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"Suitable Targets"? Parallels and Connections Between "Hate" Crimes and "Driving While Black"

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“SUITABLE TARGETS”?
PARALLELS AND CONNECTIONS BETWEEN “HATE”
CRIMES AND “DRIVING WHILE BLACK”†

Lu-in Wang*

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INTRODUCTION

By placing our topics on the same panel,¹ “Identity and the Criminal Justice System,” the *Michigan Journal of Race & Law* recognizes the similarities among the three ostensibly distinct problems of violence against women, racial profiling, and “hate” or bias crimes. This Essay will elaborate on some of the parallels and connections between hate crimes—crimes in which the victim was selected based on race or other social group status²—and racial profiling, particularly as exemplified by the phenomenon

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1. I presented this Essay on a panel with David Harris and Julie Goldscheid at the University of Michigan Journal of Race and Law’s symposium, “Identities in the Year 2000 and Beyond,” on March 18, 2000. See David Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Statutes*, 6 MICH. J. RACE & L. 237 (2001), and Julie Goldscheid, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265 (2001).

2. See *infra* note 5 for a description of hate crimes legislation. Violence against women might be prosecuted as a hate crime if the applicable statute includes sex or gender as a prohibited basis for discrimination. Whether sex or gender ought to be included in hate crimes laws has been a matter of some controversy. Notably, the Anti-Defamation League of B’nai B’rith (ADL), which drafted a model hate crime statute, has resisted including gender as a protected class. See Steven Bennett Weisburd & Brian Levin, “On the Basis of Sex”: *Recognizing Gender-Based Bias Crimes*, STAN. L. & POL’Y REV., Spring 1994, at 21, 36 (summarizing ADL’s position, which maintains that, in most cases of violence against women, the perpetrator and victim have a personal relationship,

of “driving while Black” (“DWB”)—“police officers stopping, questioning, and even searching Black drivers who have committed no crime, based on the excuse of a traffic offense.”³ It will focus on the ways in which these two practices are commonly understood and how those conventional understandings, which underlie the legal responses to each, overlook the extent to which each practice both reflects and reinforces society’s designation of certain groups as “suitable targets.”

Hate crimes and “driving while Black” bear superficial similarities, but are obviously different in a number of ways. Both are forms of discrimination in which individuals are targeted for unfavorable and even frightening treatment largely on the basis of race or other social group membership.⁴ Yet the two problems seem obviously different in terms of both the legal status of the discriminatory conduct and the specific contexts in which they occur. The hate crime perpetrator’s actions are clearly unlawful, and would be so even without his discriminatory intent,

and it is that relationship—and not the victim’s gender—on which the violence centers). A complete discussion of the arguments for and against including gender in bias crimes legislation is beyond the scope of this Essay. However, many of my observations concerning hate crimes in general might apply specifically to violence against women. For discussion of how courts have approached claims of gender-motivated violence, see Goldsheid, *supra* note 1.

3. David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 265 (1999). Members of other minority social groups, such as Hispanics, also commonly experience discriminatory traffic stops. See, e.g., *id.* at 266 n.5 (pointing out that “it is also common for Hispanic drivers to face pretextual traffic stops. In fact, some legal actions against discriminatory traffic stop practices have been brought exclusively on behalf of Hispanics.”) (citation omitted); Katheryn K. Russell, “*Driving While Black*”: *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 717 and 717–18 n.2 (1999) (noting that “[t]his expression [“DWB”] has been used to describe a wide range of race-based suspicion of Black and Brown motorists,” that “Driving While Brown” refers to racial profiling of Hispanic motorists, and that “Blacks and Hispanics . . . are not the only minorities who report being subjected to traffic stops on the basis of race.”) (citation omitted). Further, driving is not the only context in which race is equated with criminality. See *id.* at 721–25 (describing similar phenomena such as “walking while Black,” “standing while Black,” and “shopping while Black”).

4. It could be argued that a traffic violation triggers the traffic stop in “driving while Black.” However, because minor traffic violations are so common that almost everyone commits them, such violations can support stopping any number of people. See Harris, *supra* note 1, at 253–54. Because police have (and probably need to have) wide discretion in deciding which drivers to stop, traffic violations can and often do serve as pretexts for discriminatory investigation. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 34–41 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 427–28, 432 n. 51 (1997); Harris, *supra* note 3, at 302. The effect of such stops thus falls heavily on drivers who have committed no criminal act, for as Professor Harris has pointed out, “[w]hile police catch some criminals through the use of pretext stops, far more innocent people are likely to be affected by these practices than criminals.” *Id.* at 290 (original emphasis omitted).

for "hate" crimes are just crimes in which the perpetrator selected the victim because of the victim's race, religion, sexual orientation, or other social group status.⁵ Racial profiling, in contrast, occurs within the context of a law enforcement officer's performance of a public duty, and such conduct rarely faces a penalty under current law.⁶

Moreover, the two practices generally can be viewed as dissimilar in kind, comprising different sorts of behavior and experiences. Hate crime

5. The most common form of hate crimes legislation is the penalty enhancement statute, some form of which has been adopted in the majority of states and at the federal level. Most of these statutes follow model "ethnic intimidation" legislation drafted by the ADL in 1981. The model statute increases punishment for a crime where the defendant committed the crime "by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals. . . ." ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE 3 (1994). See also LU-IN WANG, HATE CRIMES LAW, § 8.03[1], and § 10 (1994) (describing features of penalty enhancement statutes). Thus, hate crimes laws simply enhance the penalty for what is already punishable conduct.

Because it increases punishment based upon the defendant's bias motivation, the penalty enhancement approach has been challenged on the ground that it violates the First Amendment by punishing defendants' racist speech, mental processes, or opinions based upon the government's disagreement with their ideological content. Almost all of these challenges have failed. See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding Wisconsin's penalty enhancement statute, Wis. Stat. § 939.645); WANG, *supra* § 10.05[1] (citing and discussing similar cases). See also *infra* note 16 and accompanying text.

6. In *Whren v. United States*, 517 U.S. 806 (1996), the United States Supreme Court "formally sanctioned" use of discriminatory, pretextual traffic stops. COLE, *supra* note 4, at 39; see also Harris, *supra* note 3, at 311 (stating that "*Whren* means that police officers can stop any driver, any time they are willing to follow the car for a short distance."). In *Whren*, the Court foreclosed invoking the Fourth Amendment as an avenue for challenging racially motivated pretextual stops, rejecting the view that "ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." 517 U.S. at 811. The Court stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Instead of the Fourth Amendment, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause. . . ." *Id.* Legal scholars have pointed out, however, that an equal protection challenge would be extremely difficult, if not impossible, to maintain if the pretextual basis for the stop is viewed as a legitimate reason for it and (as would be expected) the officer declines to admit that he or she stopped the driver because of race. See, e.g., COLE, *supra* note 4, at 39-40; Davis, *supra* note 4, at 436-38 (discussing "the obstacles a criminal defendant must overcome when he alleges a denial of equal protection").

For further discussion of *Whren*, see, e.g., COLE, *supra* note 4, at 39-40; Davis, *supra* note 4, at 432-35; Harris, *supra* note 3, at 310-12; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978-83 (1999). In his article, Professor Thompson analyzes the history of the Fourth Amendment and argues that the Court's treatment of racially motivated searches and seizures is not consistent with the intentions of the framers of the Amendment. See *id.* at 991-98. He then suggests doctrinal reforms and nonjudicial remedies that could better effectuate the original intent of the framers to "treat[] racial targeting as a type of harm the amendment was intended to avert." *Id.* at 998-1012.

is often viewed as an extreme or isolated phenomenon that involves conduct that is dramatic and aberrant and is perpetrated by deviant, rage-filled individuals who are “out of touch” with the rest of society.⁷ “Driving while Black,” on the other hand, generally occurs within the context of mundane police traffic stops, and it appears to be so commonplace⁸ that it has become expected, if not accepted.⁹ Furthermore, being stopped by a law enforcement officer, which usually results in just a brief detention, would seem to be a less traumatic experience than being the victim of a crime.¹⁰

This Essay seeks to show that there is less to some of these apparent differences than meets the eye. While hate crimes may tend to be less routine and more violent than discriminatory traffic stops,¹¹ closer examination of each shows the need to complicate our understanding of both. The work of social scientists who have studied bias-motivated violence and of legal scholars who have studied racial profiling—prominent among them my fellow panelist, Professor David A. Harris—

7. See *infra* notes 23–26 and accompanying text.

8. Federal, state, and local governments generally do not maintain statistics on traffic stops and race. See Harris, *supra* note 3, at 276, 320–23 (discussing federal, state, and local data collection initiatives and opposition to them). However, several studies conducted by police agencies, in connection with lawsuits, or by independent academics have found that, in a number of places, Black and Hispanic drivers are stopped by police at rates significantly disproportionate to their presence in the population. See, e.g., David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, at A1 (reporting on internal audits by the New Jersey State Police that “turned up evidence of widespread [racial] profiling along the New Jersey Turnpike” and revealing that the department withheld that information from federal civil rights prosecutors); Davis, *supra* note 4, at 431–32 (discussing statistics collected in New Jersey, Maryland, and Florida that revealed disproportionate numbers of traffic stops of Black and Hispanic drivers, as well as police officers’ admissions in a lawsuit against the city of Reynoldsburg, Ohio, that an informal group of officers that called themselves the “Special Nigger Arrest Team” targeted African Americans for traffic stops and arrest); Harris, *supra* note 1 (presents statistical data of racial profiling in New Jersey, Maryland, and Ohio; and discusses the potential attacks against such data); Harris, *supra* note 3, at 277–88 (discussing studies in New Jersey, Maryland, and Ohio that found that Black drivers were stopped at rates dramatically disproportionate to their percentage of the driving population); see also David Kocieniewski, *New Jersey Argues That the U. S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1 (reporting on the influence on state police tactics of racial profiling methods used, taught, and encouraged in the federal Drug Enforcement Administration’s “war on drugs”).

9. See Russell, *supra* note 3, at 721 (stating, “The very fact that DWB has become so widespread that it has an acronym may mean that it has become an acceptable practice—the acronym makes DWB appear routine, normal and inevitable.”).

10. But see Harris, *supra* note 3, at 288–89 (asserting that “[t]hese stops are not the minor inconveniences they might seem to those who are not subjected to them.”). For further discussion of the effects of DWB, see *infra* notes 112–39 and accompanying text.

11. It is important to note, however, that traffic stops can turn violent and even deadly. See *infra* note 114 and accompanying text.

reveals striking similarities and connections between the two practices. In particular, both hate crimes and racial profiling tend to be condemned only at the extremes, in situations where they appear to be irrational and excessive, but overlooked in cases where they seem logical or are expected. The tendency to see only the most extreme cases as problematic, however, fails to recognize that neither practice is as marginal as it might seem. Both forms of discrimination are strongly influenced by a social context that has designated certain social groups as the accepted or "suitable" targets for ill treatment. They both reflect especially strongly the myth that certain groups are prone to criminality or deviance. In turn, the perpetration of both practices also reinforces both the suitable target designation and myth of criminal propensity by influencing the perceptions and behavior of both members and non-members of vulnerable groups.

By pointing out the parallels and connections between the two practices, I do not mean to suggest that the legal responses to hate crimes and racial profiling should be the same. Rather, I suggest that the legal responses to each should take account of the ways in which that practice both influences and is influenced by the larger social context, as well as how it relates to discrimination, in contexts such as education and employment, that denies some groups equal access to fair treatment and opportunity.

I. CONCEPTIONS OF BIAS: THE BAD, THE GOOD, AND THE INVISIBLE

This Part will discuss similarities in the ways in which hate crimes and "driving while Black" are explained or understood; as well as similarities in how these understandings influence the legal treatment of each. It will first examine some common assumptions about the forces that propel hate crimes, and then relate those points to similar points that have been made by scholars who have studied racial profiling.

The idea that bias-motivated crime should be treated as a distinct legal category is relatively new and has been highly controversial.¹² Proponents of special "hate crimes" laws have cited as justification for those laws the unique and serious harms that hate crimes inflict on the

12. The term "hate crime" probably originated with 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 (2000) (requiring the federal government to collect and publish information concerning bias-motivated crimes). See JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* 4 (1998). The criminal offense that we now know as "hate crime" was introduced in 1981, when the ADL published its model "ethnic intimidation" statute. See ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1-4.

individual victim, the victim's social group (sometimes called the "target group"), and society in general, as well as the greater culpability of the perpetrator.¹³ They also contend that hate crime laws serve an important function in expressing society's condemnation of criminal acts that violate the principles of racial harmony and equality and in giving full expression to society's "commitment to American values of equality of treatment and opportunity."¹⁴ Critics, on the other hand, have argued that the laws—which generally enhance punishment for acts that the law already condemns¹⁵—merely seek to punish the perpetrator for his offensive thoughts and opinions, a purpose that violates the First Amendment right to freedom of expression.¹⁶ Moreover, they argue that the criminal law is an awkward instrument for achieving social change, contending that hate crimes laws will only serve to exacerbate intergroup tensions by sending the message that some groups are "worth" more than others¹⁷ or "need more protection than others"¹⁸ and by promoting an environment of "identity politics" in which various social groups vie for comparable legislative recognition of their victimization.¹⁹

Prominent critics and supporters of bias crimes laws advance these sharply opposing positions on the merits of the laws themselves, but at the same time tend to share a narrow, conventional view of the problem the laws seek to address. This conventional understanding rests upon a caricatured image of a "prototypical" crime and perpetrator²⁰—a one-

13. See generally, e.g., ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1; FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 29–63 (1999); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47 (1997).

14. LAWRENCE, *supra* note 13, at 169.

15. See *supra* note 5 (describing the penalty enhancement approach).

16. See generally, e.g., JACOBS & POTTER, *supra* note 12, at 111–29; Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991) (arguing that ethnic intimidation laws are both unconstitutional and unwise from a policy standpoint); Nat Hentoff, *Beware Stiffer Sentences for Thought Crimes*, WASH. POST, June 19, 1993, at A21.

17. See, e.g., Hentoff, *supra* note 16.

18. See, e.g., Gellman, *supra* note 16, at 385–86.

19. See, e.g., JACOBS & POTTER, *supra* note 12, at 130–34.

20. The prototypical hate crime is one in which the perpetrator and victim are strangers. The perpetrator selects the victim not because of any personal hostility between them or because of any provocative behavior on the part of the victim, but solely because the perpetrator sees the victim as a "fungible" or "interchangeable" member of a social group that the perpetrator hates. The perpetrator commonly utters derogatory group-based epithets before, during, or after the crime, but even if he does not, the act itself is typically characterized by extreme, gratuitous violence or the destruction of property. The fear, injury, and damage inflicted appear to be the perpetrator's only goals, for in the prototypical crime nothing of value is taken. While one-on-one and group-on-group

dimensional image that is reinforced by the great publicity given to the most extreme and brutal cases, such as the 1998 murders of Matthew Shepard²¹ and James Byrd, Jr.²² That is, both sides center their positions on a narrow model of hate crime that recognizes no motivations other than pure animus and tends to identify as "real" hate crimes only the most extreme and dramatic cases. They tend to consider the bias crime perpetrator and his culpability in isolation from the social context, characterizing the perpetrator as a deviant, hate-filled extremist who acts on his own deeply-held hostilities toward the victim's social group.

In particular, the two sides share a common view of the forces that propel bias crimes. This conventional view incorporates three key assumptions that draw a narrow and relatively simplistic picture of the motivations for committing hate crimes.²³ The first assumption is that the perpetrator's bias is personal, based in his own negative opinions or attitudes toward the targeted social group, rather than being a reaction to external forces or stemming from the desire to attain a tangible goal.²⁴ The second assumption is that the perpetrator's bias is deviant and irrational. That is, the perpetrator is viewed as an extremist, a lunatic and a freak: someone whose views are not shared by members of mainstream society and whose actions are neither sensible nor rational, but instead are "driven by" his overpowering hatred for the victim's group.²⁵ The third assumption, which derives from the first two, is that 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,

crimes could fit the pattern, the prototypical crime more commonly is committed by multiple perpetrators on a single victim. See Wang, *supra* note 13, at 49-51.

21. In October 1998, two young men severely beat Mr. Shepard, a gay college student, tied him to a wooden fence in an isolated area, and then left him in near-freezing temperatures. Mr. Shepard was in a coma for almost a week before he died, his skull "too crushed for surgery." See Elaine Herscher, *News Analysis; Wyoming Death Echoes Rising Anti-Gay Attacks*, S.F. CHRON., Oct. 13, 1998, at A7; *Gay Victim of Beating Is Dead; Wyoming College Student Never Came Out of Coma*, CHI. TRIB., Oct. 12, 1998, at 1.

22. In June 1998, three White men chained Mr. Byrd, a Black man, to the back of a pick-up truck and dragged 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; *Patty Reinert et al., Jasper killer gets death penalty; A smirking King shows no remorse*, HOUS. CHRON., Feb. 26, 1999, at 1 (reporting on sentencing of one of Byrd's killers).

23. The three assumptions are discussed more fully in Lu-in Wang, *The Complexities of "Hate"*, 60 OHIO ST. L.J. 799, 815-30 (1999).

24. See *id.* at 817-21 (discussing the assumption that the perpetrator's bias is personal and based on his opinions, beliefs, or attitudes toward the target group).

25. See *id.* at 821-24 (discussing the assumption that the perpetrator's bias is deviant and irrational).

rather than for a more easily understandable reason, such as to obtain personal gain.²⁶

These assumptions are shared by law enforcement officers and lead to the tendency to treat as bias crimes only “prototypical” or “paradigmatic” cases involving extraordinary brutality or dramatic facts,²⁷ and to eliminate from the category less sensational cases or cases in which the perpetrator appeared to have a tangible goal.²⁸ For example, officers charged with identifying bias crimes tend to overlook cases in which the perpetrator acted on a combination of bias and other motives, such as a desire for pecuniary gain.²⁹ Even cases involving the use of force and racial or anti-gay slurs may be excluded if the officer perceives the offender to have had mixed motives—for example, where racial slurs and a violent assault accompanied a robbery.³⁰

Especially when a bias-motivated crime is seen as being “rational” in some way, the bias required for condemnation becomes invisible. For example, when an assault on a gay peer is viewed as an expected “rite of passage” for young males, the anti-gay bias is minimized or excused.³¹ Similarly, when a member of a particular social group is targeted for robbery because that group is viewed as wealthier or “easier” to rob than others, the crime is viewed as logical, not “hateful” or discriminatory.³²

26. See *id.* at 825–30 (discussing the assumption that the perpetrator’s only purpose is to do harm to a member of the target group).

27. See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 604 (1998).

28. See Wang, *supra* note 23, at 814–15, 825–29 (describing law enforcement officers’ approaches to classifying hate crimes).

29. See, e.g., 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, 835 (1996) (observing, in a study of hate crime classification methods in one large urban police department, that officers tended to count as hate crimes “only those incidents which could be shown to be motivated solely and unambiguously by hatred”), 827–28, 832–33 (describing officers’ views as to what constitutes a “true” hate crime).

30. See, e.g., FBI, UNIFORM CRIME REPORTING, HATE CRIME DATA COLLECTION GUIDELINES 6–7, examples 2 and 5 (1991) (highly influential source of guidance on classification of bias crimes, advising that cases involving robbery, even when accompanied by assault and racial or homophobic epithets, are “ambiguous” and are not to be reported as bias-motivated crimes); see also Wang, *supra* note 23, at 825–29 (discussing other examples).

31. For example, Jamie Nabozny, the plaintiff in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), was subjected to a series of anti-gay attacks during middle school and high school. When Nabozny reported the incidents to school officials, they responded with laughter and told him that “boys will be boys” and that he should “expect” and “deserved” such treatment if he was “going to be so openly gay.” *Id.* at 451–52. No school official took any action to protect Nabozny or to discipline the perpetrators. *Id.* See also Wang, *supra* note 23, at 871–79 (discussing *Nabozny* and other examples).

32. For example, the Committee Report on the federal Hate Crimes Sentencing Enhancement Act states:

A similar dynamic is evident in how racial profiling is regarded. In that context, as well, the practice tends to be condemned, if at all, only in the most extreme cases, such as when a police officer deliberately sets out to harass minorities. In cases where discriminatory targeting can be explained as rational, it is seen as justified—or it may not even be seen at all. As Professor Anthony Thompson has explained, the inclination to “demonize” the explicit use of race in policing leads to a reluctance to label a police officer a “racist,” and thereby renders the use of race invisible in many cases.³³ That is, there is a tendency to “divide[] the world of police officers into ‘good cops’ ([those] . . . who can be trusted) and ‘rogue cops’ (the ones who might be expected to abuse whatever powers have been delegated to them).”³⁴ Similar to what is often said about “hard-core” hate criminals,³⁵ it is maintained that any effort to control the latter group would be “futile.”³⁶

Federal fraud crimes committed against one 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, are not hate crimes. . . .

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 characteristics set forth in the definition of “hate crime.” Any other result would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense.

H.R. REP. NO. 103-244, at 5 (1993). See also Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 376 (1994) (contending that bias crime laws should not apply to a perpetrator who selects victims from a particular social group only because “he believes that he will better achieve his criminal goals” by targeting that group, and not because he feels hostility toward the group).

33. Thompson, *supra* note 6, at 1008 (stating that “[t]he current status of ignoring race—or ‘declaring’ race irrelevant—both drives the discussion underground and encourages courts to assume nonracial motives in instances where the facts suggest otherwise.”).

34. *Id.* at 972. Thompson makes this point in discussing the United States Supreme Court’s opinion in the famous “stop and frisk” case, *Terry v. Ohio*, 392 U.S. 1 (1968). For further discussion of the “myth of the good cop,” see Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994).

35. See, e.g., JACOBS & POTTER, *supra* note 12, at 8 (stating that “for reasons of socialization and education, criminals inherently are less amenable than other citizens to societal norms of tolerance and equality and to demands for higher levels of civility. It is one thing to purge our core political and social institutions of discrimination and bigotry and another to transform our criminals into equal opportunity offenders.”); cf. Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509, 530 (contending that “[a]ll the ‘anti-hate’ laws in the world won’t stop people from believing and expressing bigoted views,” but that “community taboos” might achieve such a result over time).

36. Thompson, *supra* note 6, at 972 (quoting *Terry*, 392 U.S. at 14–15).

One aspect of this dichotomous thinking is the view that selective detention or investigation of minority groups in routine cases is simply good police practice. As Professor Harris has explained, “the most common justification offered for the disproportionate numbers of traffic stops of African Americans” takes the form not of racism, but of “rationality,” “efficiency,” and “sound policy.”³⁷ The argument is that “Blacks commit a disproportionate share of certain crimes,” so “it only makes sense for police to focus their efforts on African Americans.”³⁸ Several scholars have pointed out the faulty reasoning underlying this argument, noting, *inter alia*, that it rests upon dubious interpretations of crime statistics;³⁹ that it fails to recognize that the vast majority of Blacks do not commit crimes;⁴⁰ and that similar reasoning is not applied to Whites for the crimes they commit in disproportionate numbers.⁴¹ Scholars also have pointed out that, even if the practice were “rational”

37. Harris, *supra* note 3, at 294. Professor Harris quotes a Maryland State Police officer who said that the practice was “not racism, but rather ‘an unfortunate byproduct of sound police policies.’” *Id.* at 268. See also, e.g., Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 807 (1999) (quoting Gary McLhinney, president of the Baltimore Fraternal Order of Police: “Of course we do racial profiling at the train station. . . . If 20 people get off a train and 19 are white guys in suits and one is a black female, guess who gets followed? If racial profiling is intuition and experience, I guess we all racial profile.”).

38. Harris, *supra* note 3, at 294; see also Davis, *supra* note 4, at 431.

39. See, e.g., Harris, *supra* note 3, at 294–97 (asserting that government statistics on drug offenses are more an indication of the choices and actions of law enforcement agencies to target certain groups for investigation than they are of the actual racial breakdown of those involved in drug crime; pointing out that “hit rates” for searches by the U.S. Customs Service of travelers suspected of drug use are actually *lower* for both Blacks and Hispanics than for Whites, and that statistics on drug use (which should correlate reasonably well to the crime of drug possession) indicate that the “percentages of drug users who are black or white are roughly the same as the presence of those groups in the population as a whole.”). See also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 36–46 (1997) (criticizing reliance on statistics to rationalize discrimination as reasonable).

40. See, e.g., COLE, *supra* note 4, at 42 (pointing out that “the correlation of race and crime remains a stereotype, and most blacks will not conform to the stereotype. Even though blacks are arrested and convicted for a disproportionate amount of violent crime, it is nonetheless true that in any given year only about 2 percent of black citizens are arrested for committing any crime; the vast majority, or 98 percent, of black citizens are not even charged with crime.”); Roberts, *supra* note 37, at 807 (pointing out that “most Blacks do not commit crimes”); see also ARMOUR, *supra* note 39, at 38–39 (stating that “Blacks arrested for violent crimes comprised less than 1 percent of the Black population in 1994, and only 1.86 percent of the Black male population”).

41. See, e.g., Roberts, *supra* note 37, at 807–08 (pointing out the inconsistency with which “rationality” rationale is applied, and noting, with respect to hypotheticals concerning the use of racial profiling to identify drug crime suspects at a train station, that “[w]hile the white passengers enjoy the presumption of innocence, the Black passenger is presumed to be lawless on account of her race.”).

in a statistical sense, the use of racial profiling would be neither justified nor desirable, given the costs it imposes upon both minority group members and society at large.⁴²

Yet, even as some race-based decisions are justified in that questionable manner, many race-based police decisions will not even be recognized. Under current Fourth Amendment law, as announced in the United States Supreme Court's 1996 decision in *Whren v. United States*,⁴³ a police officer's subjective use of race in deciding to make a traffic stop will not invalidate that stop if an objectively valid reason *could have* supported the decision.⁴⁴ As several legal scholars have explained, this decision invites officers to invent race-neutral, pretextual reasons for making discriminatory stops, for they have been reassured that courts will not look beyond the proffered reason for the stop.⁴⁵ Yet even the pretextual reasons that are offered might incorporate racially biased reasoning, for seemingly race-neutral reasons often are accepted because their believability correlates with the race of the subject.⁴⁶ That is, the myth that certain social groups are especially prone to criminal or deviant behavior makes seemingly race-neutral reasons more believable and allows for the apparent separation of racial bias and reasonable suspicion or probable cause.⁴⁷ As Professor Cole has stated, "The Court's removal of meaningful Fourth Amendment review allows the police to rely on unparticularized discretion, unsubstantiated hunches, and nonindividualized

42. See, e.g., COLE, *supra* note 4, at 42 (noting that "our nation's historical reliance on race for invidious discrimination renders suspect such consideration of race today, even if it might be 'rational' in some sense"; and pointing out that the Supreme Court subjects even "expressly benign considerations of race, such as affirmative action programs," to strict scrutiny, rather than a "rational basis" analysis). Cf. ARMOUR, *supra* note 39, at 46–60 (asserting that "rational" discrimination is not "reasonable," and pointing out the social costs of statistical generalizations based upon race).

43. 517 U.S. 806 (1996).

44. In *Whren*, the Court noted that it "[has] never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but . . . [has] repeatedly held and asserted the contrary. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 812–13.

45. As Professor David Cole has explained, "that allows officers who have no more basis for suspicion than the color of a driver's skin to make a constitutional stop. Under *Whren*, a racially motivated pretextual stop is 'reasonable' under the Fourth Amendment." COLE, *supra* note 4, at 39. See also, e.g., Harris, *supra* note 3, at 311 (stating that "*Whren* means that police officers can stop any driver, any time they are willing to follow the car for a short distance.").

46. See, e.g., Harris, *supra* note 3, at 291–94 (discussing the use of race as a "proxy" for criminal propensity that police use "as a way to sort those they are interested in investigating from those that they are not.>").

47. See Davis, *supra* note 4, at 430–31 (providing an example of how a drug courier profile may be used in a racially discriminatory fashion even when the profile does not include race as a relevant characteristic).

suspicion. Racial prejudice and stereotypes linking racial minorities to crime rush to fill the void.”⁴⁸

Moreover, as Professor Thompson has explained, some officers who make racially biased decisions may not even intend to discriminate on the basis of race. Law enforcement officers, like everyone else, are likely to have incorporated racial stereotypes into their perceptions and understandings of the world.⁴⁹ Among these stereotypes are the assumptions that certain groups, such as people of color, are especially prone to deviant or criminal behavior.⁵⁰ When officers are called upon to make complicated and grave decisions under stressful, time-pressured conditions, they are likely to rely on these stereotypes in interpreting the behavior of others.⁵¹ As a result, behavior that might appear harmless in a White person may seem criminal or threatening when exhibited by a Black person, and the officer may “see” probable cause or reasonable grounds to be suspicious of the Black person.⁵²

As Professor Thompson has further explained, current law does not account for the less explicit types of discriminatory decisions by police officers, for the Supreme Court’s decisions have removed race from Fourth Amendment analysis and created a world in which we can distinguish not only between “good cops” and “rogue cops,”⁵³ but also between situations “in which there clearly is and those in which there clearly is not ‘probable cause.’”⁵⁴ In other words, the Court has created “a reality in which it is possible to separate a police officer’s racial bias from his or her observations and account of alleged criminality,” thereby making it possible to see the officer’s actions “as resting upon neutral facts untainted by racial bias.”⁵⁵ What this conception of the world fails to consider, however, is that race cannot be “antiseptically removed”⁵⁶

48. COLE, *supra* note 4, at 53.

49. See Thompson, *supra* note 6, at 983–86 (discussing social science research on categorization, schemas, and stereotyping).

50. See *id.* at 986–87 (discussing the ways in which categorization intersects with policing goals, making “stereotyping . . . integral to the police officer’s world”).

51. See *id.*

52. See *id.* at 987–991 (discussing potential cognitive biases in the way a police officer assesses the behavior of individuals of color); see also Davis, *supra* note 4, at 431 (noting that police who believe that Blacks are more likely to engage in criminal behavior than Whites “may either consciously or unconsciously consider an African American’s race as a factor in the nebulous reasonable suspicion calculus.”).

53. See *supra* notes 34–36 and accompanying text.

54. Thompson, *supra* note 6, at 982.

55. *Id.*

56. *Id.* at 983.

from the account of the officer’s decision-making process,⁵⁷ or even from another decision-maker’s review of that decision.⁵⁸

Dichotomous thinking is common to the way we view both hate crimes and racial profiling. There is a tendency to think we can distinguish between a clearly “bad” biased motivation—where the actor seeks only to do harm to the target⁵⁹—and “rational” or “expected” selective targeting that is not viewed as undesirable because we see it as justifiable or excusable⁶⁰—or perhaps do not see it at all.⁶¹ This dichotomous thinking oversimplifies the targeting decision, because it fails to recognize that the lines between “bad” and “good” discrimination cannot be so clearly drawn. In some cases, even bias-motivated targeting that appears irrational and hateful may be logical and even understandable, because it is influenced by a social and cultural environment that makes discrimination useful and even acceptable. On the other hand, even those biased decisions that seem to be reasonable and benign are often harmful, for they may both rest upon and serve to promote the cultural and social understanding that some groups are “suitable targets”—the expected and accepted recipients of ill treatment.

II. PARALLELS AND CONNECTIONS BETWEEN “HATE” CRIMES AND “DRIVING WHILE BLACK”

In previous work, I have examined social science and historical literature on the effects of and motivations behind bias-related violence.⁶² This research has convinced me of the need to complicate our understanding of hate crimes in considering the appropriate legal response. By magnifying the perpetrators’ hostility, the conventional view masks the range of other motivations that propel bias crimes, some of which are quite mundane and opportunistic. Even more troubling is the way in which the conventional view obscures the role played by a social environment that marks members of certain groups as “suitable

57. See *supra* notes 46–52 and accompanying text.

58. See Thompson, *supra* note 6, at 983.

59. See *supra* notes 27–30 (on hate crimes), 33–36 (on racial profiling), and accompanying text.

60. See *supra* notes 31 (on hate crimes), 37–42 (on racial profiling), and accompanying text.

61. See *supra* notes 31 (on hate crimes), 45–52 (on racial profiling), and accompanying text; see also *infra* notes 134–38 and accompanying text.

62. See, e.g., Wang, *supra* note 13 (examining social cognition theory and explaining how discriminatory victim selection affects the individual victim, members of the victim’s social group, and the social context); Wang, *supra* note 23 (examining historical, sociological, and social psychological literature on the motivations behind racial violence during this country’s “lynching era,” 1880–1930, and contemporary anti-gay crime and violence).

victims” and thereby enables perpetrators to use violence against them as a means to a variety of goals. In addition, it is important to recognize how, in turn, the perpetration of hate crimes itself contributes to the social context that marks those groups as “suitable victims.” In other words, a cultural and social “feedback loop” runs between the harms of and the motivations for committing hate crimes—a reciprocal, reinforcing relationship that has been overlooked by those who approach hate crimes with a narrower perspective founded on simplistic conventional assumptions.

These themes—of particular groups being marked as expected or appropriate recipients of ill treatment and of the cultural and social feedback loop that reinforces that designation and perpetuates such treatment—have been identified in the racial profiling context, as well. This part will elaborate on some of the parallels and connections between hate crimes and racial profiling.

A. “Suitable Targets”: Influence of the Social Context

The perpetration of hate crimes and the practice of racial profiling both reflect the view that certain groups are “suitable victims” or “suitable targets.” The two practices exhibit similar patterns, because both are influenced and promoted by a social environment in which discriminatory targeting can be used as a means of attaining various goals.⁶³ In addition, the two practices are connected to and influence one another, because both hate crimes and racial profiling reflect and reinforce the myth that certain groups are prone to deviant or criminal behavior.⁶⁴ In these ways, the social context has made discriminatory selection so commonplace that it can seem sensible, rational, or justified. As a result, discriminatory targeting is often obscured—recognized by neither observers nor even its practitioners.

Bias crime perpetrators often deny that they are prejudiced. This is true even of some who have committed extreme acts of violence. As forensic psychologist Karen Franklin discovered through her interviews with admitted assailants, “people who have assaulted homosexuals typically do not recognize themselves in the stereotyped image of the hate-filled extremist.”⁶⁵ Similarly, police officers who have “openly

63. See *infra* notes 69–77 (on hate crimes), 78–79 (on racial profiling), and accompanying text.

64. See *infra* notes 80–88 and accompanying text.

65. 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). See also GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 75–76, 93–94 (1990) (describing anti-gay assailants’ professed or apparent lack of hostility toward, or even

admitt[ed] that they hate blacks and openly characteriz[ed] them in the most pejorative terms" often deny being prejudiced.⁶⁶ While these denials may seem incredible and self-serving, they may in many cases also be a fair description of the actors' thinking. As social scientists have explained in the context of two "prototypical" hate crimes—anti-gay violence and lynching—a perpetrator need not personally "hate" a particular group in order to find reasons to target members of that group for violence, because other motivations can be sufficient.⁶⁷ For example, in our society committing a crime against a "suitable victim" can bring the perpetrator psychological or social rewards in the form of excitement, prestige, or bonding with peers. Targeting a suitable victim also can lead to greater material rewards, for often perpetrators of property crimes calculate that members of disfavored groups will not receive the same level of law enforcement assistance as other victims.

Indeed, as social psychologist Gregory M. Herek has observed about anti-gay violence, "the primary cause . . . is not always the attacker's own personal prejudice against lesbians and gay men."⁶⁸ Instead, much of the appeal of attacking a gay person arises from the wide range of functions that such violence can serve for the perpetrators.⁶⁹ Researchers have found that perpetrators of gay-bashing often reap psychological, social, and even material rewards. They are able to attain their goals because the cultural ideology has identified gay men as suitable vehicles

disapproval of, gay men and lesbians); 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 170, 170–71 (Gregory M. Herek & Kevin T. Berrill eds., 1992) (in interviews with the author, young men who had participated in anti-gay violence and vandalism expressed a number of motivations, including the desire to "go along with" the group, but did not express a desire to hurt gay men).

66. Thompson, *supra* note 6, at 988 n.164 (citing JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 79 (3d ed. 1994)).

67. See *infra* notes 68–77 and accompanying text.

68. 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 149, 163 (Gregory M. Herek & Kevin T. Berrill eds., 1992). See also Wang, *supra* note 23, at 880.

69. See Herek, *supra* note 68, at 164 (noting that anti-gay crimes "can serve a variety of social and psychological functions for those who commit them" and explaining that, "[r]ather than acting from their own bigotry . . . some perpetrators of violence against lesbians and gay men may be responding primarily to peer pressure or other situational factors.").

These points can be applied to prejudice against other groups, as well. Dr. Herek has explained that "antigay prejudice manifests the same general psychological structure 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." 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).

for achieving those goals. For example, some gay bashers seek to obtain thrills, recognition, social bonding, or some combination of these rewards, and see gay men as “fundamentally a dramatic prop” suitable for use in that quest.⁷⁰ They anticipate receiving attention, acclaim, and affirmation, because they view gay bashing as socially acceptable and know that many in our society—including authority figures such as parents, law enforcement officers, and political and religious leaders—view gays as deserving of such treatment or will not treat the violence seriously.⁷¹ Others desire material rewards, such as money, and are also able to use society’s general disregard for gay men to their advantage. These perpetrators calculate that gay men—who themselves are all too aware of society’s disapproval—would prefer to part with their property than to fight back or to report the crime and risk revealing their sexual orientation, and that police, judges, juries, and others will not take seriously offenses against gays.⁷²

Even racial violence during this country’s “lynching era”—the archetypal “hate” crime⁷³—could rationally have been practiced by individuals who did not personally harbor racial animus. Indeed, historical data indicate that lynching is better explained as having been driven by White southerners’ economic self-interest than by their hatred for Blacks. The work of historical sociologists Stewart Tolnay and E.M. Beck, for example, indicates that lynching was driven primarily by White southerners’ desire to maintain their control over the key economic resources of land and labor.⁷⁴ Tolnay and Beck also uncovered

70. Franklin, *supra* note 65, at 12.

71. See Wang, *supra* note 23, at 877–80 (describing ways in which authority figures treat anti-gay violence and harassment as expected and accepted).

72. See *id.* at 883–92 (describing factors that contribute to the vulnerability of gay men as targets for property crimes such as robbery, blackmail, and extortion by police officers or impersonators).

73. See *id.* at 831 (noting that lynching is “the historical antecedent of contemporary ‘hate’ crimes and the original model on which contemporary images and understandings of such crimes are based”).

74. Two facts about lynching are important to note. First, the strongest links between White interests and anti-Black lynching were seen in the cotton-growing region of the South known as the “Black Belt,” an area with a distinctive culture and history, as well as a heavy dependence upon Black labor. Second, the “lynching era” began following the collapse of slavery, when cotton-growing Whites started losing their control over the key economic resources of land and labor. Tolnay and Beck studied the temporal and regional patterns in lynching, and concluded that those patterns indicated that White southerners used racial violence to maintain their control of land (by intimidating Blacks who would buy land or Whites who would sell to them) and to maintain a supply of cheap and compliant Black workers (by hindering solidarity and maintaining competition between Black and White workers and by intimidating the Black workforce). For further discussion of these studies, see Wang, *supra* note 23 at 836–55.

compelling evidence that, rather than being "driven" by racial animus, White southerners controlled the level and timing of the violence as it suited their interests—escalating the violence at times when and in places where it would help them to control land and labor,⁷⁵ and moderating or even abandoning the violence when and where it was either not necessary or even harmful to White interests.⁷⁶

This is not to say that racism played no role in lynching. To the contrary, the racially hostile climate in the South during that time made its widespread practice possible. However, an important point that emerges from these studies by Tolnay and Beck is that an individual perpetrator did not need to harbor racial animus in order to have reason to lynch. Given the prevailing view that African Americans were acceptable targets for violence, racial violence could be used to further a variety of interests, chief among them White southerners' economic interests. Lynching also could serve perpetrators' social and emotional interests, by reminding Blacks and Whites alike of the race-based caste system that dictated White supremacy despite advances toward economic equality, or by permitting Whites to release feelings of economic frustration on targets who were not likely to fight back or gain assistance from others, including law enforcement. As Tolnay and Beck have explained, "Given the Deep South's racial caste structure, whites could harass and assault blacks with virtual impunity. Blacks were considered legitimate, and even deserving, objects for white wrath."⁷⁷

In the case of racial profiling, the "rationality" behind the discrimination tends to be more explicit.⁷⁸ The appearance of rationality in discriminatory police practices is supported by a social environment in which a "myth of criminal propensity" is attached to certain groups so

75. For example, Tolnay and Beck found that subregional differences in the level of lynching corresponded with the extent to which the area's economy depended upon cotton and with the area's level of White landlessness, relationships that indicated instrumental uses for the violence such as maintaining White control over land. See Wang, *supra* note 23, at 841–43, 847 (describing Tolnay and Beck's studies of these relationships). In addition, lynching displayed seasonal patterns that coincided with the cyclic demand for labor, a correspondence that provides support for a "labor control" model of lynching under which landlords and planters dominated and controlled Black agricultural workers. See *id.* at 848–51 (discussing Tolnay and Beck's studies of the seasonal patterns).

76. For example, the decline of the lynching era was strongly associated with the "Great Migration" of African Americans from the South—a migration that led to a massive loss of Black workers. For further discussion of this period and of Tolnay and Beck's studies of the spatial effects of lynchings, see Wang, *supra* note 23, at 855–65.

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

78. See *supra* notes 37–38 and accompanying text. As with hate crimes, however, the appearance of rationality can render the discrimination both acceptable and invisible. See *supra* notes 37–55 and accompanying text.

that race alone can be used as a “surrogate indicator” or “proxy” for criminality.⁷⁹ As Professor Dorothy Roberts has explained, racial profiling reflects cultural stereotypes that divide people into two categories, “law-abiding” and “law-breaking,” assumes that police can tell the difference between them on sight, and thereby justifies minimizing the rights of the “visibly lawless.”⁸⁰ This view is so deeply embedded in our culture that it may not be recognized by the officer or even those who might review her decisions.⁸¹

The myth that certain groups are prone to criminality or deviance promotes the practice of hate crimes as well as racial profiling, for in addition to inviting disproportionate attention from law enforcement officers, it also justifies the perpetration of violence against those groups.⁸² For example, lynchings commonly were launched upon allegations that a Black male had raped or otherwise terrorized a White woman or girl.⁸³

79. Professor Katheryn K. Russell has written extensively on the “myth of the *criminalblackman*.” See KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 1–13 (1998) (discussing media portrayals of Black men and their influence on public perceptions of Blacks). See also, e.g., Harris, *supra* note 3, at 319 (asserting that the Supreme Court has made “the power of the police to control crime its top priority in criminal law,” and has thereby “freed law enforcement from traditional constraints to such a degree that police can use blackness as a proxy for criminal propensity.”); Roberts, *supra* note 37, at 806 (stating, “Police officers are particularly notorious for using race as a proxy for criminal propensity.”); Thompson, *supra* note 6, at 983–91 (describing the cognitive processes and biases that make the suspect’s race an integral part of an officer’s determination of probable cause or reasonable suspicion).

80. Roberts, *supra* note 37, at 803, 810–12 (discussing discriminatory policing in the context of the enforcement of “anti-loitering” ordinances). The view that this is sound police practice also reflects the view that the “visibly lawless” are less deserving of civil liberties and that thereby permits officers to infringe on those liberties without sanction. See Roberts, *supra* note 37, at 812.

81. See *supra* notes 49–58 and accompanying text (discussing the work of Professor Anthony C. Thompson).

82. See, e.g., Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402–52 (1996) (discussing how stereotypes of Blacks, Asians, and Latinos serve to minimize or justify violence against them).

83. See EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 240–43 (1984). It should be noted, on the other hand, that the mobs felt justified in lynching Blacks who were charged with much less serious “offenses,” as well—including “being obnoxious,” “demanding respect,” “suing a white man,” and “unpopularity.” STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* 47, Table 2–5 (1995) (listing allegations offered by mobs as justifications for the lynching of Blacks). See also HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 30–31 (1988) (describing the general pattern of southern lynchings and noting the range of allegations against a potential victim that could incite the mobs to a frenzy).

The likelihood that these allegations were false in most cases only highlights how effective the myth of Black criminality was in inciting the mobs to their frenzies of "racial barbarism."⁸⁴ Anti-gay violence also has been justified or minimized by the belief that gays are prone to criminality and deviance. For example, one judge justified the lenient sentence he imposed on a man 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."⁸⁵ The judge further implied that the victims had invited their own murders when he said that "had (the victims) not been out there trying to spread AIDS, they'd still be alive today,"⁸⁶ and that "[t]hese 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."⁸⁷ The judge made these remarks despite the fact that no conclusive evidence was presented at trial that the victims had solicited sex and despite the witnesses' testimony that the defendant and a group of friends "had set out to harass homosexuals and entered the men's car with the intent of beating them."⁸⁸

Hate crimes are not perpetrated only by rage-filled, anti-social deviants, nor is racial profiling practiced only by hateful "rogue cops." In many cases, the selective targeting of certain social groups may seem sensible or even rational, because the social environment supports, encourages, and even rewards such targeting: This is not to say, of course, that the influence of the social environment provides a valid excuse or justification for the discriminatory practice.⁸⁹ Further, as the following section elaborates, hate crimes and racial profiling themselves contribute to and reinforce the social context that encourages their perpetration. Indeed, we should not underestimate the influence particularly of those cases in which discriminatory targeting seems rational or understandable, for those cases may be all the more influential in constructing a world in which certain social groups are seen as "deserving" of ill treatment and in which the ill treatment of such groups comes to be expected and thereby is rendered invisible.

84. SHAPIRO, *supra* note 83, at 30.

85. Lisa Belkin, *Anti-Gay Comments Spark Dallas Furor/Judge Defends Leniency for Teen Killer*, HOUS. CHRON., Dec. 17, 1988, at 29.

86. Larry Rowe, *Gays Discouraged by Report Clearing Dallas Judge of Bias*, DAILY TEXAN, Nov. 2, 1989, at 8 (alteration in original).

87. Belkin, *supra* note 85, at 29.

88. *Id.*

89. See, e.g., *supra* notes 39–42 and accompanying text (discussing flaws in the reasoning used to justify racial profiling and pointing out that even if the practice were "rational," it would not therefore be justified or desirable); Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1429–35 (2000) (discussing the culpability of opportunistic bias crime perpetrators).

B. "Distortion of the Social World":⁹⁰
Influence on the Social Context

While hate crimes and racial profiling can be understood as being *responsive* to the pre-existing social environment, it is important to recognize their role in contributing to and reinforcing that environment, as well. Social scientists and legal scholars have explained that hate crimes and racial profiling have effects that are both different from and more harmful than those of their non-discriminatory counterparts, a parallel crime⁹¹ or a routine traffic stop. The individual victim may experience greater emotional and psychological harm and adopt more extreme defensive behavioral strategies to avoid similar encounters in the future. The effects also extend beyond the individual victim, to the social group that identifies with the victim and to society at large. Both the discriminatory selection itself and the defensive behavior that it encourages serve to reinforce the social context in which racial and other group-based targeting occur, because they both influence expectations about how certain groups will be treated.

Social psychological theory explains that the selective victimization in hate crimes results in greater harms, not because—as some critics of bias crime legislation have suggested might be supposed—members of particular social groups are inherently weaker or more sensitive than people in general.⁹² Rather, these effects arise largely because both the victim and observers have a basic psychological need to explain traumatic events,⁹³ and because the ways in which the victim and observers explain and respond to the incident incorporate the understanding that certain groups are especially vulnerable to, and are even expected to be recipients of, such treatment.⁹⁴

When the victim of a bias crime understands that he or she was targeted because of social group status, the victim likely will suffer great emotional and psychological trauma. The victim will perceive that his very identity rendered him vulnerable to crime in a way that others who

90. Harris, *supra* note 3, at 305.

91. A "parallel" crime is the non-bias-motivated counterpart of a bias crime. Professor Frederick M. Lawrence, who developed the term, explained that, for example, a simple assault without the bias motive is the parallel crime to a bias-motivated assault. See Lawrence, *supra* note 13, at 321 n.5.

92. See, e.g., Gellman, *supra* note 16, at 385–86.

93. See Wang, *supra* note 13, at 100–01, 106 (discussing the psychological need to find meaning in significant events that leads both victim and observers to seek an explanation for the victim's misfortune).

94. See *id.* at 115–16, 121–23, and 125–28 (discussing how the reactions to a bias crime of the victim, target group members, and non-target group observers, respectively, incorporate the understanding that some groups are especially vulnerable to bias crimes).

do not share that trait are not vulnerable.⁹⁵ This sense of “unique vulnerability” may lead to feelings of depression, anxiety, isolation, and even guilt.⁹⁶ The victim may blame herself for having caused the attack and may lose her sense of control over her life.⁹⁷ She may compound those feelings by declining to take steps that could help her to regain her sense of control, such as talking about the incident with family and friends.⁹⁸ In addition, hate crime victims often decline to report the crime to law enforcement authorities because they fear further mistreatment, sometimes from law enforcement officers themselves.⁹⁹ The victim may withdraw from her regular daily activities, as well, in an attempt to make herself less visible and therefore less vulnerable.¹⁰⁰

What most clearly distinguishes hate crime from non-bias-motivated crime, however, are the effects that extend beyond the individual victim—particularly the way in which hate crime influences the perceptions of observers, both those who identify with the victim and those who are able to distinguish themselves from the victim. Even if they have not been victims of bias crime, other members of the victim’s social group may feel isolated or fearful, because they also understand themselves to be uniquely vulnerable due to that shared group status.¹⁰¹ To avoid becoming targets themselves, members of vulnerable groups may spend a great deal of time and energy adjusting their day-to-day behavior in numerous trivial ways that can cause them to forgo opportunities and lose a great deal of control over their lives.¹⁰² For example, they may avoid going to places where they might “stick out” or decline to engage in activities that might draw attention to them. Some writers have described how their fear of hate crime has influenced their decisions about such seemingly mundane matters as what neighborhoods to drive or run through, what events to attend, and even what vacation spots to patronize.¹⁰³ For some target group members, another way to avoid inviting attack may be to engage in behavior that is

95. See *id.* at 112–18.

96. See *id.* at 112–13.

97. See *id.* at 112–16.

98. See *id.* at 116, 118.

99. See *id.* at 116–17.

100. See *id.* at 118–19.

101. See *id.* at 119–22.

102. See *id.* at 120–24.

103. See, e.g., John A. Powell, *Rights Talk/Free Speech and Equality*, 1992/1993 ANN. SURV. AM. L. 587, 589–90 (discussing how fear of bias crime—but not fear of random crime—affected the author’s choices of what neighborhoods to run or drive through and of what events to attend); LENA WILLIAMS, *IT’S THE LITTLE THINGS: THE EVERYDAY INTERACTIONS THAT GET UNDER THE SKIN OF BLACKS AND WHITES* 41–43 (2000) (discussing how Blacks take into account the likelihood of encountering racism, including racist violence, in choosing where to travel for vacation).

“expected”—that is, stereotypical of one’s social group—so as to avoid attracting unwanted attention.¹⁰⁴

Hate crimes also contribute to the perception among a wider range of observers that some groups are expected targets for violence. Social psychologists have explained that bias-motivated violence creates the conditions for prejudice and discrimination because it defines the “safe” or expected targets for all manner of ill treatment.¹⁰⁵ Even if non-target group observers condemn the acts and would never engage in such conduct themselves, they may derive some comfort from their ability to differentiate themselves from the victim and target group and thereby to feel comparatively less vulnerable and more in control of their circumstances.¹⁰⁶ Further, even if observers do not believe that the victim’s social group status justified the attack, they will recognize that the status prompted the attack, and may attribute responsibility to the victim for having invited the crime by making that status visible. For example, the gay bias crime victim may be blamed for having worn certain clothing or having behaved in a way that made his sexual orientation “obvious.”¹⁰⁷ Similarly, the African American victim of a racially motivated assault may be blamed for having appeared on the streets of a White neighborhood. Following the well-publicized 1986 incident in Howard Beach, New York, in which a group of eight to ten White teenagers attacked three Black men, Professor Patricia Williams observed:

A veritable Greek chorus formed, comprised of the defendants’ lawyers and resident after resident after resident of Howard Beach, all repeating and repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out. “They had to be starting trouble.” “We’re strictly a white neighborhood.” “What were they doing here in the first place?”¹⁰⁸

As this report indicates, observers recognize the “script” or pattern of bias-motivated violence and understand that members of vulnerable groups

104. See Wang, *supra* note 13, at 124 (citing authorities who have noted that fear of anti-gay harassment or gender-related violence may cause gay persons and women to conform their behavior to gender-based stereotypes).

105. See, e.g., Thomas Ashby Wills, *Downward Comparison Principles in Social Psychology*, 90 PSYCHOL. BULL. 245, 246, 257 (1981). See also Wang, *supra* note 13, at 125–26.

106. See *id.* at 126–27.

107. See, e.g., Linda Garnets, Gregory M. Herek, & Barrie Levy, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. INTERPERSONAL VIOLENCE 366, 374 (1990); Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 AM. PSYCHOLOGIST 948, 948 (1989).

108. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 136 (1987) (citations omitted).

are "persons whom the dominant culture considers acceptable to derogate."¹⁰⁹

Racial profiling results in multi-layered effects similar to those of hate crimes, although the effects of racial profiling may be even less apparent to those who have not studied them. Just as some have minimized the difference between being the victim of a hate crime and of an ordinary crime,¹¹⁰ many believe that a racially motivated traffic stop is a "minor inconvenience" that does not warrant legal redress, particularly if the driver is released afterward.¹¹¹ A number of legal scholars have rebutted this assumption, explaining that discriminatory traffic stops can be extremely frightening and embarrassing. Some drivers who are stopped react similarly to hate crime victims, suffering depression, trying to keep their experience hidden from others, and withdrawing from their normal activities.¹¹² This is particularly true in those cases where the driver is treated with disproportionate harshness, as if he or she were a dangerous criminal.¹¹³ The Black motorist's sense of fear is heightened by the awareness that such encounters can turn, and often have turned, deadly.¹¹⁴ Even if the driver is not subjected to especially abusive treatment, the frequency with which many Blacks are stopped for traffic violations places a constant and heavy burden on their daily lives.¹¹⁵ It also gives rise to feelings of anger, helplessness, and distrust of the police,¹¹⁶ and may lead the driver to modify his or her behavior substantially in order to avoid being stopped again.¹¹⁷

109. Wills, *supra* note 105, at 246.

110. See, e.g., JACOBS & POTTER, *supra* note 12, at 81–86 (challenging the view that hate crimes involve "disproportionately severe impacts on the individual").

111. See Harris, *supra* note 3, at 289–89 (rebutting this assumption); Davis, *supra* note 4, at 438 (similar).

112. See, e.g., Harris, *supra* note 3, at 269–75 (describing interviews with individuals who were stopped as they were "driving while Black"); see also ARMOUR, *supra* note 39, at 53–54 (discussing the psychic costs of race-based suspicion, which include the humiliation and stigmatization of Black persons who are presumed to be, and treated as if they were, criminals).

113. See, e.g., RUSSELL, *supra* note 79, at 36 (describing the experience of Mae Jemison); Harris, *supra* note 3, at 270–73 (describing the experiences of Karen Brank and "Michael").

114. See RUSSELL, *supra* note 79, at 34, 36–37 (discussing Blacks' experiences with and awareness of police brutality and describing case of Jonny Gammage); Harris, *supra* note 3, at 274–75, 276 n.56 (citing cases in which traffic stops have resulted in the Black motorist's death).

115. See, e.g., RUSSELL, *supra* note 79, at 34; Harris, *supra* note 3, at 273–74.

116. See, e.g., RUSSELL, *supra* note 79, at 34–36; Harris, *supra* note 3, at 298–300; Davis, *supra* note 4, at 442; Adam B. Wolf, Case Note, *The Adversity of Race and Place, Fourth Amendment Jurisprudence in Illinois v. Wardlow*, 528 S. Ct. 673 (2000), 5 MICH. J. RACE & L. 711, 716–22 (2000).

117. See, e.g., Harris, *supra* note 3, at 273–74 (discussing adjustments African Americans make in their daily lives "to cope" with DWB); see also *infra* notes 120–22 and accompanying text.

As with hate crimes, the most striking effects are those that extend beyond the individual. The target group's response to racial profiling is very similar to the response to hate crime and results in a similar "distortion of the social world."¹¹⁸ Even while recognizing that they cannot totally avoid discriminatory traffic stops,¹¹⁹ members of the target group may adjust numerous aspects of their daily lives in order to minimize their chances of being noticed and stopped, or to decrease the likelihood that they will be treated abusively if they are stopped. These adjustments may include driving cars that are bland and not "flashy," dressing in drab clothing or avoiding accessories that might make them noticeable, sitting erect at all times while driving, obtaining "vanity" license plates that advertise their educational degrees or professional status, keeping the radio tuned to a classical music station, and scheduling extra time for car trips to allow for the delay involved in a traffic stop.¹²⁰ These lessons are passed from one generation to the next when young Black males receive "The Lesson":¹²¹ instructions from their elders on "how to behave when—not if—they are stopped by police."¹²²

One of the most common avoidance tactics is to stay out of areas where Black people would "stand out," such as predominantly White neighborhoods.¹²³ As Professor Harris has explained, this strategy has the effect of carving out entire areas where Blacks are perceived as "not belonging," and thus severely restricts their freedoms and further distorts the social world.¹²⁴ Professor Dorothy Roberts has pointed out that "[r]estricting people's freedom of movement can be a form of political subjugation,"¹²⁵ and has noted that laws designed to achieve this effect (such as vagrancy laws) have been used throughout history to limit the

118. Harris, *supra* note 3, at 305.

119. See, e.g., Harris, *supra* note 3, at 298.

120. See, e.g., RUSSELL, *supra* note 79, at 34; Davis, *supra* note 4, at 425; Harris, *supra* note 3, at 273–74, 305.

121. RUSSELL, *supra* note 79, at 34.

122. Harris, *supra* note 3, at 274.

123. See Harris, *supra* note 3, at 305–06. See also ARMOUR, *supra* note 39, at 52–53 (discussing the social costs of race-based suspicion, which include the "chilling effect" that it has on "Black participation in core community activities")

124. See Harris, *supra* note 3, at 298–299.

On the other hand, in areas where they *are* perceived as "belonging," such as "high-crime" areas, people of color are subjected to disproportionately harsh and intrusive treatment by police because an individual's presence in such an area is considered a factor supporting "reasonable, articulable suspicion that criminal activity is afoot." See Wolf, *supra* note 116, at 715, 722–25 (discussing implications of the Supreme Court's decision in *Illinois v. Wardlow*, 528 S. Ct. 673 (2000), which held that defendant's presence in a high-crime area, coupled with his fleeing at the sight of a police caravan, were factors sufficient to provide officers with reasonable suspicion to conduct a stop and pat-down search).

125. Roberts, *supra* note 37, at 788.

choices of subordinated groups.¹²⁶ In this way, too, racial profiling operates similarly to hate crime, for during the "lynching era" racial violence was sometimes used to keep Black workers "trapped," both geographically and economically.¹²⁷

The distorting effect of racial profiling extends beyond its influence on the behavior of the target group, for the practice also affects societal perceptions and expectations of and for targeted groups. Most directly, it furthers the myth of criminal propensity that attaches to those groups. First, and especially when it faces no legal prohibition, discriminatory targeting allows police to use skin color as a "proxy" for criminal propensity.¹²⁸ The message that Blackness is equivalent to criminality is transmitted to the general public as the public becomes accustomed to seeing disproportionate numbers of Black motorists being detained by police.¹²⁹ Professor Thompson has explained that this myth of criminal propensity makes even those who are not consciously racist more likely to see suspicious behavior in Blacks, for the assumption that "people of color . . . are more prone to engage in criminal and violent activity than whites" can make it seem "reasonable to assume that conduct engaged in by people of color [is] more likely [to] be criminal or suspicious than the same actions by whites."¹³⁰ Particularly when Blacks are viewed as "not belonging" in certain neighborhoods, their occasional appearances in those areas are even more likely to be questioned. In addition, as noted above, the myth of criminal propensity also has the "cross-over effect" of serving as a justification for bias crimes against certain groups.¹³¹

These effects of racial profiling are compounded when the belief in the disproportionate criminality of Blacks becomes a "self-fulfilling prophecy."¹³² Professor Harris explains:

126. See *id.* (citing examples).

127. See Wang, *supra* note 23, at 847–48 (describing how lynching was used to prevent Blacks from buying land) and 848–55 (describing how lynching was used to keep Black workers available and compliant to serve White landowners).

128. Harris, *supra* note 3, at 291. See also *id.* at 292 (stating that, "[i]n effect, blackness itself has been criminalized.").

129. See Roberts, *supra* note 37, at 813 (stating, "Myths of Black criminality are so embedded in the white psyche that it seems perfectly natural to many Americans that Blacks are disproportionately stopped for traffic infractions, arrested for drug offenses, swept off the streets for loitering, and sent to prison.").

130. Thompson, *supra* note 6, at 988, citing Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595–97 (1976). Professor Russell has pointed out that society as a whole is harmed by "the societal cost of perpetuating inaccurate stereotypes, which produces exaggerated levels of fear and more pronounced levels of scapegoating." RUSSELL, *supra* note 79, at 45.

131. See *supra* notes 82–88 and accompanying text.

132. Harris, *supra* note 3, at 297; see also Roberts, *supra* note 37, at 818.

Because police will *look* for drug crime among black drivers, they will *find* it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals. At the same time, because police will focus on black drivers, white drivers will receive less attention, and the drug dealers and possessors among them will be apprehended in proportionately smaller numbers than their presence in the population would predict.¹³³

Furthermore, viewing members of certain groups as being prone to criminality also results in a less specific kind of devaluation of those groups, in which the infringement of their constitutional rights and even their physical suffering are minimized and expected. In this way, again, the effects of racial profiling are strikingly similar to those of hate crimes because both practices result in the understanding that some groups are more likely (and therefore are expected) to suffer ill treatment.¹³⁴ Professor Roberts has explained that discriminatory targeting by law enforcement officers reinforces the perception that some groups are “second-class citizens”¹³⁵ for whom police surveillance and even arrest are “perfectly natural.”¹³⁶ In turn, this belief promotes the view that those groups are entitled to fewer liberties and that their rights are “mere ‘amenities’ that may be sacrificed to protect law-abiding people.”¹³⁷ Professor Roberts has further explained that, as a result, the pattern of discriminatory targeting can seem benign: “when social understandings

133. Harris, *supra* note 3, at 297 (emphasis in original). See also RUSSELL, *supra* note 79, at 45 (stating, “Race-based policies pit law enforcement against minorities and create an unbreakable cycle: racial stereotypes may motivate police to arrest blacks more frequently. This in turn generates statistically disparate arrest patterns, which in turn form the basis for further police selectivity by race.”); Roberts, *supra* note 37, at 818 (stating that “targeting Blacks for police surveillance results in higher rates of arrests, reinforcing the presumption of Black criminality. If police stopped and frisked whites as frequently as they do Blacks, white arrest rates would increase.”). Cf. Davis, *supra* note 4, at 442 (noting that “[i]n a certain sense, discriminatory police stops are the first in a chain of racially lopsided decisions by officials in the criminal justice process.”).

134. See *supra* notes 101, 105–09 and accompanying text.

135. Roberts, *supra* note 37, at 811.

136. *Id.* at 813. See also *id.* at 802–03 (discussing the two categories into which people are placed based upon assumptions concerning their propensity to commit crimes: “orderly and disorderly” or “law-abiders and law-breakers”) and 807–08.

137. *Id.* at 811–12. See also RUSSELL, *supra* note 79, at 45 (discussing how police harassment of Black men results in “[t]reating Whites as if their constitutional rights are worth more” than those of Black men).

are so uncontested that they become invisible, the social meanings that arise from them appear natural."¹³⁸

Discriminatory targeting both reflects and reinforces the view that certain groups are "suitable targets." Through this "feedback loop," the perpetration of hate crimes and racial profiling also perpetuate themselves and one another, both by enhancing the usefulness of discriminatory targeting for future actors and by contributing to the assumption that such discrimination is inevitable.¹³⁹

CONCLUSION

Despite their different contexts and legal statuses, hate crime and racial profiling exhibit similar dynamics and have similar effects. In seeking solutions to both, we should resist the tendency to view these forms of discrimination as marginal, extreme, or isolated, and instead should recognize that they often occur in situations where they are accepted and rationalized. Indeed, these practices are arguably most harmful in those cases where they are *not* perceived as extreme or deviant, but instead as expected or "rational," because that perception itself contributes to and reinforces the social environment that makes the practices seem useful or sensible to perpetrators.

These themes have implications beyond the debates over the desirability of hate crimes legislation and the legality of racial profiling, for the two practices have relevance to other, less dramatic, more mundane, and more generally shared experiences of different minority groups. First, the more commonplace experiences contribute to both practices, for it is not just violent crime against or unfair policing of certain groups that marks them as suitable victims; the social context is influenced by both the extreme and the ordinary. For example, African Americans were viewed as suitable targets for racial violence during the lynching era in part because of the bad treatment that they routinely suffered in employment and other everyday settings. Conversely, as described above,¹⁴⁰ hate crimes and racial profiling contribute to an environment that promotes other, often less noticeable, forms of inferior treatment of certain groups. One particularly timely example of how the effects of racial profiling spill over into other contexts is the experience, during the most recent Presidential election, of some Black voters in

138. Roberts, *supra* note 37, at 812.

139. For further discussion of the "feedback loop" in the context of hate crimes, see Wang, *supra* note 23, at 895–99.

140. See *supra* notes 101, 105–09, 134–38 and accompanying text.

Florida who were turned away at the polls because they had erroneously been listed as convicted felons in the state's central voter file.¹⁴¹

In seeking solutions to these two forms of discriminatory targeting, the law ought to recognize the extent to which the two practices influence one another, as well as the extent to which each practice both reflects and contributes to society's designation of particular social groups as "suitable targets."

141. See, e.g., Gregory Palast, *Florida's flawed "voter-cleansing" program*, SALON MAGAZINE (Dec. 4, 2000), at http://www.salon.com/politics/feature/2000/12/04/voter_file/index.html (reporting on Florida's use of an inaccurate and unverified "scrub list" of felons to remove disqualified individuals from their voter rolls, the use of which list had a disproportionate effect on minority voters); Bob Herbert, *Keep Them Out!*, N.Y. TIMES, Dec. 7, 2000, at A31 (commenting on these events).