]t was wrong and stupid . . ." *Id.* at 177. On the other hand, "Allen" did not think that what he had done was "right," but would do it again "[u]nder the right circumstances," because of peer pressure. *Id.* at 175–76.

⁴⁶² See, e.g., *id.* at 177 ("Victor"), 175–76 ("Allen"), 177–78 ("Mitch"—noting, however, that he had "changed [his] mind about a lot of things in the past year."). These young men also indicated, however, that they did not understand or approve of sexual relationships between men. See *id.* at 175–78.

⁴⁶³ For example, "Gerry" explained that "I knew it was wrong, but I wasn't going to be the one to say 'Don't do it.'" *Id.* at 172; *cf. id.* at 176 ("Allen": expressing hope that he would react differently now, but pointing out that "peer pressure has a lot to do with" one's participation).

⁴⁶⁴ See Weissman, *supra* note 459, at 172 ("Gerry": "We really didn't want to hurt anybody; at least I didn't."), 176 ("Allen": "We didn't want anyone to get hurt."), 177 ("Mitch": "We weren't trying to hurt anyone. . . .").

⁴⁶⁵ *Id.* at 172, 176.

⁴⁶⁶ As "Gerry" explained, "We were trying to be tough to each other. It was like a game of chicken—someone dared you to do something and there was just no backing down." *Id.* at 172. Similarly, "Allen" stated, "Sometimes you're forced into doing something to prove yourself to others." *Id.* at 176.

⁴⁶⁷ *Id.* at 176–77.

⁴⁶⁸ *Id.* at 172.

Despite their initial reluctance to participate, their fear and anxiety during the event,⁴⁶⁹ and their subsequent misgivings about having participated, several of the young men described their emotions immediately after the incident in highly positive terms. For example, "Mitch" reported that "[a]fter, there were a lot of feelings. Relief. A kind of high. There was also a strong, close feeling that we were all in something together, you know what I mean."⁴⁷⁰ "Allen" similarly described the group's jovial mood afterwards: "[T]here was just relief, a lot of joking around. We were getting high off our tension."⁴⁷¹ "Gerry" explained that having participated in the incident was "a symbol of prestige."⁴⁷²

The circumstances, atmosphere, and emotions described by Weissman's subjects are consistent with other reported incidents of group gay-bashings. In his empirical study of perpetrators, Gary David Comstock reported on several incidents of anti-gay violence committed by groups of three or more young perpetrators.⁴⁷³ Comstock noted that, prior to all of those incidents, the perpetrators had been with friends at a social gathering⁴⁷⁴ and had made the decision to attack within "a social-peer context."⁴⁷⁵ Further, "[d]iscussion before and after the attacks indicate[d] that adventure, enjoyment, boasting, and sharing stories about the experience were the perpetrators' apparent rewards."⁴⁷⁶

The spontaneous and even frivolous nature of the incident Weissman described seems inconsistent with the hostility-driven prototypical crime, but it is not uncommon. Perpetrators of anti-gay violence—and of other types of bias-motivated violence as well⁴⁷⁷—often describe the attack as unplanned,

⁴⁶⁹ See, e.g., *id.* at 172, 175.

⁴⁷⁰ *Id.* at 176.

⁴⁷¹ *Id.* at 175.

⁴⁷² *Id.* at 172.

⁴⁷³ See COMSTOCK, *supra* note 196, at 78–82. The perpetrators studied were between the ages of 15 and 22; see also *id.* at 78.

⁴⁷⁴ The attacks occurred during times "when teenagers can and do typically socialize," and the groups were "either at a popular hang-out, on the way to a party, at a party, or gathered at the home of one of the perpetrators." COMSTOCK, *supra* note 196, at 78. In four of the six incidents, the perpetrators had also consumed alcohol or recreational drugs. See *id.*

⁴⁷⁵ See *id.*

⁴⁷⁶ *Id.* at 79. In one case robbery was a motive, but even in that case it was not a primary motive. See *id.*

⁴⁷⁷ See, e.g., *United States v. Kissinger*, No. 90-5553, 90-5562, 1991 WL 173042, at *2 (4th Cir. Sept. 10, 1991) (unpublished disposition) (providing a defendant who testified that he and co-defendants decided to firebomb a black family's home after their original plan—to ride around in a car "looking for an individual with whom [he] had a disagreement"—failed); LEVIN & MCDEVITT, *supra* note 11, at 67 (describing "'spree of destruction' that two youths embarked upon 'when 'there was nothing else to do.'" The two "defaced walls, driveways, and automobiles with slurs against Jews, blacks, Greeks, and even skinheads. After their arrest, the

impulsive, "something to do" when they were bored or when their original plans for the time period were thwarted.⁴⁷⁸ That the activity was not preplanned or given much thought illustrates the sometimes recreational character of gay-bashing—perpetrators frequently view it as simply a diversion or a way to alleviate boredom. As Comstock has observed with respect to the young men interviewed by Weissman, the statement,

"We weren't trying to hurt anyone, we were just out for some fun"—casts a benignity on their behavior that does not seriously consider the fear, discomfort, and injury of the victims. It, with their other remarks . . . , suggests that for some teenage males attacking gay men and lesbians is not an expression of hatred or even disapproval as much as it is a *recreational option*.⁴⁷⁹

Comstock notes that similar sentiments have been expressed by perpetrators who have caused far greater physical harm than Weissman's subjects—including perpetrators who have killed their victims.⁴⁸⁰ Law enforcement and legal

two young men claimed that they hadn't intended to hurt anyone and that it happened because they were drunk.").

⁴⁷⁸ For example, "Victor," another of the young men Weissman interviewed, described another incident of gay-bashing in which he had participated as an alternative his group [settled for] when their original plans were thwarted:

We were at the club [a private cellar club in the Village owned by the neighborhood kids], and we decided to go out and look for some kids who were bothering a local girl. We couldn't find them, so we started to hit these fags that were walking around the neighborhood.

Weissman, *supra* note 459, at 171.

⁴⁷⁹ COMSTOCK, *supra* note 196, at 75–76 (emphasis added); *see also* LEVIN & MCDEVITT, *supra* note 11, at 65 ("In the same way that some young men get together on a Saturday night to play a game of cards, certain hate-mongers gather to destroy property or to bash minorities. They look merely to have some fun and stir up a little excitement . . . at someone else's expense."); Lisa Belkin, *Anti-Gay Comments Spark Dallas Furor/Judge Defends Leniency for Teen Killer*, HOUS. CHRON., Dec. 17, 1988, at 29 (noting that a common activity for Dallas high school students was "to spend evenings 'gay-bashing'").

⁴⁸⁰ COMSTOCK, *supra* note 196, at 76. Comstock reported on a case in which three perpetrators killed a gay man by picking him up and throwing him off of a bridge. After the attack, the three assailants reportedly "all shook hands with each other; they were all laughing, just laughing 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). One of the three said afterwards:

We were just going to talk to him or scare him. I walked up to him and said, "Hi, how you doing, fag?" You could tell he was really scared. We did pick him up and brought him over to the rail [of the bridge over the stream]. . . . We threw him in. I didn't want to kill

professionals familiar with teenage perpetrators have observed that the perpetrators often view gay-bashing as “a ‘kind of sport.’”⁴⁸¹ (One young “gay-basher” interviewed by forensic psychologist Karen Franklin explained that his “primary motive in committing assaults was to ‘have fun.’” He and his friends “prepared like athletes before a game, stretching their limbs, rehearsing their moves, avoiding alcohol and drugs.”)⁴⁸² Elders and authority figures (including law enforcement officers⁴⁸³ and school administrators)⁴⁸⁴ often express a similar view of the violence, dismissing it as a “teenage prank” or “boys being boys.”⁴⁸⁵

That gay-bashing is considered a recreational option and minimized by both the perpetrators and their elders in the community belies the view that it is committed by “deviant” actors. Indeed, researchers have noted the “ordinariness” or “averageness” of perpetrators. For example, Comstock reports that “psychiatric and law enforcement professionals [have observed] that assailants do not typically exhibit what are customarily thought of as criminal attitudes and behaviors. Many conform to or are models of middle-class respectability.”⁴⁸⁶

him—all I did was try to scare him. It was just stupid, very stupid.

Id. at 76 (footnote omitted).

⁴⁸¹ COMSTOCK, *supra* note 196, at 76; *see also id.* at 94 (noting “Data about incidents reported in newspapers and magazines suggest that the primary reason for adolescent attacks on lesbians and gay men is recreational” and not to express hatred); LEVIN & MCDEVITT, *supra* note 11, at 71 (noting that gay bashing has become a “fad” or “sport”); George M. Anderson, *Gay-Bashing Is a Hate Crime*, in HATE CRIMES, *supra* note 12, at 25 (quoting Boston police lieutenant Bill Johnston).

⁴⁸² Franklin, *Unassuming Motivations*, *supra* note 450, at 14.

⁴⁸³ *See* COMSTOCK, *supra* note 196, at 92 (citing examples); Chris Bull, *A Gay-Bashing Killer Turns His Life Around*, THE ADVOCATE, Dec. 1, 1992, at 55 (providing an example of a man who, as a teenager, killed a gay man with friends, and who said with respect to his and his peers’ participation in gay bashing, “The police never came to us and told us someone was going to get hurt.”).

⁴⁸⁴ *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).

⁴⁸⁵ *Id.* (Upon being informed of anti-gay harassment and mock rape perpetrated upon plaintiff by fellow middle school students, school principal responded, “boys will be boys” and told plaintiff that he should expect such behavior from class mates if he was “going to be so openly gay”). *See also infra* notes 500–02 and accompanying text.

⁴⁸⁶ COMSTOCK, *supra* note 196, at 91–92. Comstock quotes the arresting officer in one case as saying of the defendants, “If you went to [a shopping mall] and picked up any group of young males about the same age as these boys—that is what they were like. Average.” *Id.* at 93. The mother of an acquaintance of the defendants said, “I just thank God my son happened not to be there that night . . . He is a good boy, but it could be him going to jail, too. It could be anyone’s son.” *Id.*; *see also, e.g.*, LEVIN & MCDEVITT, *supra* note 11, at 71 (noting that perpetrators who target gays tend to be “average young men” without criminal records who come from any of a number of different lifestyles, backgrounds, and social classes); David

Weissman's subjects also conformed to this description: all were fair to good high school or college students with plans for conventional careers, and all were living with their parents.⁴⁸⁷ Taking advantage of the benignity associated with this image, a common defense strategy at trial is to portray the perpetrator as an "average" person whose "actions are neither serious nor unusual,"⁴⁸⁸ through, for example, evidence of "'good family background,' exemplary behavior in school, and participation in organized athletics."⁴⁸⁹

Perhaps more significantly, the fact that perpetrators of anti-gay violence frequently are average or ordinary sheds light on the conformist nature of the act itself. As one counselor at a juvenile detention center put it in comparing the perpetrators of an anti-gay killing to the other residents of his center, "These kids, as far as I can see, are atypical from our average kid [at the Center]. They're social beings. Most of the kids we see are anti-social."⁴⁹⁰ With respect to the same perpetrators, Comstock pointed out that "the slayers of Charlie Howard [a gay man] committed [their crime] as a way of being accepted by [society]."⁴⁹¹

Young men who commit anti-gay violence in fact often are *not* rebelling, but instead are acting in a way that they perceive their peers and elders to accept and expect.⁴⁹² Gay-bashing is common among young adults. Forensic psychologist Karen Franklin reports that, in an anonymous survey of 484 community college students in the San Francisco Bay area, 1 in 10 respondents admitted to committing physical violence and making threats against people they believed to be gay; among male respondents only, 18% admitted to such acts.⁴⁹³ Franklin further reports that

assaults on gay men and lesbians were so socially acceptable that respondents often advocated or defended such behaviors out loud in the classrooms, while I was administering my survey. Furthermore, almost half of assailants reported a likelihood to assault again in similar circumstances. That is, they either lacked

Jackson, *How Judge's Sentencing Measures Up*, DALLAS MORNING NEWS, Dec. 21, 1988, at 33A (noting that factors in sentence imposed upon defendant convicted of killing two gay men included "his age—18 at the time—lack of criminal record, family life, and attendance at a local community college").

⁴⁸⁷ See Weissman, *supra* note 459, at 171–76.

⁴⁸⁸ COMSTOCK, *supra* note 196, at 92.

⁴⁸⁹ *Id.* at 82.

⁴⁹⁰ *Id.* at 92.

⁴⁹¹ *Id.* at 92 (emphasis added).

⁴⁹² See, e.g., *id.* at 92–93; Cotton, *supra* note 436, at 3000.

⁴⁹³ See Franklin, *Psychosocial Motivations*, *supra* note 53, at 2, 10, tbl.2. 24% of all respondents admitted to anti-gay name calling; among males, the rate was 32%. See *id.*

remorse or did not see anything wrong with their behavior.⁴⁹⁴

Parents⁴⁹⁵ and other authority figures, including political and religious leaders,⁴⁹⁶ create the impression that gay men and lesbians are persons deserving of ill treatment when they utter anti-gay slurs, make anti-gay jokes, or endorse discrimination based on sexual orientation.⁴⁹⁷ Popular entertainment, such as television shows and motion pictures, reinforce this view by presenting highly stereotyped gay characters who are placed disproportionately in the roles of “victims or villains.”⁴⁹⁸ The message sent is not only that gay people are somehow less worthy than heterosexuals, but also that violence against gays is acceptable. For example, mainstream films—some intended for young audiences—often portray anti-gay violence as appropriate and even humorous.⁴⁹⁹

The impression that anti-gay violence is acceptable is confirmed when perpetrators receive light sanctions or escape punishment altogether. Those in

⁴⁹⁴ *Id.* at 2–3.

⁴⁹⁵ Jimmy Baines, who killed a gay man when he was a teenager, said that he “heard homophobic comments from [his] parents and teachers all the time.” Bull, *supra* note 483, at 55.

⁴⁹⁶ See, e.g., Lott: *Gays Need Help “To Deal With That Problem,”* WASH. POST, June 16, 1998, at A6 (reporting Senate Majority Leader Trent Lott’s statements that homosexuality is a sin and comparing gay people to alcoholics, sex addicts, and kleptomaniacs); Kevin Sack, *Gay Rights Movement Meets Big Resistance in S. Carolina*, N.Y. TIMES, July 7, 1998, at A1 (reporting political and religious leaders’ “rhetorical war on homosexuality”).

⁴⁹⁷ As hate crime experts Jack Levin and Jack McDevitt put it,

These youths see gays, blacks, Asians, Jews, and women being the butt of jokes by certain comedians (not to mention members of their audience who repeat the same jokes), being belittled in the lyrics of popular music, and being discredited by thinly disguised political messages. In some cases, young people looking for a thrill learn a dangerously misguided message: nobody will care if we attack the members of this group; in fact, others might applaud us!

LEVIN & MCDEVITT, *supra* note 11, at 67.

⁴⁹⁸ See, e.g., Larry Gross, *Out of the Mainstream: Sexual Minorities and the Mass Media*, in REMOTE CONTROL: TELEVISION, AUDIENCES, AND CULTURAL POWER 130, 135–36 (Ellen Seiter et al. eds., 1989) (arguing that in the rare instances gay people are visible in the media, it is in a negative light); Larry Gross, *What is Wrong with This Picture? Lesbian Women and Gay Men on Television*, in QUEER WORDS, QUEER IMAGES: COMMUNICATION AND THE CONSTRUCTION OF HOMOSEXUALITY 143, 143–47 (R. Jeffrey Ringer ed., 1994) (arguing that minorities have little influence over the mass media); VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES 251–71 (rev. ed. 1987) (discussing the often negative and stereotypical portrayal of homosexuals in the movies).

⁴⁹⁹ See RUSSO, *supra* note 498, at 251–54 (citing examples).

authority often minimize violence against gays by suggesting that the victim "deserved" the abuse simply for being gay or that the victim brought the violence upon himself through deviant behavior. When middle school student Jamie Nabozny reported that fellow students had subjected him to a mock rape in a science classroom while twenty other students looked on and laughed, the school principal said "boys will be boys" and told Nabozny that he should "expect" such treatment if he was "going to be so openly gay."⁵⁰⁰ Later, in high school, a group of eight boys accosted Nabozny and laughed while their leader kicked him in the stomach for five to ten minutes. Upon being told of the incident, the assistant principal in charge of discipline "laughed and told Nabozny that Nabozny deserved such treatment because he was gay."⁵⁰¹ Despite receiving numerous reports of anti-gay harassment and violence against Nabozny throughout his middle and high school years, school officials took no action to protect Nabozny or to discipline the perpetrators.⁵⁰²

Displaying similar attitudes, a judge in Dallas justified the lenient sentence he imposed on Richard Lee Bednarski, an eighteen-year-old who had murdered two gay men, by stating, "I put prostitutes and gays at about the same level, and I'd be hard put to give somebody life for killing a prostitute."⁵⁰³ The judge implied that the victims had invited their own murders when he said, "These two guys that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teen-age boys. I don't care much for queers cruising the streets. I've got a teen-age boy."⁵⁰⁴ The judge insinuated that the victims were at fault despite the fact that no conclusive evidence was presented at trial that the victims had solicited sex and despite witnesses' testimony that Bednarski and a group of friends "had set out to harass homosexuals and entered the men's car with the intent of beating them."⁵⁰⁵

The foregoing characteristics of gay-bashing—that it is considered a recreational option, is carried out by ordinary young men who are "model citizens" in most other respects, and is often accepted and even encouraged by elders within the community—provide clues to what would otherwise be a

⁵⁰⁰ Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).

⁵⁰¹ *Id.* at 452.

⁵⁰² *See id.* at 451–52. Indeed, the only student who was disciplined was Nabozny himself—for leaving school without permission after the middle school principal told him he should expect abusive treatment from his fellow students if he was "going to be so openly gay." *Id.* at 451.

⁵⁰³ Belkin, *supra* note 479, at 29.

⁵⁰⁴ *Id.* The judge also said that "had (the victims) not been out there trying to spread AIDS around, they'd still be alive today." Larry Rowe, *Gays Discouraged by Report Clearing Dallas Judge of Bias*, DAILY TEXAN, Nov. 2, 1989, at 8.

⁵⁰⁵ Belkin, *supra* note 479.

puzzling fact: that perpetrators of even the most brutal and gruesome acts of anti-gay violence often assert that they personally feel no hostility toward gay men or lesbians.⁵⁰⁶ It becomes clear that one *can* commit anti-gay violence without feeling any personal animus toward gay men and lesbians, because the motivation for the attack need not be one's own feelings toward the victim or target group. Instead, for many perpetrators the motivation is tied to *how others react* when they attack a gay man or lesbian and how those reactions make them feel.⁵⁰⁷ Simply put, these reactions can make the perpetrators *feel good*—about being part of a group, about the status of the group, and about themselves.

One frequently reported motivation for gay-bashing—especially among perpetrators who exhibit little or no hostility toward gays—is “thrill seeking”:⁵⁰⁸ to alleviate boredom or “to have fun.”⁵⁰⁹ As “Brian” explained in his interview with Franklin:

It wasn't because we had something against gays, but because we could get some money and have some fun. It was a *rush*. A serious rush. Massive rush. Danger, fight-or-flight syndrome, pumps up the adrenaline. And when we get over on someone, it heightens the rush It was nothing at all against gays. They're just an easy target.⁵¹⁰

This attitude resembles that of the perpetrators and spectators of lynchings who appeared to view those events as a form of entertainment.⁵¹¹

In addition, joining together in an activity that they consider risky, exciting, and adventurous can lead the group to feel an intense and exhilarating sense of closeness, or what psychologist Karl M. Hamner has called “communal euphoria.”⁵¹² As “Mitch” explained to Eric Weissman, “There was also a strong,

⁵⁰⁶ See COMSTOCK, *supra* note 196, at 93–94; Franklin, *Unassuming Motivations*, *supra* note 450, at 20; Weissman, *supra* note 450, at 172–77. Even if such perpetrators do espouse anti-gay views, Levin and McDevitt explain that the “hatred beneath thrill-seeking violence is for most perpetrators actually at a superficial level; perpetrators hold on to their disparaging images essentially to justify victimizing strangers.” LEVIN & MCDEVITT, *supra* note 11, at 68. In addition, some who admit to feeling hostility toward gays may assert that they did not assault gays *because of* that hostility. See Franklin, *Unassuming Motivations*, *supra* note 450, at 3 (interview with “Eric”).

⁵⁰⁷ See Herek, *Psychological Heterosexism*, *supra* note 53, at 154, 160–61, 164.

⁵⁰⁸ Franklin, *Unassuming Motivations*, *supra* note 450, at 14–15.

⁵⁰⁹ See COMSTOCK, *supra* note 196, at 94; LEVIN & MCDEVITT, *supra* note 11, at 65; Franklin, *Psychosocial Motivations*, *supra* note 53, at 4, 11, tbl.4; Franklin, *Unassuming Motivations*, *supra* note 450, at 14–15.

⁵¹⁰ Franklin, *Unassuming Motivations*, *supra* note 450, at 14 (emphasis in original).

⁵¹¹ See *supra* note 206 and accompanying text.

⁵¹² Karl M. Hamner, *Gay Bashing: A Social Identity Analysis of Violence Against*

close feeling that we were all in something together . . ."⁵¹³ The act creates among the group members a feeling of solidarity and community that fulfills the individual's need for affiliation or a sense of belonging.⁵¹⁴ Indeed, the fact that anti-gay violence usually involves more than one perpetrator in itself "suggests that such crimes serve as a form of group affirmation."⁵¹⁵ Joining in the violence also is a way for individual members to prove their worthiness—that is, their strength and loyalty—to other group members.⁵¹⁶ Bias crime experts Jack Levin and Jack McDevitt explain that the rewards of being part of the group—and the fear of being rejected by them—are what compel many perpetrators to participate in violence that they might not have engaged in on their own: "Being accepted by his pals makes him feel special. . . . [B]eing rejected by them may be tantamount to being given a death sentence, at least in his eyes."⁵¹⁷

The act also can enhance the status of the group among outsiders, which in turn enhances the individual members' self-esteem. Perpetrators often anticipate that attacking gay victims will bring their group recognition and respect. Jimmy Baines, a young man who, with friends, killed a gay man, explained that, "The night of the murder, we expected to return to school Monday morning and tell other kids, 'We threw a homo off the bridge,' like it was a great thing, like it was some big prank."⁵¹⁸ In fact, gay bashers often do receive the attention and admiration they seek. As a counselor at the juvenile detention center to which Baines was sentenced noted, "throwing a known homosexual off the bridge is something that would be a feather in their cap among kids at Bangor High

Lesbians and Gay Men, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, supra note 22, at 179, 183.

⁵¹³ Weissman, *supra* note 459, at 176; *see also* Franklin, *Unassuming Motivations, supra* note 450, at 11 (noting that one function of a "socially prohibited act" is to "increase group solidarity and cohesion").

⁵¹⁴ *See* Herek, *Psychological Heterosexism, supra* note 53, at 160–61.

⁵¹⁵ Hammer, *supra* note 512, at 183; *see also* Franklin, *Unassuming Motivations, supra* note 450, at 11; Herek, *Psychological Heterosexism, supra* note 53, at 160.

Lynching, too, created a feeling of "solidarity" among whites that elite whites were able to turn to their advantage in minimizing the danger of white and black workers joining forces. *See supra* notes 338–40 and accompanying text.

⁵¹⁶ *See* Franklin, *Unassuming Motivations, supra* note 450, at 11–15.

⁵¹⁷ LEVIN & MCDEVITT, *supra* note 11, at 66. Being part of the group also minimizes the individual's sense of blame for participating in the violence. *Id.*; *see also* Franklin, *Unassuming Motivations, supra* note 450, at 12.

⁵¹⁸ Bull, *supra* note 483, at 55; *see also* LEVIN & MCDEVITT, *supra* note 11, at 67; Herek, *Psychological Heterosexism, supra* note 53, at 161 (stating that the leader of the "Blue Boys," a self-defined group of gay bashers, "seemed to seek recognition and acceptance from a larger audience; he fantasized that people who read about the group's exploits would cheer them on, much the way that baseball fans cheer a home run").

[School].”⁵¹⁹

Through their violence, perpetrators “create” the status that they seek, for the violence is a way of denigrating their gay victim and thereby “positively” differentiating themselves from the “out-group”⁵²⁰ that the victim represents.⁵²¹ The status that perpetrators derive from gay-bashing is not without ideological content. Young men may see attacking a gay man as a way to “affirm their heterosexuality or masculinity”⁵²² or to exhibit their adherence to “the social order”⁵²³ by enforcing society’s rules about gender.⁵²⁴ (This may explain why

⁵¹⁹ COMSTOCK, *supra* note 196, at 92; *see also* Weissman, *supra* note 459, at 172 (quoting “Gerry”).

⁵²⁰ Hamner, *supra* note 512, at 180. Hamner defines the terms “in-group” and “out-group” as follows:

An “in-group” is any group with which an individual identifies and feels a sense of membership. People often identify simultaneously with more than one in-group. Which in-group is the most salient at any one time depends partly on situational factors. . . .

“Out-groups” are any social groups with which individuals compare their own in-group to evaluate it and thus make judgments about themselves. Whereas the number of out-groups to which one might compare oneself is seemingly infinite, a relatively small number of out-groups are actually relevant at any time. As with in-groups, the salience of a particular out-group depends on the situation.

Id. Hamner notes that determining what constitutes a relevant out-group is often a circular process, because the perpetrators’ discrimination against a particular group itself makes that group a relevant out-group. *Id.* at 184–85. Nevertheless, “[t]he ubiquitous heterosexism of American society, . . . makes gay people a potentially relevant out-group for everyone who identifies as a heterosexual, regardless of their membership in other in-groups.” *Id.* at 180.

⁵²¹ The violence is a way of denying the out-group member access to valued material resources while increasing the in-group’s access to them; it enables the perpetrators to create a “negative evaluation” of gay men and lesbians, and thereby to positively differentiate their in-group from that out-group. *Id.* at 180–82. Hamner notes further that individuals may be more strongly motivated to enhance their in-group’s status by denigrating the out-group than by improving the in-group’s position, citing studies that have shown that in-group members will “discriminate against out-group members even when it has meant sacrificing their own overall gain” and “that in-group members who were able to discriminate against out-group members scored higher on several measures of self-esteem than did . . . in-group members who were not allowed to discriminate . . .” *Id.* at 181 (citation omitted); *see also* Franklin, *Unassuming Motivations*, *supra* note 450, at 11; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044–46 (1995); Wang, *supra* note 6, at 96, 126–27.

⁵²² Herek, *Psychological Heterosexism*, *supra* note 53, at 161.

⁵²³ COMSTOCK, *supra* note 196, at 94.

⁵²⁴ *See* Cotton, *supra* note 436, at 3000; *see also* Franklin, *Unassuming Motivations*, *supra* note 450, at 7–11. Through her research on admitted anti-gay assailants, Franklin “came to conceptualize the violence not in terms of individual hatred but as an extreme expression of

anti-gay attacks often occur in the presence of the perpetrators' female friends or "cheerleaders.")⁵²⁵

The decision to commit anti-gay violence therefore may be more reflective of the perpetrator's understanding of the cultural ideology than of his own hostility toward gay men.⁵²⁶ That is, the perpetrator may target gay men not so much because he "hates" them but because his needs or desires converge with a cultural ideology that has identified gay men as suitable victims and vehicles for meeting those needs.⁵²⁷ Thus, situational factors—such as the desires to alleviate boredom, to receive recognition, to bond with peers or respond to pressure from them—most likely in some combination⁵²⁸—may be stronger influences on perpetrators than their own attitudes or beliefs.⁵²⁹ Nevertheless, as Herek observes, "obviously [the perpetrators] don't have strong feelings against it or they wouldn't [go] along with it."⁵³⁰ Perhaps, then, the perpetrator's attitude toward gay men and lesbians is most aptly described as a willingness to take advantage of society's prejudice against them in order to reap the benefits associated with victimizing them.⁵³¹

3. *Material or Financial Gain: The "Shakedown," Blackmail, and Robbery*

When the cultural ideology has identified particular social groups as "safe" or "suitable" targets for violence, it also may render those groups especially vulnerable to more calculated, profit-seeking crimes.⁵³² As with lynching,⁵³³

American cultural stereotypes and expectations regarding male and female behavior." *Id.* at 7.

⁵²⁵ LICENSED TO KILL (Arthur Dong/DeepFocus Productions 1997) (containing an interview with Jeffrey Swinford, who was convicted of murdering and robbing a gay man and who stated, with reference to gay bashing, "girls, you know, they would like ride along sometimes, . . . like cheerleaders"); see also Cotton, *supra* note 436, at 3000.

⁵²⁶ See Herek, *Psychological Heterosexism*, *supra* note 53, at 164.

⁵²⁷ See *id.* at 156; see also COMSTOCK, *supra* note 196, at 93–94; LEVIN & MCDEVITT, *supra* note 11, at 68.

⁵²⁸ See Franklin, *Unassuming Motivations*, *supra* note 450, at 2 ("[I]n fact, my interviews [with admitted assailants of gay men] supported the thesis of *multiple determinism*, in which a variety of social, psychological, and situational forces converge to create a violent incident.").

⁵²⁹ See Herek, *Psychological Heterosexism*, *supra* note 53, at 163.

⁵³⁰ Cotton, *supra* note 436, at 3000 (quoting Herek).

⁵³¹ See COMSTOCK, *supra* note 196, at 94; LEVIN & MCDEVITT, *supra* note 11, at 68; Hammer, *supra* note 512, at 180–83; Herek, *Psychological Heterosexism*, *supra* note 53, at 164.

⁵³² For example, Asians and Jews are often viewed as "easy" or "profitable" targets for property crimes. See, e.g., H.R. REP. NO. 103-244, at 3 (1993) ("Asian Americans have noted a dramatic increase in anti-Asian violence as 'Japan-bashing' has become common."); Note,

economic motivations—whether alone or in combination with motivations such as those described above⁵³⁴—can induce perpetrators to engage in acts that might appear to be driven only by “hate.” Gay men provide a striking example of this phenomenon. Sociologists have found that gay men are particularly susceptible to certain categories of property crimes because perpetrators of those crimes often take sexual orientation into account when choosing a victim.⁵³⁵ Some of the property crimes to which gay men are susceptible *because* they are gay seem to be especially heinous, playing as they do on the victims’ presumed fear of revealing their sexual orientation and thereby exposing themselves to further abuse.⁵³⁶ While this aspect may make property crimes that target gay men appear to be unique, examining these crimes illustrates the important role that the cultural ideology plays in marking particular groups as suitable victims, thereby contributing to perpetrators’ inclination to target them. It also reveals in stark terms the “rationality” behind bias crimes that play upon a group’s social vulnerability, for perpetrators of both property crimes and personal crimes rely on many of the same stereotypes and assumptions concerning the target group. Thus, examining the crimes discussed in this subpart can enhance our understanding both of property crimes to which other social groups are vulnerable and of bias crimes generally.

The property crimes to which gay men are susceptible include

Racial Violence Against Asian Americans, *supra* note 68, at 1929–30. Whether property crimes, such as extortion and robbery as described in this subpart, can be prosecuted as bias crimes would depend upon whether a particular jurisdiction’s bias crime statute covers the relevant underlying property crime. *See supra* note 56 (describing penalty enhancement statutory model). Many do. Jurisdictions that have enacted general penalty enhancement statutes that apply to all crimes, such as the federal sentencing guideline at U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1997), or that have designated relevant parallel crimes as predicate offenses, such as D.C. CODE ANN. § 22-4001 (robbery), could treat some or all of the crimes discussed in Part IV.B.3 as bias crimes.

In addition, these crimes do not always involve physical violence, but the threat of violence often pervades the crime—either through the fear that the perpetrator himself will use violence if the victim does not immediately comply with his demands or through the fear that the perpetrator will expose the victim’s sexual orientation to others who will physically harm the victim. *See, e.g.*, LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 89–90 (1970) (discussing his research on the practice of blackmailing tearoom participants); Harry, *supra* note 420, at 546–49; *cf.* Cotton, *supra* note 436, at 2999 (quoting Herek).

⁵³³ *See supra* Part IV.A.

⁵³⁴ *See, e.g.*, Franklin, *Unassuming Motivations*, *supra* note 450, at 5 (describing interview with perpetrator whose gay bashing combined thrill seeking and social bonding aspects with profit motive).

⁵³⁵ *See* Harry, *supra* note 420, at 551.

⁵³⁶ *See infra* notes 537–43 and accompanying text.

"shakedown"⁵³⁷ or "fairy shaking"⁵³⁸ by police officers or persons posing as police officers, blackmail by friends or acquaintances, and robbery or "fag-bashing" by strangers.⁵³⁹ While the modes of operation may differ, all of these crimes depend to a large extent on the perpetrators' assumption that gay men are socially vulnerable. The shakedown, blackmail, and fag-bashing all constitute what sociologist Joseph Harry calls "derivative forms of deviance."⁵⁴⁰ That is, they are criminal acts that target stigmatized persons because the perpetrator believes that such a person either will be reluctant to take protective action (such as calling police) if such action might reveal his "discreditable status,"⁵⁴¹ thereby exposing him to violence or discrimination from others,⁵⁴² or because he fears he will not receive full legal protection when he seeks it.⁵⁴³ Each of the offenses described in this section relies to varying degrees on one or both of these sources of the victim's vulnerability. Therefore, an individual's susceptibility to each type of crime may depend on the degree to which the individual is "out": Gay men with more covert lifestyles seem to be more susceptible to the shakedown and blackmail,⁵⁴⁴ while more openly or apparently gay men seem to be more susceptible to robbery.⁵⁴⁵

a. *The "Shakedown"*

The "shakedown" is a form of extortion committed by police officers or imposters posing as police officers.⁵⁴⁶ The practice recently received media attention when it was revealed that a police lieutenant and roommate of the police chief of Washington, D.C. had been carrying out an extortion plot against gay men,⁵⁴⁷ but the "tradition" dates back at least two centuries.⁵⁴⁸

⁵³⁷ Harry, *supra* note 420, at 548 (describing the "shakedown" as "[t]he form of extortion practiced by police or police impostors against deviants").

⁵³⁸ Michael Powell et al., *Lt. Stowe's Sudden Fall From Grace; D.C. Officer Allegedly Had Motive and Means to Blackmail Gay Men*, WASH. POST, Nov. 30, 1997, at A1 (describing "[a] type of extortion scheme known crudely as 'fairy shaking'").

⁵³⁹ See generally Harry, *supra* note 420.

⁵⁴⁰ *Id.* at 546.

⁵⁴¹ See *id.* at 546 (stating that individuals with a stigmatized status often become victims of "derivative deviance").

⁵⁴² See, e.g., Cotton, *supra* note 436, at 2999 (quoting Herek).

⁵⁴³ See Harry, *supra* note 420, at 546.

⁵⁴⁴ See *infra* notes 563-70, 580-82 and accompanying text.

⁵⁴⁵ See *infra* notes 589-92 and accompanying text.

⁵⁴⁶ See, e.g., HUMPHREYS, *supra* note 532, at 89-90 (discussing police participation in blackmail); Harry, *supra* note 420, at 548 (describing a police "shakedown").

⁵⁴⁷ See Avis Thomas-Lester & Toni Locy, *Complaint of Extortion Attempt Led to Probe*

The shakedown generally occurs at or near locations such as public facilities, gay bars, or “lovers’ lanes” where gay men gather to engage in activities including public sex.⁵⁴⁹ A police officer may encounter the opportunity to commit the shakedown legitimately. In most states, engaging in public sex is a criminal offense,⁵⁵⁰ and law enforcement officers often come into contact with potential shakedown victims while acting within the scope of their duties to enforce the laws.⁵⁵¹ However, not all victims have themselves violated the law. An officer also might identify potential targets under the pretense of protecting them from others who would commit crimes against them.⁵⁵² In addition, researchers have noted that one method of law enforcement, which involves the use of “decoys” who pose as willing participants in the proscribed activities, may cross the line from legitimate law enforcement to entrapment, thus unlawfully creating the opportunity for police officers to exploit the target.⁵⁵³ Moreover, one who pretends to be a law enforcement officer acts unlawfully in setting the stage for a shakedown as well.⁵⁵⁴

of Police Unit, Sources Say, WASH. POST, Nov. 12, 1997, at B4 [hereinafter Thomas-Lester & Locy, *Complaint*]; Toni Locy & Avis Thomas-Lester, *Lieutenant Allegedly Acted Alone; But Officials Examining What Soulsby Knew or Suspected*, WASH. POST, Nov. 27, 1997, at C1 [hereinafter Thomas-Lester & Locy, *Lieutenant*]; Michael Powell et al., *supra* note 538, at A1.

⁵⁴⁸ See, e.g., Peter Alldridge, ‘Attempted Murder of the Soul:’ *Blackmail, Privacy and Secrets*, 13 OXFORD J. LEGAL STUD. 368, 374–77 (1993) (discussing English cases of blackmail and shakedown of gay men dating back to the eighteenth century).

⁵⁴⁹ See Harry, *supra* note 420, at 548 (stating that police routinely survey deviant locations).

⁵⁵⁰ See, e.g., ARIZ. REV. STAT. § 13-1403 (1998) (“Public sexual indecency”); CAL. PENAL CODE § 647 (Deering 1998) (“Disorderly conduct”); CONN. GEN. STAT. ANN. § 53a-186 (1999) (“Public indecency”); ILL. COMP. STAT. ANN. § 5/11-9 (West Supp. 1999) (“Public indecency”); NEV. REV. STAT. § 201.190 (1995) (“Commission of certain sexual acts in public”); N.Y. PENAL LAW § 240.35 (McKinney 1999) (“Loitering”); TEX. CODE ANN. § 21.07 (West 1999) (“Public Lewdness”).

⁵⁵¹ See HUMPHREYS, *supra* note 532, at 84, 89–90 (arguing that it is the law not the law enforcer that is to blame for blackmail); Harry, *supra* note 420, at 548 (noting that police officers often come into contact with potential victims through surveillance of deviant areas).

⁵⁵² In the Washington, D.C. case discussed at *supra* note 547, the police lieutenant was alleged to have committed the shakedown against men he identified as targets through his duties as head of a special unit that investigated such extortion plots. See Avis Thomas-Lester & Toni Locy, *Soulsby’s Friend Accused of Extortion; D.C. Lieutenant Supervised Unit That Investigates Shakedowns*, WASH. POST, Nov. 26, 1997, at A1.

⁵⁵³ See HUMPHREYS, *supra* note 532, at 87–88 (describing cases); see also *id.* at 90–93 (detailing an interview with former decoy); Harry, *supra* note 420, at 559 (suggesting that police entrapment occurs).

⁵⁵⁴ See, e.g., CAL. PENAL CODE § 146a (Deering 1998) (“Impersonating an officer”); ILL. COMP. STAT. § 5/17-2 (West Supp. 1999) (“Impersonating [Member of Police Organization]”);

Whether the perpetrator has legitimately "caught" the victim in an illegal act or illegitimately entrapped him, an unlawful shakedown occurs when the perpetrator extracts payment⁵⁵⁵ from the victim by threatening to arrest or to "discredit" him—specifically, to expose the victim's sexual practices or sexual orientation to his significant others or the public.⁵⁵⁶ Officers also may use the threat of arrest and exposure as a way of extracting payment in situations where the victim has engaged in no proscribed activity.⁵⁵⁷ In some cases, the victim himself may initiate the payoff.⁵⁵⁸ However, as sociologist Joseph Harry points out, citizen initiation of the payoff renders the shakedown no less coercive, for it merely reflects the "institutionalized" nature of the practice.⁵⁵⁹

Perpetrators of shakedowns experience a high rate of success: Individuals who report being victims of shakedowns also report a high degree of compliance with the perpetrators' demands.⁵⁶⁰ Victims comply partly because they wish to avoid criminal penalties and the inconvenience associated with arrest and trial.⁵⁶¹ A more compelling reason for cooperating, however, is the victims' fear that

MD. ANN. CODE art. 27, § 440 (Supp. 1999) ("Impersonating police officers"); N.Y. PENAL LAW § 190.25 (McKinney 1999) ("Criminal impersonation in the second degree"); N.Y. PENAL LAW § 190.26 (McKinney 1999) ("Criminal impersonation in the first degree"); WASH. REV. CODE ANN. § 9A.60.040 (Supp. 1999) ("Criminal impersonation").

⁵⁵⁵ In Humphreys's study, respondents reported making payoffs to the police in the form of straight cash, "donations" . . . to a "charity fund," and "sexual services rendered." HUMPHREYS, *supra* note 532, at 89.

⁵⁵⁶ See Harry, *supra* note 420, at 548. The victim may be exposed to significant others who may have to bail the victim out or to the public if the newspaper publishes the names of persons who have been arrested. See *id.* at 549; *cf.* HUMPHREYS, *supra* note 532, at 94 (stating that a victim's social identity is at stake).

⁵⁵⁷ Sociologist Laud Humphreys has recounted his own experience with such a "pseudo-arrest," which occurred when he was "standing about ten feet outside a tearoom [public restroom used for public sex]" talking with a potential survey respondent for his research. Two detectives confronted Humphreys and the other man, demanding to know where they lived and their names. After telling them where he lived, Humphreys refused to give the officers any more information until he talked with an attorney. The other man was more compliant; he answered the officers' questions and, after walking with one of the detectives for a minute, was permitted to leave. Humphreys, in contrast, was arrested and driven to the police station. The officers refused to tell him what the charges against him would be, told him that he "should have thought about that before" when he stated that he was "concerned about letting [his] wife know," and insisted that they phone his wife for him, rather than allowing Humphreys to call her. HUMPHREYS, *supra* note 532, at 94–96.

⁵⁵⁸ See Harry, *supra* note 420, at 560; see also HUMPHREYS, *supra* note 532, at 89 (citing a case where an individual "bought off" the police on eight occasions).

⁵⁵⁹ See Harry, *supra* note 420, at 560.

⁵⁶⁰ See *id.* at 559.

⁵⁶¹ See *id.* at 548.

others will discover their sexual orientation or practices.⁵⁶² The most attractive shakedown targets therefore are those men who engage in a covert or closeted lifestyle.⁵⁶³ Many of the victims are in heterosexual marriages,⁵⁶⁴ and only a very small percentage are “socially ‘gay’” or part of a community of gay friends and acquaintances.⁵⁶⁵ Sociologists Brian Miller and Laud Humphreys have referred to such men as “homosexual marginals,”⁵⁶⁶ and explained that they “operat[e] on the periphery of gay institutions and social networks.”⁵⁶⁷ Their social situations make such men “appear to [be] ideal candidates for [a] successful shakedown,”⁵⁶⁸ because men who strive to conceal their sexual practices are especially fearful of having their activities revealed,⁵⁶⁹ and men who do not socialize within a gay network lack “a supportive reference group of stigmatized others.”⁵⁷⁰

Several factors combine to make the shakedown an appealing crime: “The

⁵⁶² See HUMPHREYS, *supra* note 532, at 89–90; *see also* Harry, *supra* note 420, at 546–49.

⁵⁶³ See HUMPHREYS, *supra* note 532, at 104–16, 125–29 (describing participants in his study who maintained more covert lifestyles); *id.* at 145–48 (discussing consequences and implications of maintaining covert lifestyle).

⁵⁶⁴ Recognizing that such men would be especially vulnerable to his scheme, discussed at *supra* notes 547, 552, D.C. police lieutenant Stowe identified potential victims by looking for “vehicles that appeared to belong to men with families—minivans and cars with kiddie seats in them—parked outside gay clubs.” Thomas-Lester & Locy, *Lieutenant*, *supra* note 547, at C1.

⁵⁶⁵ Harry, *supra* note 420, at 550 (citing HUMPHREYS, *supra* note 532).

⁵⁶⁶ Miller & Humphreys, *supra* note 423, at 175. Homosexual marginals “compris[e]d] the majority of victims” in Miller and Humphreys’s study of murders of gay men. *Id.*

⁵⁶⁷ *Id.* at 177.

⁵⁶⁸ Harry, *supra* note 420, at 551.

⁵⁶⁹ Married men, in particular, would seem to be obvious targets for the shakedown for this reason. The married participants in Humphreys’s study responded to survey questions in a way that indicated it was very important to them to maintain the appearance of being in “exemplary marriages.” HUMPHREYS, *supra* note 532, at 105. In addition, “[t]he married man who engages in homosexual activity must be more cautious about his involvement in the subculture than his single counterpart.” *Id.* at 110.

⁵⁷⁰ Harry, *supra* note 420, at 550–51. A man who socializes within a supportive group has less to lose if his activities are revealed, as most of the people who are close to him already are aware of his lifestyle. *See* HUMPHREYS, *supra* note 532, at 132 (stating deviance “is made easier and safer by the communication networks that are built into deviant subcultures.”); Harry, *supra* note 420, at 548. Further, the support group itself can provide the man with the information and skills he needs to avoid and defend against “entrapment and exposure.” HUMPHREYS, *supra* note 532, at 133. For example, someone within the network can learn which facilities are being monitored more closely and therefore which to avoid, and can learn how “to manipulate the game to [his] advantage, accompanied by the means to buy and bluff [his] way out of danger.” *Id.* at 132–33.

strong public disapproval believed to attach to homosexuality, the extreme reluctance of homosexuals to report victimization (particularly at the hands of the police), and the discretion the officer may exercise in deciding when homosexual behavior is an 'offense,' all serve as inducements."⁵⁷¹

Police officers and police impersonators are in a favorable position to take advantage of the shakedown victims' fears of exposure because they can credibly threaten arrest and publicity. Indeed, as Harry explains, the "official function [of police] is that of being full-time paid discreditors empowered to use continuing physical coercion which can compel information about significant others from the victim."⁵⁷² Thus, the police shakedown is a crime in which both bodily harm and social harm to members of a socially vulnerable target group are threatened and used by the perpetrator to obtain material gains.⁵⁷³

b. *Blackmail*

Gay men also are susceptible to a more straightforward type of extortion—old-fashioned blackmail by acquaintances or even friends.⁵⁷⁴ But for his lack of reliance on official authority to arrest and expose the victim, the blackmailer commits a crime nearly identical to the police shakedown:⁵⁷⁵ he coerces payment from the victim by threatening to reveal discrediting information to significant people in the victim's life, such as his relatives, friends, or employer.⁵⁷⁶

A textbook example of this crime is the federal extortion case, *United States v. Lallemand*.⁵⁷⁷ Lallemand was an unemployed man who wanted to raise money because his wife was pregnant. He decided that blackmailing a married gay man would be a good way to do that because he was familiar with a forest preserve that was frequented by gay men "who appeared, from their dress and cars, to have money."⁵⁷⁸ Lallemand went to the forest preserve, met a man who Lallemand determined was married, and invited the man back to his apartment where they engaged in a sex act. Lallemand videotaped their activity using a

⁵⁷¹ HUMPHREYS, *supra* note 532, at 90 (quoting EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS 83 (1965)).

⁵⁷² Harry, *supra* note 420, at 549.

⁵⁷³ Cf. HUMPHREYS, *supra* note 532, at 83 (identifying both social and bodily risks). That is, it is a crime that "seem[s] to combine both coercive and discrediting forms of victimization." Harry, *supra* note 420, at 549.

⁵⁷⁴ See Harry, *supra* note 420, at 557.

⁵⁷⁵ See HUMPHREYS, *supra* note 532, at 83.

⁵⁷⁶ See Harry, *supra* note 420, at 548.

⁵⁷⁷ 989 F.2d 936 (7th Cir. 1993).

⁵⁷⁸ *Id.* at 937.

concealed camera. Lallemand later tracked the man, found his name, address, and place of employment, and verified that he was married. He then mailed a copy of the videotape to the victim at his office with a demand for \$16,000. When the victim failed to comply with this and a subsequent demand for money, Lallemand mailed a copy of the tape to the victim's home, where the victim's wife opened it. At some point after the blackmail attempt, the victim attempted suicide.⁵⁷⁹

The Seventh Circuit, affirming Lallemand's sentence on appeal, noted that he had chosen his victim based upon the fact that the victim belonged to "a particularly susceptible subgroup of blackmail victims" who were made so due to their social environment.⁵⁸⁰ The court explained:

Blackmail victims are not all susceptible to the same degree. . . . A married homosexual or bisexual is likely to be deeply "closeted"; to have not only a wife, but children, who are ignorant of his sexual proclivity. Exposure threatens his marriage, his relationship with his children, and his status in the heterosexual milieu that he by preference inhabits by virtue of his closeted state.⁵⁸¹

Thus, blackmail, like the shakedown, seeks to take advantage of the victim's fear of the consequences of revealing information that would identify him as a member of a stigmatized social group. It also takes advantage of the law enforcement system's presumed hostility toward gay men, for many perpetrators assume that they will get away with their crimes because gay men will not expect to receive favorable treatment from the police and therefore will be reluctant to contact them.⁵⁸² Again, the perpetrator's targeting of members of a particular social group is calculated to minimize the costs and maximize the

⁵⁷⁹ See *id.* at 937-38.

⁵⁸⁰ *Id.* at 940.

⁵⁸¹ *Id.* (affirming application of "vulnerable victim" sentence adjustment, now at U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1997)).

⁵⁸² See, e.g., Harry, *supra* note 420, at 546. While the schemes employ similar strategies, blackmail tends to be a less successful enterprise than the shakedown. In Harry's study, for example, "only 35% of the respondents who were threatened with extortion actually gave the extortionist something. Of this 35%, 79% made one-time payments to the extortionist(s), 13% made repeated payments, and the remainder were involved in combinations of these two." *Id.* at 557. A couple of factors may account for this difference in success rates. First, unlike the shakedown, blackmail tends to be perpetrated by "amateurs," such as acquaintances and friends of the victim. See *id.* In addition, blackmailers do not target exclusively men with covert lifestyles, because they can more easily identify targets who are "out" or who appear to conform to stereotypes of gay men. *Id.* at 558. Unless the target is closeted and therefore both fearful of being exposed and lacking the social support of gay friends, the blackmail attempt is not likely to succeed because the victim is better able to resist the threat of social harm. *Id.* at 559.

benefits of his criminal endeavor.

c. *Assault and Robbery*

Commonly held stereotypes of gay men make them susceptible to another, "unsophisticated"⁵⁸³ type of property crime: what Harry refers to as "fag-bashing,"⁵⁸⁴ or robbery. In this crime, the perpetrator uses primarily the threat of physical, as opposed to social harm to extract money or other property from the victim. In other words, rather than threatening to discredit the victim, he uses physical coercion, such as a beating, to attain his goal.⁵⁸⁵ Fag-bashing closely resembles—and is often connected to⁵⁸⁶—"recreational" anti-gay violence.⁵⁸⁷ It is typically a stranger-on-stranger crime in which a group of young, ostensibly heterosexual males assault or rob one or two gay men;⁵⁸⁸ it tends to occur in areas that are identified with gay men, such as gay neighborhoods; and victims tend to be men who visibly conform to stereotypes of gay men or associate with others who do.⁵⁸⁹

"Fag-bashing" is a cruder form of extortion than the shakedown or blackmail because, in order to commit it, the perpetrator need not have access to any specific information about the individual victim.⁵⁹⁰ Instead, the perpetrator's method of selecting a victim and executing the crime relies almost entirely on popular stereotypes of and assumptions about gay men.⁵⁹¹ The key assumptions are: that gay men are weak or cowardly and will not fight back, that gay men will not report crimes to the police for fear of being required to reveal their sexual orientation or of being abused by them as well, and that, even if the victim does report the crime, the police will overlook or even approve of it.⁵⁹²

Several of the interviewees in "Licensed to Kill," a documentary that

⁵⁸³ *Id.* at 561.

⁵⁸⁴ *See generally id.* (discussing "fag-bashing," extortion, and shakedowns of gay men).

⁵⁸⁵ *See id.* at 549 (suggesting that cultural victimizations are motivated by brief coercion as opposed to "continuing" coercion).

⁵⁸⁶ *See, e.g.,* Franklin, *Unassuming Motivations*, *supra* note 450, at 5, 11 (describing assaults committed by interviewees that combined "social" anti-gay violence and robbery).

⁵⁸⁷ *See supra* Part IV.B.2.

⁵⁸⁸ *See* Harry, *supra* note 420, at 549–50 (suggesting that fag-bashing occurs between strangers in areas known to be frequented by gay men).

⁵⁸⁹ *See id.* at 555–56 (relaying data showing a higher rate of assault in gay areas).

⁵⁹⁰ *See id.* at 547–48 (stating that a victimizer must rely on popular criteria where he has no knowledge regarding the victim).

⁵⁹¹ *See id.*

⁵⁹² *See, e.g., id.* at 546–47; Herek, *Psychological Heterosexism*, *supra* note 53, at 159 (discussing the perception that gays are unlikely to resist attacks).

explores the motivations of men who have killed gays, shared these views in explaining why they assaulted gay men and why gay men were attractive targets for robbery. Corey Burley, who was convicted of capital murder for robbing and killing a gay Vietnamese immigrant, stated:

Back then you know it was the going thing, you know what I'm saying. Hey man, let's go over there and rob a homosexual. . . . More or less we had it embedded in our head that, you know, they're weak. You know what I'm saying, we could take theirs, you know what I'm saying, we could take theirs and get away with it. They wouldn't put up a fight.⁵⁹³

Donald Aldrich, who was sentenced to death for robbing and killing a gay man in a park, explained why robbing a gay man made so much more sense than robbing a "7-11" convenience store:

If you walk into a 7-11 and rob a 7-11 for fifteen to twenty bucks, get your face on videotape, have somebody that's got to call the police or if you can go to a park, rob somebody that's out in the dark, come away with a hell of a lot more, take the car and get a nice system. Because the fact that they are homosexual and they don't want people to know, if they are not going to report it to the police, who are you going to rob?⁵⁹⁴

Jeffrey Swinford, convicted of robbing and murdering a gay man, emphasized society's low regard for gay men: "Not too many people in the world care about a homosexual and the police are the same way. The police aren't going to do anything in Little Rock to help them. I know. I know this. I know police officers. They just aren't interested."⁵⁹⁵

The perpetrators' assumptions are not unfounded. Gay victims in fact frequently decline to report their victimization,⁵⁹⁶ and when they do report crimes against them they often are subjected to further abuse at the hands of law enforcement officers⁵⁹⁷ or other people.⁵⁹⁸

⁵⁹³ LICENSED TO KILL, *supra* note 525 (interview with Corey Burley).

⁵⁹⁴ *Id.* (interview with Donald Aldrich).

⁵⁹⁵ *Id.* (interview with Jeffrey Swinford). Aldrich echoed this view, noting that—until Texas passed a hate crime statute—telling police of his hatred for homosexuals had "helped [him] out" with the police. *Id.* (interview with Donald Aldrich).

⁵⁹⁶ See Cotton, *supra* note 436, at 2999 (stating that victims are unwilling to report attacks because the police are often thought to be equally abusive); see also, e.g., LEVIN & MCDEVITT, *supra* note 11, at 70 (explaining that those who have not "come out of the closet" may not report attacks because they fear their sexual orientation will be revealed).

⁵⁹⁷ See, e.g., Cotton, *supra* note 436, at 2999 (noting that the police themselves are known to be abusive).

4. *Self Interest and Suitable Victims*

As with lynching, closer examination of anti-gay violence—a “prototypical” example of bias crime—reveals that the conventional assumptions about perpetrators’ motivations derived from the prototype are inadequate to explain why those crimes occur. While obvious differences exist between the two cases, it is interesting to note the similarities between the perpetrators’ interests in lynching and gay-bashing. Notably, perpetrators of both crimes could obtain thrills, feelings of closeness and solidarity with members of their own groups, and economic rewards.

Upon examination, many perpetrators of anti-gay violence resemble less the irrational, deviant, hate-filled “prototypical” perpetrator⁵⁹⁹ and more the “hypothetical” perpetrators who seem so problematic from a legal and law enforcement perspective.⁶⁰⁰ Perpetrators who engage in “social” or “recreational” gay-bashing⁶⁰¹ conform closely to the description of the hypothetical offender who selects a victim from a particular social group not because of his own hostility toward that group, but because he seeks to impress his peers or to evoke a strong reaction from observers.⁶⁰² As bias crimes experts and perpetrators themselves have explained, gay-bashing brings rewards in the forms of excitement, peer bonding, and recognition—whether or not the perpetrator independently feels hostility toward gays.⁶⁰³ Those who commit property crimes against gays—the shakedown, blackmail, and robbery⁶⁰⁴—are real-life versions of the calculating, profit-seeking hypothetical perpetrator whom legal experts and law enforcement officers have such difficulty labeling a bias crime perpetrator and punishing accordingly.⁶⁰⁵ These perpetrators are not simply driven to further a deeply held personal hostility toward gays, but are

⁵⁹⁸ As psychologist Gregory M. Herek has explained, “If something shows up in the newspaper identifying them as the target of a gay attack, that can set them up for a lot of other harassment and discrimination from other people that has nothing at all to do with the original assault.” Cotton, *supra* note 436, at 2999 (quoting Herek).

⁵⁹⁹ See *supra* Part III for a discussion of the conventional assumptions concerning the prototypical perpetrator.

⁶⁰⁰ See *supra* notes 66–73, 154–56, 162–82 and accompanying text (discussing “Calculating Discriminator,” “Violent Show-Off,” and other “ambiguous” hypotheticals).

⁶⁰¹ See *supra* Part IV.B.2.

⁶⁰² This hypothetical perpetrator, the “Violent Show-Off,” is described at *supra* note 69 and accompanying text.

⁶⁰³ See *supra* notes 507–31 and accompanying text.

⁶⁰⁴ See *supra* Part IV.B.3.

⁶⁰⁵ This type of perpetrator, the “Calculating Discriminator,” is described at *supra* notes 66–68 and accompanying text.

motivated by a “desire for personal gain with minimal risk.”⁶⁰⁶ Further complicating our understanding of anti-gay violence, experts tell us that most perpetrators probably act upon a combination of the motivations described above, and perhaps other motivations as well.⁶⁰⁷

Their particular goals and methods may differ, but all of the perpetrators of anti-gay violence described above choose to target gay victims for opportunistic reasons. That is, they select gay victims as the result of their rough analysis of a cost-effective way to obtain their desired rewards. In each case, the perpetrator’s choice of victim and mode of operation are tailored to take advantage of factual assumptions the perpetrator makes about gay men.⁶⁰⁸ All of the perpetrators described in this Part anticipate receiving their desired rewards because they assume that gay men are socially vulnerable. That is, they view gay individuals as “easy,” attractive targets because of the low esteem in which gay people are held by many in society. Specifically, perpetrators who seek social benefits from gay-bashing perceive that others view gays as less worthy, and that, therefore, one can derive status and recognition from assaulting them. Those who seek material gain choose gay victims on the assumption that gay men—who themselves are all too aware of society’s disapproval—would prefer to part with their property than fight back or report the crime and risk revealing their sexual orientation. Whatever the perpetrator’s specific objectives, committing crimes against gay men is made all the more attractive by the perception that police, judges, juries, and others in society will not take seriously offenses against gays.⁶⁰⁹ In other words, similar to the way that white southerners perceived blacks during the lynching era,⁶¹⁰ gay men are seen as “suitable victims”—“both physically suitable (available) and psychologically desirable.”⁶¹¹

⁶⁰⁶ Herek, *Psychological Heterosexism*, *supra* note 53, at 159.

⁶⁰⁷ See Franklin, *Unassuming Motivations*, *supra* note 450, at 2, 19–20 (stating that anti-gay violence results from a combination of social factors); Herek, *Psychological Heterosexism*, *supra* note 53, at 162–63 (arguing that perpetrators of anti-gay assaults act from several motives simultaneously).

⁶⁰⁸ As sociologist Richard A. Berk has explained, “[T]he victim’s symbolic status is used as a marker to retrieve relevant ‘factual’ information about him. It is the factual information that motivates the crime, not the marker itself.” Berk et al., *Thinking More Clearly*, *supra* note 22, at 128.

⁶⁰⁹ See Harry, *supra* note 420, at 550–51 (citing cases of police extortion).

⁶¹⁰ See *supra* Part IV.A.3.

⁶¹¹ Harry, *supra* note 420, at 551; see also COMSTOCK, *supra* note 196, at 94 (stating that gays are targeted because they lack the resource of police protection); Franklin, *Unassuming Motivations*, *supra* note 450, at 19–20 (listing social reasons that gays are targeted); Herek, *Psychological Heterosexism*, *supra* note 53, at 164 (“[I]t is cultural heterosexism that defines gay people as suitable targets . . .”).

V. THE COMPLEXITIES OF "HATE": RECOGNIZING RECIPROCAL, REINFORCING RELATIONSHIPS

Social science research into the motivations behind the "prototypical" bias crimes of lynching and gay-bashing reveals that the conventional understanding of such crimes is seriously flawed. The major flaw is that the conventional view attributes the perpetrator's actions solely to his or her assumed dispositional qualities and fails to consider situational factors that often play an important role in propelling those actions. Because of the heavy influence that the prototype has exerted on legal thinking about bias crimes,⁶¹² this conventional view has distorted not just perceptions of *prototypical* perpetrators' motivations, but also identification of the motivations for which the law should enhance punishment.⁶¹³ Accordingly, it is time to rethink the conventional assumptions concerning bias crime perpetrators and to reconsider the standard conceptualization of bias crimes law. The research presented above provides a new starting point for that undertaking.

Based on that research, an important first step would be for bias crimes law to incorporate an understanding of the importance of social context in constructing and reinforcing the motivations for committing bias crimes. The popular, animus-centered legal model and the assumptions on which it is based reflect the most common error of causal attribution: the tendency to attribute another person's behavior solely to his or her disposition, attitudes, or prejudices, and to overlook the situational factors that influence that conduct.⁶¹⁴ This exclusively inward-looking perspective attempts to understand the perpetrator in isolation from the social context. Social context plays a role in the conventional conception only to the extent that it distinguishes group-based prejudice from other prejudices—against certain types of food, for instance⁶¹⁵—by deeming such prejudice harmful and unacceptable; social context is not recognized as being integral to the perpetrator's biased motivation itself. By thus removing the perpetrator from the social context, the conventional view fails to acknowledge the *reciprocal* relationship between the social context and the perpetrator's motivation. Not only does the social context render a bias motivation "politically salient"⁶¹⁶ or socially harmful,⁶¹⁷ but it also can kindle the desire to commit a

⁶¹² See *supra* Part III.

⁶¹³ See *supra* Part II.

⁶¹⁴ See *supra* notes 47–51 and accompanying text (describing the "fundamental attribution error").

⁶¹⁵ See JACOBS & POTTER, *supra* note 1, at 11.

⁶¹⁶ See *id.* at 16 (distinguishing between crimes motivated by lawful prejudice and unlawful prejudice).

⁶¹⁷ See LAWRENCE, *supra* note 61, at 12 (arguing that bias crime laws should protect

bias crime by making the biased selection of a victim “functional” or rewarding for the perpetrator. In other words, rather than the animus-centered, conventional assumptions set forth in Part III of this Article, it is the *following* three statements that more fully explain the motivations behind even prototypical bias crimes: the social context can sometimes motivate an offender to act on the prejudices of *others*; the social context can make it both conformist and logical to discriminate in the selection of a victim; and the social context can make discriminating in the choice of a victim conducive to personal gain.

The way in which the social context influences the decision to commit a bias crime actually comprises two related sets of reciprocal, reinforcing relationships that the conventional view has failed to acknowledge. First, there is a reciprocal and reinforcing relationship between *animus and opportunism*. As the examinations of lynching and gay-bashing revealed, for many perpetrators the desire to target members of particular groups—their “distaste” for those groups, if you will—was related to the benefits that could be derived from victimizing such groups. These benefits, in turn, depended upon the low regard in which those groups were held by persons other than the perpetrator. This combination of the perpetrator’s antipathy for the target group, his opportunism, and society’s lack of regard for the target group are related to the second important relationship: the reciprocal, reinforcing relationship between *the perpetrator’s motivation and the harms of bias crime*. Whether or not they “hate” the target group, perpetrators both depend on and perpetuate the harmful effects of bias crime. That is, the desirability of selecting a victim from a particular social group is tied to pre-existing harms caused by past discrimination against the group (including bias-motivated violence),⁶¹⁸ which has marked that group as suitable victims. In turn, perpetrators of new bias crimes continue the pattern by contributing further to a social environment in which the victimization of particular groups can bring rewards to its perpetrators.

against divisions that run deep in the social history of the culture).

⁶¹⁸ See Wang, *supra* note 6, at 125–28 (stating that bias motivated crimes can create the conditions for prejudice and discrimination).

A. *The Reciprocal, Reinforcing Relationship Between Animus and Opportunism*

As the discussion of lynching and gay-bashing revealed, even prototypical bias crime perpetrators are not necessarily driven by personal animus toward the target group. As Dr. Herek has pointed out, one who commits group-based violence need not feel hatred or hostility toward the target group; he or she need only be willing to exploit the supposed vulnerabilities of the target group.⁶¹⁹ That is, whether or not an individual hates and seeks to harm members of a particular social group, she may still see the "advantage" in robbing a member of that group if she expects to get away with the crime because the victim is reluctant to seek assistance from others for fear of being exposed to further abuse or is unlikely to receive such aid if it is requested. Similarly, a perpetrator need not feel hatred toward a group in order to desire the social bonding and social status that derive from assaulting a member of that group. Yet these perpetrators' lack of animus need not—and, I contend, should not—remove their crimes from the category that we punish as "bias crime." Indeed, as we have seen with lynching,⁶²⁰ even the prototype can accommodate an understanding of the perpetrator's state of mind that encompasses a range of opportunistic motivations beyond hatred or hostility. In addition, whether or not perpetrators "recognize themselves in the stereotyped image of the hate-filled extremist"⁶²¹ (and psychologists tell us that many do not),⁶²² victims and observers are likely to perceive their acts as being directed at the victim because of his social group status.⁶²³ When the victim and others explain the crime in this way—and they are likely to do so in order to fulfill their driving need to explain negative events⁶²⁴—the crime will produce many of the greater harms that are associated

⁶¹⁹ Cotton, *supra* note 436, at 2999 (quoting Herek in reference to anti-gay violence). Cf. Herek, *Psychological Heterosexism*, *supra* note 53, at 159 ("[T]he perpetrator might well have been responding more to situational cues than to personal prejudice—for example, an unexpected opportunity to rob an easy target.").

⁶²⁰ See *supra* note 194 and accompanying text.

⁶²¹ Franklin, *Unassuming Motivations*, *supra* note 450, at 20.

⁶²² See COMSTOCK, *supra* note 196, at 93–94; Franklin, *Unassuming Motivations*, *supra* note 450, at 20; Herek, *Psychological Heterosexism*, *supra* note 53, at 159.

⁶²³ See, e.g., Herek, *Psychological Heterosexism*, *supra* note 53, at 159 (noting that an "attack may well be experienced as a hate crime regardless of the assailant's actual motives"); Wang, *supra* note 6, at 109–10, 129–30 (discussing a victim's tendency to assume her misfortune is attributable to her social status).

⁶²⁴ See Wang, *supra* note 6, at 97, 100–01, 106 (discussing the ways in which a victim copes with and observers process a traumatic event).

with the acts of such “extremists.”⁶²⁵ Moreover, that members of certain social groups can be targeted not just out of an individual perpetrator’s hatred but also out of a perpetrator’s recognition that they are widely viewed as “suitable victims” points out the more significant harm in bias crimes⁶²⁶ and would seem to create an even greater need for the law to address their selective victimization.

B. The Reciprocal, Reinforcing Relationship Between the Motivations and the Harms

The law also must recognize the “feedback loop” that runs between the motivation to commit a bias crime and the harms that result from bias crimes. As noted above, perpetrators can anticipate benefits in committing bias crimes where members of the target group are regarded as “suitable victims.” It is important to understand that this status is itself the product of a history of discriminatory acts against the group, and that those acts of discrimination include bias-motivated violence like that committed by the perpetrator himself. Bias-motivated violence against particular groups creates the conditions for prejudice and discrimination because it defines the “safe” (or at the very least, the “expected”) targets for violence, aggression, and other forms of ill treatment. Observers of the crime will understand immediately and viscerally why the victim was singled out, even if they themselves would never engage in such action. This is because observers recognize the pattern that such crime follows. The social context surrounding acts of violence, harassment, intimidation, and ridicule of particular groups makes those acts “possible and even acceptable.”⁶²⁷

In selecting the victim as a vehicle for fulfilling his own desires for social, psychological, or material rewards, the bias crime perpetrator takes advantage of the perception that the group is a safe or suitable target. However, he does not only use the past harms that have marked the victim’s group as an aid to his own goals. Through his crime, he also perpetuates the harms that continue to mark that group as suitable for use by other perpetrators. The law should recognize both that the inspiration for targeting the victim’s group did not originate with

⁶²⁵ See Berk et al., *Thinking More Clearly*, *supra* note 22, at 128 (noting that victims may experience bias-motivated crimes as being “hate” motivated regardless of the perpetrator’s true motivation); Franklin, *Unassuming Motivations*, *supra* note 450, at 1 (stating that “victim accounts suggest that assailants possess tremendous rage”); Herek, *Psychological Heterosexism*, *supra* note 53, at 159; Wang, *supra* note 6, at 129–30 (noting that “contrary to the conventional view, the harms we associate with bias crimes can arise in absence of racial animus . . .”).

⁶²⁶ See *infra* note 627 and accompanying text.

⁶²⁷ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 61 (1990); see also Wang, *supra* note 6, at 125 (discussing the influence of observers’ perceptions).

the individual perpetrator and that each perpetrator contributes to a social context that will inspire future perpetrators to commit similar acts.

VI. CONCLUSION

The simplistic, conventional understanding of the motivations behind bias crime has not been informed by the findings of social scientists who have examined the reasons why perpetrators act and reflects a common—but serious—error in how we understand human behavior. The conventional understanding has failed to capture the range and complexity of the perpetrators' motivations and has ignored the ways in which perpetrators are influenced by the social context and other situational factors. Rather than be blinded by the prototype, we must enlarge our field of vision to incorporate this expanded understanding. We also must revise the legal model of bias crime to accommodate the multiple, often opportunistic motivations that are present in many cases. This move requires us to recognize the futility of attempting to categorize a perpetrator's motivation as either "animus" (and hence punishable) or "not animus" (and therefore not punishable).

Once we recognize the reciprocal, reinforcing relationships between opportunism and animus and between the motivations to commit and the harms that flow from bias crime, it becomes clear that the legal model should not be limited by a requirement of "animus." The legal category should be defined by reference to the law's goals, and not by reference to the poorly understood, unrepresentative "prototypical" image that has dominated development of the law to this point. If the goal of bias crimes laws is to redress the greater harms that such crimes produce, then the legal model should cover the full range of cases that give rise to those harms. These cases are not limited to crimes in which "animus" is present; they also include cases where the perpetrator seeks personal rewards but is not driven by hatred or hostility. Of the two legal models that are most prominent at present,⁶²⁸ the discriminatory victim selection model better accomplishes the asserted goals of bias crimes legislation. That model does not exclude crimes motivated by "pure" animus, yet unlike the "racial animus" model it has the potential to cover all crimes that produce the harmful effects associated with bias crimes.

I carry no brief for the "discriminatory victim selection" model nor for any specific legal model. As indicated in the Introduction, this Article was intended primarily to challenge conventional thinking about bias crimes and to offer a new starting point for the dialogue on how the law might best be understood and developed. The question of what type of legal model is best suited to redressing

⁶²⁸ See *supra* Part II.

the harms of bias crime, as well as many other important issues,⁶²⁹ should be open to renewed discussion as we learn more about the problems to which they relate. That dialogue can be most productive if we can guard against the dangers of our misguided tendency to search for meaning in prototypes and to oversimplify the complex phenomenon that we have labeled “hate.”

⁶²⁹ These issues include (but certainly are not limited to): the questions of whether the perpetrator can justly be punished based upon her discriminatory victim selection even if she did not know that her conduct inflicted greater harms, or whether an even less culpable state of mind than intentional selection, such as recklessness or negligence, would justify enhanced punishment where the actor creates the risk that the greater harms of bias crime will be realized, and whether penalty enhancement is the most efficacious way of addressing the goals of bias crime legislation.