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LEGISLATING AGAINST HATE IN NEW YORK: BIAS CRIMES AND THE LESBIAN AND GAY COMMUNITY

INTRODUCTION

In recent years, crimes of violence, threats, and vandalism, in which the defendant's conduct was motivated by hatred, prejudice, or bias based on a victim's actual or perceived race, religion, national origin, ethnicity, gender, or sexual orientation, have increased at an astonishing rate.¹ Moreover, the level of violence of these attacks, evincing bias, is more severe than its non-bias counterpart.² The purpose of this Comment is to explore and discuss the nature of the bias crimes, with particular attention to those crimes directed against the lesbian and gay community. The Comment will examine the statistical data available on bias crimes against the gay and lesbian community, the need for bias crime statutes to include sexual orientation as a protected category, and the constitutionality of hate-crime legislation. Furthermore, it will compare and contrast two recently proposed bias-crime statutes for New York State.

Although this Comment centers on bias crimes as they relate to the lesbian and gay community, nothing in this Comment is intended to ignore, slight, nor minimize the significance of hate crimes directed against other categories of victims.

A recent study by the Department of Justice on Bias Crimes reports that the criminal victimization rate of gays was found to be 400% greater than that of the overall population.³ Moreover,

1. *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1314 (1993) (citing the Hate Crimes Statistics Act and how the figures recorded, though alarming, understate the current trend).

2. Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 167 (1992/1993).

3. *Id.* Assaults comprise more than 30% of these attacks. *Id.*

during their lifetimes, gays and lesbians often face harassment and brutality at the hands of relatives, co-workers, and schoolmates, in addition to stranger-perpetrated attacks.⁴ Whereas the victim of a bias attack, motivated by racial or religious hatred, may retreat to the comfort and safety of family and friends, the victim of an anti-gay or lesbian attack is not necessarily able to do the same. This may be especially true if the victim has not “come out” or revealed his sexual orientation to family and friends. Any comfort victims may receive from their family will neither soothe nor help to heal the true essence of the harm inflicted.⁵ Furthermore, of the forty-six states that have currently enacted some type of hate-crime legislation,⁶ only twenty-six states and the District of Columbia provide for expanded sentences motivated by bias,⁷ and as of 1990 only about half a dozen cover bias crimes committed because of the victim’s sexual orientation.⁸

Additionally, studies show that bias crimes against gays and lesbians have included some of the most brutal and heinous attacks ever recorded.⁹ Since the particular purpose of these crimes is to “rub out” the human being because of his or her sexual orientation, such attacks frequently involve cutting, mutilation, torture, and beating by groups of strangers,¹⁰ in what have been termed “hunting rituals.”¹¹

4. GREGORY HEREK & KEVIN T. BERRILL, *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* 1 (1992).

5. Tape of Touro Law Center Bias Crime Symposium, *Crimes of Hate in New York State*, Terri Maroney, HIV Related Violence Coordinator of the New York City Gay and Lesbian Anti-Violence Project (on file with author).

6. Abby Mueller, *Can Motive Matter? A Constitutional and Criminal Law Analysis of Motive in Hate Crime Legislation*, 61 UMKC L. REV. 619, 620 (1993).

7. Don Terry, *The Supreme Court: The States and the Law in the Crackdown on Bias, a New Tool*, N.Y. TIMES, June 12, 1993, § 1.

8. Rorie Sherman, *Hate Crime Statutes Abound: Newest in Vermont Among Toughest*, NAT’L L.J., May 21, 1990, at 3.

9. *Id.*

10. *Id.* (citing Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States*, 5 J. INTERPERSONAL VIOLENCE 274, 282 (1990)).

11. See Beth Holland, *Gay Bashings: 8 Nabbed in Chelsea Spree*, N.Y. NEWSDAY, Sept. 14, 1992, at 5; see also Frederick Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting*

Another attribute of bias crime is the grievous psychological and emotional harm inflicted which goes far beyond the resulting physical injury or property damage. Such victims experience nearly two and a half times more negative psychological and behavioral symptoms than do victims of other types of violence. This is due to the increased anxiety caused by the unprovoked nature of the attack and the potential for future similar recurrences.¹²

A victim of crime may feel isolated, angry, and fearful of a recurrence; but the victim of the bias attack experiences this on a deeper level, since he or she has been selected from a crowd and victimized solely because of his or her race, sexual orientation, or religion. There is nothing the victim in this instance can do. There is no control over the situation. Nor is there anything the victim *should* do to change his or her race, sexual orientation, or religion in order to prevent such attacks. Thus, such crimes cause more intense feelings of humiliation, isolation, and self-hatred on the part of the victim.¹³

Additionally, such people are doubly traumatized, once for the initial attack, and secondly for the feelings of responsibility they harbor for the “secondary victims”—those people of the same group who may feel vicariously assaulted.¹⁴ Since it is the victim’s very existence that makes him a target, and not any particular activity, the victim is forever fearful and vulnerable.¹⁵ Moreover, bias crimes directly interfere with the free exercise of one’s basic civil rights, such as the use of public sidewalks, and enjoyment in the security of one’s own person.¹⁶

Racist Speech, 68 NOTRE DAME L. REV. 673, 713 (1993) (stating that the dynamics of the hate crime combine a mob mentality with primal feelings which lead to especially horrifying results).

12. Levin, *supra* note 2, at 167.

13. Joseph M. Fernandez, *Bringing Hate Crimes into Focus - The Hate Crimes Statistics Act of 1990*, Pub.L. No. 101-275, 26 HARV. C.R.-C.L. L. REV. 261, 271 (1991).

14. Melinda Henneberger, *For Bias Victims, a Double Trauma*, NEWSDAY, January 9, 1992, at 113.

15. Levin, *supra* note 2, at 167.

16. Levin, *supra* note 2, at 167.

Hate crimes are not merely directed at the specific victim. They also send a clear message to the community to which he or she belongs. In the case of an anti-gay crime, each attack is a message of terror intended to silence not only the victim for stepping outside culturally accepted norms, but to send a warning to all gays and lesbians to remain "invisible, [in the] self hatred of the closet."¹⁷ Furthermore, hate crimes are directed toward the victim's respective group and such acts tend to escalate from individual conflicts to mass disturbances. This in turn often results in community disorder, by pitting those who sympathize with the victim against those who sympathize with the attacker. Ultimately, society at large becomes the greater victim.¹⁸ "It is an unfortunate side of human nature . . . that each of us is expected to, or forced to, tolerate some prejudice in our daily lives. . . . However, [when] these hateful and intolerant attitudes serve as the basis for criminal conduct, tolerance must end and criminal sanctions must take over."¹⁹

I. STATISTICS

For the third consecutive year since 1990, New York City has led the nation in the number of anti-gay hate crimes ranging from verbal harassment and beatings, to arson and murder, with an increase of sixteen percent between 1991 and 1992 in Manhattan alone.²⁰

17. HEREK & BERRILL, *supra* note 4, at 3.

18. See *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, *supra* note 1, at 1314; see also Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 875 (1992). One need only look to the recent riots in Crown Heights, Brooklyn which erupted when a car in a rabbi's procession accidentally jumped a curb and struck two African-American children, one of whom died. The riots culminated with the stabbing death of a 29 year old rabbinical student, Yankel Rosenbaum, in a revenge slaying.

19. E.D. Rosenberg, *Hate Crimes, Hate Speech and Free Speech-Florida's Bias-Intended Crime Statute*, 17 NOVA L. REV. 597, 601 (1992).

20. Robert Der, *Anti-Gay Crime Rises in '92*, N.Y. NEWSDAY, Mar. 12, 1992, at 25 (citing 6th ANNUAL NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT 1992 report on hate crimes against gays and lesbians).

The New York City Gay and Lesbian Anti-Violence Project has recorded a nearly four-fold rise in anti-gay and lesbian crimes since 1987, doubling between 1990 to 1992. Moreover, the magnitude of the violence is increasing.²¹ The National Gay and Lesbian Task Force noted a national increase of 172% in attacks on gays and lesbians in the past five years.²² More than half of the survivors of such crimes in 1990 were physically injured, and nearly seventy percent of these victims required medical attention.²³ Between 1991 and 1992, the number of victims requiring medical attention rose forty-one percent.²⁴

A 1984 study by the National Gay and Lesbian Task Force found that one in every five gay men and one in every ten lesbians reported being physically assaulted because of their sexual orientation, and these figures appear to be increasing.²⁵ This coincides with several factors, including greater public awareness and media coverage of gay life, which in and of itself makes gays and lesbians easier targets.²⁶ Backlash against the gay and lesbian community may also be attributable to the unprecedented climate of anti-gay rhetoric spouted during the national debate over gays in the military, the introduction of gay awareness into the New York City school system via the "Children of the Rainbow" curriculum, vilification by government leaders during the National Republican Convention,²⁷ and such destructive stereotyping of gays and lesbians in such films as "Basic Instinct" and "Silence of the Lambs."²⁸

21. NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, ANNUAL REPORT 3 (1992) [hereinafter ANTI-VIOLENCE REPORT].

22. Jessey Birnbaum, *When Hate Makes a Fist- When Does a Crime Become a Hate Crime? The Supreme Court Deals With Criminals Who Add Insult to Injury*, TIME MAGAZINE, Apr. 26, 1993, at 30.

23. Matt Foreman, *Gay Bashing: A Crime of Hate*, N.Y. NEWSDAY, June 23, 1991, at 5.

24. Ronald Sullivan, *Rise in Gay Bias Crimes Reported*, N.Y. TIMES, Mar. 12, 1993, at B6 (citing ANTI-VIOLENCE REPORT).

25. *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1519, 1541 (1989).

26. HEREK & BERRILL, *supra* note 4, at 47.

27. ANTI-VIOLENCE REPORT, *supra* note 21, at 3.

28. Sullivan, *supra* note 24.

With AIDS came another stigma against those whom the disease first affected and those perceived to have the virus. The disease was and is used to rationalize the already existing prejudice and violence against gays and lesbians.²⁹ As such, hate-mongers found a scapegoat on which to vent, as studies confirm with remarks made during attacks such as “plague carrying faggot” or “try to spread AIDS now!”³⁰ Moreover, the visibility of gays and lesbians in American society, as a result of the AIDS pandemic as well as the unprecedented media coverage of gay and lesbian issues, has increased public awareness of gay and lesbians, and may have exposed them to greater risk of violence.³¹ Yet, anytime a persecuted or disempowered group becomes more visible and moves towards equality, there is a backlash, as our country’s history has shown us time and again.³²

The following is a chart of five cities showing the rates of anti-gay and lesbian bias crimes for the years 1987-1992.³³ The asterisk in the chart below represents figures which are unavailable.

29. HEREK & BERRILL, *supra* note 4, at 2.

30. HEREK & BERRILL, *supra* note 4, at 39 (noting that 15% of all anti-gay attacks involved verbal reference to AIDS or were directed at people with AIDS).

31. HEREK & BERRILL, *supra* note 4, at 38-39.

32. Arlene Levinson, *Threat of Violence: Other Longtime Companion for Gay Men, Women; Homophobia: Some Call Gay Bashing the Last Permitted Hate Crime*, L.A. TIMES, July 18, 1993, at A8.

33. See *Anti-Gay Crimes Are Reported on Rise in 5 Cities*, N.Y. TIMES, Mar. 20, 1992, at A12; George E. Curry, *2 Convicted in New York Anti-Gay Slaying*, CHI. TRIB., Nov. 21, 1991, at 12 (citing National Gay and Lesbian Task Force Report); Gary Pierre-Pierre, *New Jersey Man Held in Beating of Greenwich Village Couple*, N.Y. TIMES, Aug. 29, 1993, at 31; Sullivan, *supra* note 24; see also HEREK & BERRILL, *supra* note 4, at 37.

	New York	San. Fran.	Minn. / St. Paul	Chicago	Boston
'92	662	435	311	252	238
up	12%	-----	-----	20%	14%
'91	592	473	338	210	209
up	17%	11%	202%	6%	42%
'90	507	425	112	198	147
up	65%	29%	133%	11%	75%
'89	308	*	*	*	*
up	7%	*	*	*	*
'88	289	*	*	*	*
up	147%	*	*	*	*
'87	117	*	*	*	*

II. UNDER-REPORTING OF ANTI-GAY AND LESBIAN VIOLENCE

As the steady increase in the number and rate of bias attacks against the gay and lesbian community increases, the number of reports of hate crimes to the police has continued its steady five-year decline. In 1992, thirty-eight percent of the victims reporting to the Anti-Violence Project also filed an official report to the police, compared to forty-one percent in 1991 and forty-eight percent in 1990.³⁴ Although reasons for this decline may vary, it is believed that victims of anti-gay and lesbian crime do not think that reporting to the police will result in the attacker being caught. Therefore, the many hours spent drudging through the criminal process is deemed pointless. Additionally, some are deterred by fear of retaliation by the perpetrator and publicity concerning the event. Moreover, many fear secondary victimization by a callous or insensitive police officer.³⁵ It is no coincidence that in 1991, New York police recorded only eighty-eight incidents of anti-gay

34. ANTI-VIOLENCE REPORT, *supra* note 21, at 4.

35. ANTI-VIOLENCE REPORT, *supra* note 21.

crime, about one-seventh of the amount communicated to the Anti-Violence Project.³⁶ However, even if police figures are to be believed, the number of crimes against gays and lesbians had increased almost twofold between 1989 and 1990.³⁷ In fact, despite the decrease in reporting, the police departments in the Gay and Lesbian Task Force's five city study noted a forty-one percent increase in 1991 over 1990 in hate crimes against gays and lesbians.³⁸ Interestingly, this same survey also cited a twenty-nine percent increase of *police* abuse directed against gays and lesbians.³⁹

According to the New York City Gay and Lesbian Anti-Violence Project, seventy-five percent of those victimized will wind up not reporting the incident to anyone, which in turn affects the accuracy of statistics on anti-gay violence.⁴⁰ Other national surveys have determined that anti-gay and lesbian violence may go unreported sixty-seven to ninety-one percent of the time,⁴¹ as compared to sixty-four percent of crimes committed against the general population which are not reported to the police.⁴² Leading law firms concur that there is an under-representation of gay and lesbian victimization in bias crime surveys.⁴³

There are many and varied reasons for the under-reporting of anti-gay and lesbian crimes. However, certain reasons do resurface.

36. Dennis Hevesi, *Group Finds A 65% Rise in Bias Crime*, N.Y. TIMES, Feb. 27, 1992, at B4.

37. Evelyn Hernandez, *Gay Bashing is Up in City, Report Finds*, N.Y. NEWSDAY, Mar. 7, 1991, at 21.

38. *Anti-Gay Crimes Are Reported on Rise in 5 Cities*, N.Y. TIMES, Mar. 20, 1992, at A12 (citing National Gay and Lesbian Task Force Report).

39. *Id.*

40. Hevesi, *supra* note 36 (citing the city's Human Rights Commission's report on anti-gay violence).

41. GARY D. COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 158 (1991).

42. *Id.* at 159.

43. *Leading Law Firm Releases First National Law Enforcement Survey for 1992 Revealing Significant Increases in Hate Crimes*, P.R.N. ASS'N, Jan. 14, 1993. In this article, Stroock & Stroock & Lavan, a national law firm, in preparing the first 1992 multi-jurisdictional survey as part of an amici brief for the United States Supreme Court, admits that groups such as gays are not fully represented due to notable under-reporting. *Id.*

One survey indicated that sixty-seven percent of the victim's interviewed, had either experienced or perceived police as being anti-gay; forty percent said they did not want to risk their sexual orientation being disclosed to the public; fourteen percent feared direct abuse by the police; fourteen percent stated that there were no other witnesses; and nine percent thought it would not be worth the trouble.⁴⁴ On the other hand, of the *general* population, only six percent do not report crimes thinking police would not wish to be bothered, and only three percent thought the police would be inefficient or insensitive.⁴⁵ Thus, police-related explanations for not coming forward are more common among victims of anti-gay and lesbian violence (sixty-seven percent and fourteen percent) than for crime victims in general (six percent and three percent).⁴⁶ Furthermore, whereas the general population bases its choice not to report on an anticipation of indifference or annoyance on the part of the police, the lesbian or gay individual makes the decision based on a fear of hostility or abuse by the police.⁴⁷

This fear is widespread and well-founded.⁴⁸ Although theoretically police are responsible for safeguarding communities from such crimes, they often view these incidents as harmless pranks, or worse, as acceptable conduct.⁴⁹ Sometimes the police themselves are the perpetrators.⁵⁰ Law enforcement personnel have been found to frequently decline to step in,⁵¹ to minimize the

44. COMSTOCK, *supra* note 41, at 159.

45. COMSTOCK, *supra* note 41, at 159-60.

46. COMSTOCK, *supra* note 41, at 160.

47. COMSTOCK, *supra* note 41, at 160.

48. See COMSTOCK, *supra* note 41, at 21, 294 (citing tables indicating hostility, abuse, and indifference); see also *Developments in the Law: Sexual Orientation and the Law*, *supra* note 25 (citing a history of conflict between law enforcement and the gay and lesbian community).

49. HEREK & BERRILL, *supra* note 4, at 31.

50. HEREK & BERRILL, *supra* note 4, at 31-32 (documenting numerous deliberate mishandling of anti-gay and lesbian violence cases, verbal and physical assault, including a 1987 assault on a lesbian couple which left one woman unconscious, and a 1983 police raid on a gay bar injuring patrons and destroying the entire interior).

51. See COMSTOCK, *supra* note 41, at 152; see also Donna Minkowitz, *It's Still Open Season on Gays; Prosecution of Gay Bashers*, 254 THE NATION 11, 368 (1992) (stating that callous Milwaukee police "returned a bleeding 14 year

gravity of the offense because the victim is gay, to put the blame on the victim, or to actually verbally and/or physically abuse the victim.⁵² At one point, the International Association of Chiefs of Police endorsed a “no hire policy for homosexuals in law enforcement.”⁵³ From the pre-Stonewall shooting and killing of two unarmed gay men by a transit officer (whom the grand jury failed to indict), and routine police violence against gay and lesbian bars,⁵⁴ to other unprovoked violence and harassment by police in the 1970’s and 1980’s,⁵⁵ and the refusal of a police sergeant to file a missing person’s report once he learned the missing person was gay,⁵⁶ the lingering pattern of anti-gay bias by police persists.

In 1986, New York County District Attorney Robert Morgenthau stated, in hearings on anti-gay and lesbian violence before the United States House of Representatives Committee on the Judiciary, Subcommittee on Criminal Justice, that “at times [lesbians and gay men] have been, and in many areas of the country, continue to be taunted, harassed and even physically assaulted by the very people whose job it is to protect them.”⁵⁷

It is by no means the indifference or intolerance of police officers alone which may result in the under-reporting of anti-gay

old boy to the clutches of Jeffrey Dahmer because, apparently, they assumed violence between [what they thought to be] gay lovers was natural”).

52. COMSTOCK, *supra* note 41, at 152.

53. COMSTOCK, *supra* note 41, at 157 (stating that “insisting on recruiting a certain percentage of homosexuals into the field of law enforcement is as reasonable as insisting on the same representation of diabetics, epileptics, child molesters, or rapists”).

54. COMSTOCK, *supra* note 41, at 23.

55. *Developments in the Law: Sexual Orientation and the Law*, *supra* note 25, at 1542 n.157 (citing Governor’s Task Force on Gay Issues reporting evidence of abuse and harassment by police as well as a survey of eight cities which determined that “23% of the gay men and 13% of the lesbians surveyed reported police abuse due to their sexual orientation”).

56. David Kocieniewski, *Sis Says Cop ‘Robbed My Brother of Dignity’*, N.Y. NEWSDAY, Aug. 4, 1991, at 17. The police officer told the sister that her missing brother was probably “shacked up with a nice piece of ass.” *Id.* The woman eventually found her brother, only moments after he died of injuries to his head as a result of the attack. *Id.*

57. COMSTOCK, *supra* note 41, at 153.

and lesbian crimes. The prejudice within the criminal justice system itself contributes to the problem as well. Dallas Judge Jack Hampton justified his lenient sentencing of a man convicted of murdering two gay men by stating, "[Had the victims] not been out there trying to spread AIDS around, they'd still be alive today. . . . I put prostitutes and gays at about the same level and I'd be hard put to give somebody life for killing a prostitute."⁵⁸

A judge in Broward County, Florida, turned to a prosecuting attorney during a case where an Asian-American gay male had been beaten to death and asked jokingly, "[T]hat's a crime now, to beat up a homosexual?" The attorney answered, "[Y]es sir. And it's also a crime to kill them."⁵⁹ The judge retorted, "[T]imes have really changed."⁶⁰

Most recently, Nassau County District Attorney Dennis Dillon, the prosecutor in the bias murder of Henry Marquez, a gay man whose car was rammed off the road during a gay bashing incident, stated in a letter written earlier that year, that a gay person is "a deviant, disordered person who contravenes Catholic moral teaching."⁶¹ It was only after storms of protest from the gay community that the original charge of manslaughter was upgraded to murder and the bail amount was raised from \$15,000 to \$500,000.⁶² How can someone harboring such sentiments be expected to zealously prosecute a bias crime?

Secondary victimization can also occur during the trial when there is an accusation that the gay victim brought the situation upon himself, by the tactic of employing the "homosexual panic defense." This defense alleges that the defendant's actions resulted from a psychological panic (i.e. latent homosexuality), causing the

58. Jonathan Willmott, Comment, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of Booth v. Maryland and South Carolina v. Gathers and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045, 1047 (1990).

59. HERRICK & BERRILL, *supra* note 4, at 294.

60. HERRICK & BERRILL, *supra* note 4, at 294.

61. Shirley E. Perlman, *Request in Bias Case*, N.Y. NEWSDAY, Feb. 19, 1992, at 28.

62. Eric Nagourney, *New Charge in Alleged Gay Bashing*, N.Y. NEWSDAY, Mar. 13, 1992, at 5.

defendant to act in self-defense from a sexual overture.⁶³ Not only does this defense appeal to the stereotype of the sexually predatory gay person, but it also assumes that murder is an appropriate answer to an advance by a person of the same sex.⁶⁴ This defense is very successful against prosecutions of many anti-gay violence cases and is most successful when the victim is dead.⁶⁵ Although this defense has been denied by appellate courts, this strategy appears to have met with success before juries and sentencing judges.⁶⁶ By example, we need look only again to Nassau County District Attorney Dennis Dillon, who is under attack for not securing a grand jury indictment of a defendant accused of stabbing his victim in the heart and neck, all in the name of self defense to an unwanted sexual advance.⁶⁷ In New York, following the murder of Jesus Santiago, a transvestite who witnesses claimed was killed when it was discovered that she was a male,⁶⁸ the Anti-Violence Project began a phone calling campaign to the Mayor and leafleting the police headquarters to have this case designated a bias crime.⁶⁹ As a result, "homosexual panic" assaults as well as murders are now considered bias crimes by the New York City Police Department.⁷⁰

Even at an anti-hate seminar given on behalf of the Elie Weisel Foundation, where a panelist gave a homophobic speech against a gay rights leader, no one, not a panelist nor foundation member,

63. HERRICK & BERRILL, *supra* note 4, at 295.

64. HERRICK & BERRILL, *supra* note 4, at 295.

65. HERRICK & BERRILL, *supra* note 4, at 295. See *Developments in the Law: Sexual Orientation and the Law*, *supra* note 25, at 1545. "[N]o court recognizing the partial defense of diminished capacity has ever barred evidence of homosexual panic as a matter of law or because homosexual panic rests on an unsupported and untenable psychological theory." *Id.* This defense contravenes the American Psychiatric Associations' declassifying homosexuality as a mental illness.

66. Marney Rich Keenen, "Homosexual Panic" Used as Defense in Murder Trials, GANNETT NEWS SERVICE, Apr. 28, 1993.

67. Maureen Fan, *Group Assails Nassau D.A.*, N.Y. NEWSDAY, Sept. 2, 1993, at 22.

68. ANTI-VIOLENCE REPORT, *supra* note 21, at 5.

69. ANTI-VIOLENCE REPORT, *supra* note 21, at 10.

70. ANTI-VIOLENCE REPORT, *supra* note 21, at 10.

spoke up to protest.⁷¹ The gay leader who was the brunt of this commentary, Matt Foreman of the Anti-Violence Project, removed himself from the conference.⁷²

Lesbians and gays, in their lifetime are likely to experience rejection, stigmatization, alienation, or indifference from family, friends, and society in general. However, as victims of bias crime they face further victimization because of society's allowance of such prejudice and acts of discrimination and violence against them. Studies have shown that hostility against gays and lesbians is condoned by large numbers of Americans, more so than bias against any other group and thus evokes less sympathy for the victim.⁷³ These same studies show that the most severe hostilities by youths are aimed at gays and lesbians.⁷⁴ Moreover, as a result of reporting the crime, the victim's sexual orientation becomes a matter of public record, which could cost the victim his or her employment, housing, or child custody.⁷⁵ In other jurisdictions, the victim may risk prosecution under state sodomy statutes which may carry prison sentences of over ten years.⁷⁶

It is due to these foregoing factors (mistrust, fear of exposure, retaliation) that the Hate Crimes Statistics Act of 1990 may never be able to provide accurate statistics of hate crimes in this country. While virtually all of the country's 16,000 law enforcement agencies participate in the *overall* crime reporting system, the level of compliance with regard to *bias crime* reporting is discouraging.⁷⁷ However, the Act's higher goal of finding a

71. Gabrielle Rotello, *Hate Includes Homophobia*, N.Y. NEWSDAY, Dec. 2, 1992, at 90.

72. *Id.*

73. Abramovsky, *supra* note 18, at 881 (citing Daniel Goleman, *Homophobia: Scientists Find Clues to its Roots*, NY TIMES, July 10, 1990 at C1).

74. Abramovsky, *supra* note 18, at 881 (citing the Governor's Task Force on Bias Related Violence Final Report).

75. HEREK & BERRILL, *supra* note 4, at 289.

76. HEREK & BERRILL, *supra* note 4, at 290.

77. Levin, *supra* note 2, at 171. As of 1992 ten states supplied usable statistics for 1990, fifteen states participated fully, and eleven states and Washington D.C. partially participated. Thirteen states made a commitment to,

meaningful, serious governmental response to, and acknowledgment and awareness of, incidents of bias crimes, by the Act may nonetheless be served.⁷⁸ Whether secondary victimization, by police and the court system is real or not, the widespread view that it has occurred can only serve to fuel the under-reporting of anti-gay crimes.

III. CHARACTERISTICS OF THE BIAS CRIMINAL AND THE BIAS CRIME VICTIM

From the data available, some general characteristics of the anti-gay perpetrator ("gay basher") emerge which may provide an explanation for fewer prosecutions and reportings of anti-gay crime. For example, ninety-four percent of all assailants are male, and nearly half of them are twenty-one years old or younger with seventy percent being less than twenty-eight years old.⁷⁹ This figure is compared to twenty-nine percent of defendants under twenty-two years of age acting against the general population.⁸⁰ Other studies show that since 1981, approximately seventy percent of those arrested in New York City for bias-related incidents were under nineteen years of age with forty percent of these defendants being younger than sixteen years old,⁸¹ as compared to seventeen and twenty-five years of age being the average age for non-bias criminals.⁸² Furthermore, the vast majority of bias criminals are not members of organized hate groups and are far less sophisticated than terrorist organizations such as Skinheads or the Ku Klux Klan.⁸³

but have not yet participated and eleven states did not participate at all in crime reporting. *Id.*

78. Fernandez, *supra* note 13, at 291.

79. HEREK & BERRILL, *supra* note 4, at 59.

80. HEREK & BERRILL, *supra* note 4, at 91.

81. Abramovsky, *supra* note 18, at 886 (citing James McKinley Jr. *Tracking Crimes of Prejudice: A Hunt for the Elusive Truth*, N.Y. TIMES, June 29, 1990, at A1).

82. Levin, *supra* note 2, at 169.

83. Abramovsky, *supra* note 18, at 886.

Perhaps the most alarming statistic is that perpetrators appear to be quite ordinary, average young men, often models of middle-class respectability. Few have criminal records or histories of psychological problems. This background information may also account for under-reporting and lack of prosecution, since judges tend to try the assailant as a juvenile, release him into the custody of his parents, and order only probation in the belief that the defendant has been "punished enough," which minimizes the severity of the offense.⁸⁴ Despite prosecutorial attempts to charge the highest possible offense, to avoid plea bargaining, and obtain harsh sentences, judges are still hesitant to give juveniles harsh sentences. They opt instead for a "slap on the wrist" in the form of fines and community service and ultimately release the perpetrator. The view here is that these youths do not realize the seriousness of their actions.⁸⁵

As for the victims of these crimes, gay men tend to be outnumbered nearly fifty percent of the time in these attacks and gay women, thirty-three percent of the time. These percentages increase as the age of the attacker decreases.⁸⁶ Furthermore, male victims who are alone are nearly twice as likely to be attacked than when in the company of another person. Conversely, lesbians who are in pairs are more likely to be attacked than those alone.⁸⁷ Statistics also show that forty-three percent of all victims are between eighteen and twenty-nine years of age, and forty-six percent are between thirty years and forty-four years of age. While the statistics show that seventy-two percent of these victims tend to be Caucasian, sixteen percent Latino, and nine percent African-American, it is believed that these figures are inaccurate in the recording of bias crimes against men of color.⁸⁸

84. See HEREK & BERRILL, *supra* note 4, at 91-92; see also Levin, *supra* note 2, at 170.

85. Peter Finn, *Bias Crimes: Difficult to Define, Difficult to Prosecute New Laws and Techniques That are Putting Bigots Behind Bars*, A.B.A. J. SEC. OF CRIM. JUST. 19 (1988).

86. HEREK & BERRILL, *supra* note 4, at 63.

87. HEREK & BERRILL, *supra* note 4, at 65.

88. ANTI-VIOLENCE REPORT, *supra* note 21, at 6.

Additional problems, such as lack of systematic methods of designating hate crimes as such, defining them, recording them or adequate reporting procedures, often halt prosecutions. Often such crimes are not defined as bias incidents unless the evidence is overwhelming. This is especially true if labeling a crime as bias-related requires detailed and demanding procedures which differ from other crimes.⁸⁹ For example, it took nine months to classify the Julio Rivera gay bashing murder as a bias crime, and a full time detective was never assigned to investigate the case.⁹⁰ Yet, in this case the defendants, who were Skinheads, traveled to a local gay "cruising area" "hunting" for a "homo." Upon finding Rivera, they killed him "because he was gay,"⁹¹ by beating him beyond recognition with a wrench and claw hammer, and then fatally stabbing him with a knife.⁹²

Given the aforementioned statistics, as well as ample justification as to why these figures grossly underestimate the current situation, along with the present lack of any laws in New York specifically calling for tougher sentences in cases of bias crimes, with the inclusion of gays and lesbians as a protected group, it is no wonder that crimes against gay people also tend to be characteristically more violent and heinous than crimes against non-gay persons. Such is to be expected since there is a greater likelihood that these crimes will go unreported and unpunished.⁹³

Despite some agencies and police department's sincere efforts at improving responses to anti-gay crimes,⁹⁴ at the present time, reporting an anti-gay or lesbian incident is a risk without reward.

89. HEREK & BERRILL, *supra* note 4, at 133-34.

90. Minkowitz, *supra* note 51.

91. Joseph Fried, *Week in Review*, N.Y. TIMES, § 4, at 6.

92. Curtis Taylor, *Gay Bash Killing Testimony Witness*, N.Y. NEWSDAY, Nov. 8, 1991, at 6.

93. Miller and Humphreys, *Lifestyles and Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC. 169, 179-80 (1980).

94. See HEREK & BERRILL, *supra* note 4, at 235-37 (citing liaison programs between the New York City Gay and Lesbian Anti-Violence Project and local precincts, courtroom monitoring and accompaniment for the victim, and sensitivity training); see also COMSTOCK, *supra* note 41, at 160-61 (citing training sessions regarding lesbian and gay issues and active recruitment of lesbians and gay men to the police force).

IV. BIAS CRIME LEGISLATION: CONSTITUTIONAL CRIMINAL LAWS

It is due to the heightened violence, personal degradation, and the potential for community disaster stemming from bias crimes that have prompted a response from state legislatures to enact statutes imposing enhanced penalties, both civil and criminal, for crimes motivated by prejudice.⁹⁵ This Comment will focus on the latter.

In general, all state bias crimes laws enhance penalties for bias-motivated criminal activity against certain groups of people, or categories of property.⁹⁶ However, many limit this enhancement to certain crimes such as institutional vandalism or harassment in the form of interference with religious worship.⁹⁷ Some states, like Vermont, increase sentences for *any* crime motivated by hatred against any one of the classes mentioned in the statute.⁹⁸

Bias crime statutes come in various forms, such as statutes specifying increased penalties for bias related crimes⁹⁹ or those creating the crime of "malicious harassment" or "ethnic intimidation" in which one element is the commission of certain enumerated underlying offenses.¹⁰⁰ Other statutes similar in nature to ethnic intimidation laws create new bias crimes that combine an existing crime and the new element of bias.¹⁰¹ Other states incorporate bias into their statutes defining aggravated assault. Moreover, some states merely add the motive of bias to an already existing list of aggravating factors which a judge may consider in

95. Levin, *supra* note 2, at 70.

96. Sherman, *supra* note 8.

97. Sherman, *supra* note 8.

98. Sherman, *supra* note 8 (stating that normal one year misdemeanors are upgraded to two years for a hate crime perpetrator, convicts receiving normally more than one year but less than five receive a minimum of five years, and judges must consider any bias motivation of the convict when sentencing defendants to more than five years).

99. Eric J. Grannis, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993).

100. *Id.* at 181.

101. *Id.* at 182.

determining a sentence within the statutory range provided by the already existing statute for the underlying crime.¹⁰²

The First Amendment protects speech or beliefs no matter how vile or loathsome, as long as it remains a belief—even a voiced belief. However, once such bias goes beyond expression and thought and “inspires a prejudicial act that injures someone in a non-communicative manner,” society can and should punish the offender.¹⁰³

The issue of whether the First Amendment prohibits states from enhancing existing penalties if it is found that the defendant intentionally selected his victim because of the victim’s race, religion, or other specified status was resolved on June 11, 1993, by the United States Supreme Court, in the case of *Wisconsin v. Mitchell*.¹⁰⁴ In this case, defendant Todd Mitchell, a nineteen year old black man, was convicted of aggravated battery, for his role in the severe beating of Gregory Riddick, a fourteen year old white male who was stomped, punched, and kicked until his attackers thought he was dead.¹⁰⁵ Normally the maximum sentence for the crime of aggravated battery in Wisconsin is two years, however Wisconsin state law provides for penalty enhancement for bias motivated aggravated battery of up to five years.¹⁰⁶ Mitchell was found to have acted out of racial bias *in the selection of his victim*, as evidenced by his statements of, “Do you feel hyped up to move on some white people?” and “there goes a white boy; go get him.”¹⁰⁷ These statements followed a video viewing and discussion of a scene from the film “Mississippi Burning” wherein white men beat a black youth while he was praying.¹⁰⁸ As a result of his actions, Mitchell was sentenced to four years incarceration based on Wisconsin Statute section 939.645.¹⁰⁹

102. *Id.*

103. David Cole, *The Value of Hate Crime Statutes*, TEXAS LAW., Mar. 22, 1993, at 18.

104. 113 S. Ct. 2194 (1993).

105. *State v. Mitchell*, 473 N.W.2d 1, 2-3 (Wis. Ct. App. 1991).

106. WIS. STAT. § 939.645 (1989-90).

107. *Mitchell*, 473 N.W.2d at 2-3.

108. *Id.* at 2.

109. WIS. STAT. § 939.645 (1989-90). The statute provides in pertinent part:

Mitchell argued that the Wisconsin statute was unconstitutional in that it punished an offender's bigoted thoughts¹¹⁰ and discriminatory motive¹¹¹ because the statute punished criminal conduct more severely when motivated by bigoted thought than for some other reason or no reason at all. Furthermore, he argued that the Wisconsin statute was unconstitutionally overbroad because of its chilling effect on speech.¹¹² The United States Supreme Court disagreed on all points in a rare unanimous decision, holding that Mitchell's First Amendment rights were not violated by the sentencing provision of the Wisconsin statute and reversed the Wisconsin Supreme Court decision.¹¹³

It is important at this juncture to distinguish hate *crime* statutes from hate *speech* statutes. In *R.A.V. v. City of Saint Paul*,¹¹⁴ the United States Supreme Court struck down a municipal ordinance prohibiting the use of only those "fighting words" that insult or provoke violence on the basis of race, color, religion, or gender.¹¹⁵ This speech ordinance applied specifically to expression as it is conveyed by appellation, symbols, objects, etcetera, where a harm stems from the communicative impact of these expressions.¹¹⁶ However, the ordinance prohibited a class of fighting words which were found to be offensive by the city, and the ordinance therefore,

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property . . . that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

Id.

110. *Mitchell*, 113 S. Ct. at 2198.

111. *Id.* at 2200.

112. *Id.* at 2201.

113. *Id.* at 2202.

114. 112 S. Ct. 2538 (1992).

115. *Id.*

116. *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, *supra* note 1, at 1317.

violated the First Amendment rule against content-based discrimination.¹¹⁷

Penalty enhancement statutes on the other hand do not punish the same types of expressions recognized by the First Amendment, but rather prohibit conduct unprotected by the First Amendment. This distinction was made clear by the Court in *Mitchell*.¹¹⁸ It is absurd to read the decision in *R.A.V.* so as to deem a violent beating as a form of "expressive conduct" to be afforded First Amendment protection. If such an interpretation is taken, then every crime could be viewed as an expression of anti-social thoughts or ideas. In this light, an act of assassination could be seen as an expression of political dissent.¹¹⁹ In fact, the courts in New York have consistently held that no First Amendment issue is raised in the crime of aggravated harassment,¹²⁰ since the intent of the statute is to prohibit violence and physical intimidation based upon prejudice, and violent acts such as this are not protected under the First Amendment.¹²¹ Though it may be argued that any kind of conduct conveys an idea or message of some sort and can be labeled "speech," the Court in *Mitchell* held that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."¹²²

117. *R.A.V.*, 112 S. Ct. 2538.

118. *Mitchell*, 113 S. Ct. at 2200-01.

119. *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, *supra* note 1, at 1317.

120. N.Y. PENAL LAW § 240.30 [3] (McKinney Supp. 1995) provides that:
A person is guilty of aggravated harassment in the second degree when,
with intent to harass, annoy, threaten or alarm another person, he or
she:

. . . .

3. Strikes, shoves, kicks, or otherwise subjects another person to physical
contact, or attempts or threatens to do the same because of the race,
color, religion or national origin of such person. . . .

Id.

121. *People v. Grupe*, 141 Misc. 2d 6, 9, 532 N.Y.S.2d 815, 818 (Crim. Ct. N.Y. County 1988).

122. *See Mitchell*, 113 S. Ct. at 2199; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1988) ("[V]iolence . . . that produces special harms distinct from their communicative impact . . . are entitled to no constitutional

Moreover, in the criminal context, the United States Supreme Court has stated that the Constitution “does not erect a per se barrier to the admission of evidence concerning one’s beliefs . . . [at sentencing] merely because those beliefs . . . are protected by the First Amendment.”¹²³ In *Barclay v. Florida*,¹²⁴ evidence of the defendant’s prejudice toward the victim was taken into account in sentencing the defendant to death, “surely the severest enhancement of all.”¹²⁵ Membership in the Black Liberation Army was deemed relevant to the racial hatred that inspired the defendant’s murder of a white man in order to start a race riot, despite the First Amendment right to freedom of association.¹²⁶ At the same time, it must be noted that a defendant’s abstract beliefs, however loathsome, cannot be a factor weighed by a judge in sentencing a defendant, where it is irrelevant to the issues being decided.¹²⁷

Furthermore, any argument that bias crime statutes punish discriminatory motive must fail as well. Motive as a factor in sentencing is not a new practice, but has traditionally been merely one of the factors taken into consideration by judges in determining what sentence is to be meted out.¹²⁸ Both good motives as well as bad motives may be considered at sentencing to determine either lenient or harsher sentences.¹²⁹

Moreover, penalty enhancement statutes advance state interests unrelated to the suppression of free expression such as protecting targeted groups from disproportionate victimization, and interference with their constitutionally protected rights, regardless

protection.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”).

123. *Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992).

124. 463 U.S. 939 (1983).

125. *Id.* at 942-44, 949.

126. *Id.*

127. *Mitchell*, 113 S. Ct. at 2200 (citing *Dawson v. Delaware*, 112 S. Ct. 1093 (1992)).

128. *Mitchell*, 113 S. Ct. at 2199. See *Tison v. Arizona*, 481 U.S. 137, 156, (1987) (“[D]eeply rooted in our legal system is the idea that the more purposeful the criminal conduct, the more serious is the offense and therefore the more severely it ought to be punished.”).

129. *Mueller*, *supra* note 6, at 627.

of the perpetrator's intent.¹³⁰ Similar to the discrimination against someone with regard to accommodations, when people know that their very being makes them especially prone to being a victim of a physical assault in a given location, they may well be discouraged from traveling there.¹³¹ People attacked for their religious practices may refrain from practice, those harmed for their national origin may retire from political activity,¹³² and those who are gay or lesbian may retreat into a world of darkness and self-hatred by hiding their true selves from others.

Statutes, such as the one at issue in Wisconsin, penalize what the attack communicates as well as what it does - it singles out a person for harm based on his or her sexual orientation, race, etcetera. The government's interest lies not in repressing or stifling a homophobic statement but rather in punishing a discriminatory act that inflicts an identifiable, non-communicative harm. Moreover, this harm is not an ordinary one. It is not merely an assault on the victim's person but on his essential human worth, which is an injury that remains long after the scars heal.¹³³

Penalty enhancement statutes, like anti-discrimination laws, prohibit conduct when it is performed "because of" a victim's race, religion, disability, etcetera. Federal and state anti-discrimination laws have long been upheld against constitutional challenges.¹³⁴ For example, refusing to rent to an African-American is permissible if it is based on something along the lines of poor credit history but not if based on the applicant's race. It is not merely the failure to rent the space to the African-American that is punished, but the discriminatory motive inherent in the landlord's refusing to do so because of that person's race.¹³⁵ Similarly, Mitchell's conduct evinced more than just an intent to injure a

130. Grannis, *supra* note 99, at 219-20.

131. Grannis, *supra* note 99, at 220.

132. Grannis, *supra* note 99, at 221.

133. David Cole, *What's Wrong with Punishing Thought Crimes?*, N.J. L.J., Mar. 22, 1993, at 17.

134. *Enhanced Penalty for Choosing Victim Based on Race Does Not Violate First Amendment*, N.J. L.J., June 21, 1993, at 80.

135. *Court Decisions, Agency Rulings, New Court Decisions*, U.S.L.W., Mar. 30, 1993, § 2, at 15.

person. He did not act regardless of the person's race, but rather *because of it*.¹³⁶ It is this purposeful selection coupled with the already criminal conduct that such statutes aim to punish, not the perpetrator's thought, speech or motive. Any words used by the defendant in the commission of that act may be introduced as circumstantial evidence to prove an intentional selection.¹³⁷ The First Amendment does not preclude the use of speech as evidence to establish the elements of a crime or to prove intent or motive. Evidence of a defendant's prior declarations are commonly admitted in criminal trials, subject to evidentiary rulings concerning relevancy and reliability.¹³⁸ Speech is often used to prove crimes that do not proscribe speech, especially the intent element of such crimes, where the words themselves are not an element of the crime. Thus, in criminal law, such bias crime statutes do not punish the thought but rather create a mens rea requirement of "purposefulness" with respect to the category of the victim.¹³⁹

Moreover, "fighting words" and expressive conduct may be regulated where there is found to be an important governmental interest and where the regulation is narrowly tailored to effectuate that interest. In such cases where speech and non-speech elements are present, the government may restrict the non-speech elements when it is clear that there is a sufficient compelling interest, "unrelated to the suppression of belief or expression" which would justify the indirect burden on the defendant's First Amendment rights.¹⁴⁰

Hate crime statutes are also a valid exercise of a state's constitutional power to legislate in order to protect the public

136. Kevin Ainsworth, *Targeting Conduct: A Constitutional Method of Penalizing Hate Crimes*, 20 FORDHAM URB. L.J. 669, 682 (1993).

137. See Rosenberg, *supra* note 19, at 616; see also *People v. Grupe*, 141 Misc. 2d 6, 9, 532 N.Y.S.2d 815, 818 (Crim. Ct. N.Y. County 1988) (stating that defendant's words are circumstantial evidence that the attack was committed because of the victim's religion).

138. See *Mitchell*, 113 S. Ct. at 2201; see also *Haupt v. United States*, 330 U.S. 631 (1947).

139. Grannis, *supra* note 99, at 179.

140. Mueller, *supra* note 6, at 624-25 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

health and safety. Such statutes further the state's important, if not compelling, interest in eradicating bias crime due to its impact on the victim, his community, and society in general.¹⁴¹ Furthermore, with respect to eliminating the "epidemic of hate violence and protecting citizens from the violence it precipitates and its tragic effects," Justice Scalia in *R.A.V.* closed by stating, "[W]e do not doubt that these interests are compelling."¹⁴² Both federal and state courts concur.¹⁴³

One of the purposes of criminal law is to punish the "blameworthiness entailed in choosing to commit a criminal wrong," (the mens rea), and the level with which the defendant acted when performing the proscribed act.¹⁴⁴ Criminal law has long since held that certain mens rea, culpable criminal mentality, are more or less blameworthy than others (i.e. intent more culpable than recklessness).¹⁴⁵ This concept has never been asserted to be unconstitutional on First Amendment grounds.¹⁴⁶

To invalidate penalty enhancement statutes because of a biased motive would invalidate all anti-discrimination laws. These bias statutes can be seen merely as the "typical criminal schemes that differentiate between the levels of severity of criminal conduct based upon the defendant's level of mens rea."¹⁴⁷

The handling of the mens rea in bias or penalty enhancement statutes is in accord with the principles of criminal law because they make the distinction between knowledge and purpose as it

141. J.D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After R.A.V.*, 72 OR. L. REV. 157, 177 (citing *U.S. v. Gilbert*, 813 F.2d 1523, 1531 (9th Cir.), cert. denied, 484 U.S. 860 (1987)).

142. *Id.* at 181.

143. *Id.* See *U.S. v. Gilbert*, 813 F.2d 1423 (9th Cir.), cert. denied, 484 U.S. 860 (1987); *U.S. v. Bledsoe*, 728 F.2d 1094 (8th Cir.), cert. denied, 469 U.S. 838 (1984); *People v. Grupe*, 141 Misc. 2d 6, 9, 532 N.Y.S.2d 815, 818 (Crim. Ct. N.Y. County 1988); *State v. Beebe*, 680 P.2d 11, 13 (Or. Ct. App. 1984).

144. S.H. KADISH & S.J. SHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 217 (1989).

145. Ainsworth, *supra* note 136, at 679.

146. Mueller, *supra* note 6, at 625-26.

147. Dorothy Roberts, *What's the Harm in Hate Speech and Bias Attacks?*, N.J. L.J., Apr. 26, 1993. The author is a professor of criminal law and civil liberties at Rutgers Law School - Newark, New Jersey.

pertains to the attendant circumstance of the victim's race, religion, sexual orientation, etcetera.¹⁴⁸ The bias-motivated attacker has acted purposely with regard to this attendant circumstance and is thus guilty under penalty enhancement statutes. However, the non-bias motivated assailant knows of the victim's sexual orientation but is indifferent to this fact.¹⁴⁹

Specific intent crimes illustrate this "punishment for blameworthiness" concept wherein an added element of engaging in certain conduct for a particular purpose, beyond the immediate act, is part of the underlying crime. For example, New York defines burglary in the third degree as a criminal trespass with the intent of committing a felony inside.¹⁵⁰ Whether the defendant is guilty of criminal trespass or burglary depends upon his further intent once inside, regardless of whether that further plan is carried out. Punishment rests on the perpetrator's purpose, yet we do not hold burglary statutes as unconstitutional because they punish this purpose. If these types of statutes were held to be unconstitutional, "then all criminal attempt statutes and all of the gradations between levels of culpability would necessarily fall, as they depend on the actor's motive."¹⁵¹

Motive, purpose, and intent are all related in that they pertain to a person's mental processes. However, in the instance of penalty enhancement or ethnic intimidation laws, it can be illustrated that these statutes do not punish the motive but rather the purpose of the criminal conduct. For example, in the burglary scenario, the purpose of the original break-in is to commit a felony inside. This is punishable by burglary statutes, regardless of the motivation for the criminal conduct (i.e. to steal money so as to pay for food). The nature of the conduct is only altered when the *purpose* of the initial break-in is changed, and as a result, the burglary statute may or may not be applied. For example, if it can be proven that the purpose of the initial trespass was to obtain the money which the homeowner had left for the trespasser who was locked out, then the

148. Grannis, *supra* note 99, at 188.

149. Grannis, *supra* note 99, at 192.

150. Ainsworth, *supra* note 136, at 679 (citing N.Y. PENAL LAW §§ 140.20, 140.10 (McKinney 1988)).

151. Ainsworth, *supra* note 136, at 680.

burglary statute would not apply. In this case, the specific intent to commit a felony was not present even though the same ultimate motive was to pay for food.¹⁵²

In the Wisconsin case, the defendant intentionally committed a battery, but in order to convict him of the hate crime involved, the further intent of purposefulness, that his victim be a white person, must be proven. Todd Mitchell was proven to have such "further intent" since his objective of "moving in on some white people" could only be achieved by attacking someone of that race. In essence, Mitchell's purpose was to injure a white person. His motive could be seen as revenge (i.e. pay-back for what he had seen in the film). It was to prevent the act of selecting a victim based on that person's race for which the statute was enacted.¹⁵³

Similarly, in New York, the act of harassment in the second degree is already prohibited by law,¹⁵⁴ but to prove aggravated harassment¹⁵⁵ for purposes of a bias crime, a further intent beyond

152. Mueller, *supra* note 6, at 626-27.

153. See Mueller, *supra* note 6, at 682; see also *Dobbins v. State*, 605 So. 2d 922, 924 (1992) (stating that the act of choosing a victim because of his race or religion is a type of speech that is subject to regulation).

154. N.Y. PENAL LAW § 240.26 (McKinney Supp. 1995). The section provides:

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2. He or she follows a person in or about a public place or places; or
3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. . . .

Harassment in the second degree is a violation.

Id.

155. N.Y. PENAL LAW § 240.30 (3) (McKinney Supp. 1995). Section 240.30 provides that:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: . . .

. . . .

3. Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person;

the immediate act must be shown in order to prove that the purpose of the harassment stemmed from the race, color, religion, or national origin of the victim.¹⁵⁶ To clarify by means of example, a racist attacking an African-American *in order to steal his money* has not violated a bias crime statute of aggravated harassment, whereas a racially indifferent perpetrator doing the same act *in order to impress his racist friends* would.¹⁵⁷ It is not the thought itself, but rather the thought expressed by an act that is already considered a criminal offense that is made punishable.¹⁵⁸ Moreover, a perpetrator using racial slurs or other derogatory language in the commission of a violent criminal act does not necessarily violate penalty enhancement or bias crime statutes, such epithets unrelated to the confrontation may nonetheless accompany the underlying attack.¹⁵⁹ The prosecution has the heavy burden of proving the underlying crime, the dissimilar race, sexual orientation, or beliefs of the parties,¹⁶⁰ as well as the intent of the offender to victimize that particular person because of the person's actual or perceived membership in a certain group.¹⁶¹

The Supreme Court held that the argument that penalty enhancement statutes will have the effect of chilling speech, by causing people to refrain from expressing opinions for fear that such statements will be offered as evidence if a future offense occurs, is too attenuated and speculative to support a claim that the law is too broad.¹⁶² This argument could possibly be made with

Aggravated harassment in the second degree is a class A misdemeanor.

Id.

156. See N.Y. PENAL LAW § 240.26. *But see* N.Y. PENAL LAW § 240.30 (3).

157. *People v. Miccio*, 155 Misc. 2d 697, 589 N.Y.S.2d 762 (Crim. Ct. Kings County 1992).

158. *Id.*

159. Grannis, *supra* note 99, at 184.

160. Marc L. Fleischauer, Comment, *Teeth For a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 701 (1990).

161. Rosenberg, *supra* note 19, at 621.

162. See *Mitchell*, 113 S. Ct. at 2201; see also Susan Gellman, *Sticks and Stones Can Put You in Jail, But Words Can Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. REV. 333, 358 (1991) ("One of the chief difficulties in drafting an ethnic

regard to any crime where intent must be proven.¹⁶³ Proof is often found in the accused's own words - i.e. "I hate my boss . . . I'm going to kill him one day."¹⁶⁴ It is also crucial to note that a defendant could be convicted under a penalty enhancement statute even if he were silent, if other evidence of bias in selecting the victim is available.¹⁶⁵

Furthermore, the United States Supreme Court in *Mitchell* specifically noted that bias crimes inflict greater harm to individuals and society, such as emotional harm, retaliatory crimes, and community unrest.¹⁶⁶ It stated that a state's desire to rectify these harms is a solid basis for hate crime laws.¹⁶⁷

There is evidence that hate crime statutes may in fact deter bias crimes.¹⁶⁸ However, it must be noted that bias crimes are not solely acts of hate.¹⁶⁹ One study has shown that from the attacker's point of view, his conduct is a positive act, reinforcing a sense of pride, superiority, and accomplishment for the benefit of his own group.¹⁷⁰ As such, the assailant whose mind set is one of fighting for what he believes in does not believe that he committed a crime at all, which would obliterate the effect of the hate crime statute.¹⁷¹

Nonetheless, it can be argued that hate crime statutes also serve a very simple purpose - that of retribution for a moral wrong. It can be argued that they represent the societal view that it is especially morally wrong to assault someone because of his or her status such

intimidation statute is making it broad enough to be effective without reaching the point of constitutional overbreadth.").

163. Rosenberg, *supra* note 19, at 618.

164. Rosenberg, *supra* note 19, at 618.

165. Rosenberg, *supra* note 19, at 619. *See* State v. Plowman, 838 P.2d 558, 563 (Or. 1992) ("Persons can commit that crime without speaking a word, and holding no opinion other than their perception of the victim's characteristics.").

166. *Mitchell*, 113 S. Ct. at 2201.

167. *Id.*

168. *Developments in the Law: Sexual Orientation and the Law*, *supra* note 25, at 1550.

169. John R. Berg, *State Legislators Battle Bigotry: Is the Ethnic Intimidation Law a Constitutionally Infirm and Ineffectual Weapon?*, 20 CAP. U. L. REV. 971, 991 (1991).

170. *Id.*

171. *Id.* at 991-92.

as race, religion, sexual orientation, and that such violent conduct is intolerable. This can be supported by acknowledging that the Supreme Court has stated that “[t]he law . . . is constantly based on notions of morality.”¹⁷²

Thus it appears hate crime statutes do not infringe on the right of an individual to hate people based upon their actual or perceived sexual orientation, race, religion, or other status. As such, it seems as though they are a valid response to bigots who are still free to think as they choose but who cannot express their beliefs and hatred through criminal conduct. In fact, it should be noted that a person does not have to hate to be guilty of this crime.¹⁷³ No one is proscribed by penalty enhancement statutes from expressing homophobia or racism; “the only proscribed method is violence.”¹⁷⁴

V. THE PROBLEMATIC PROSECUTION OF BIAS-RELATED CRIMES

Despite the upward trend in the number of bias crimes against the gay and lesbian community,¹⁷⁵ the number of cases being prosecuted has not risen at the same speed¹⁷⁶ despite the fact that according to one New York Police Officer, most instances of bias related violence are seen as prosecution-worthy by law enforcement officials.¹⁷⁷

Several factors, in addition to under-reporting, explain the lack of prosecution. The most significant is the problem of proving that the crime was committed as a result of bias.¹⁷⁸ When individual officers compile reports, as opposed to police units specializing in

172. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

173. *State v. Plowman*, 838 P.2d 558, 563 (Or. 1992).

174. Selbin, *supra* note 141, at 169.

175. ANTI-VIOLENCE REPORT, *supra* note 21, at 2-3.

176. Tanya K. Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence”*, 99 YALE L.J. 845, 846 (1990) (stating that only thirty-three out of eight hundred bias incidents reported in 1988 were prosecuted).

177. *Id.* at 846 n.8 (stating that police officers feel that people disfavored in the community would not lie about such attacks).

178. Finn, *supra* note 85, at 23.

investigating bias crime, cases often lack physical evidence, verification of use of bias language or witnesses who are reliable.¹⁷⁹ This often forces prosecuting attorneys to drop charges or offer plea bargains,¹⁸⁰ something rarely done in bias crime cases.¹⁸¹

Additionally, there are obstacles which must be overcome when determining if a crime was bias-motivated. Prosecutors often use common sense in this determination.¹⁸² To determine whether an attack was bias-related, factors considered are the language used in the course of the attack by the defendant, the seriousness of the attack, absence of provocation, history of similar attacks in the vicinity, and the lack of another apparent motive.¹⁸³ Once at trial, the prosecutor must be prepared to deal with the "homosexual panic" defense and judges who habitually impose lenient sentences on juvenile offenders,¹⁸⁴ who comprise a large number of perpetrators of anti-gay violence.¹⁸⁵ Moreover, another problem hindering the prosecution of bias crimes is the bias of prosecutors themselves.¹⁸⁶ Since police officers are the criminals in many bias based incidents, prosecutors may be inclined not to prosecute the officer.¹⁸⁷ Some prosecutors, as a result of unconscious bias, will not recognize or worse, see nothing wrong with it.¹⁸⁸

Furthermore, even where a prosecutor strongly desires to pursue a bias crime case, there is not always ample law on the books to assist him. There are federal civil rights and criminal statutes

179. Finn, *supra* note 85, at 23.

180. Finn, *supra* note 85, at 23.

181. Abraham Abramovsky, *Bias Motivated Crime, Part II*, N.Y. L.J., Oct. 11, 1989, at 3.

182. Finn, *supra* note 85, at 23 (providing an example of a cross burning on a black family's lawn in an all white neighborhood immediately following the family's arrival to the area).

183. Finn, *supra* note 85, at 23.

184. Finn, *supra* note 85, at 47.

185. Levin, *supra* note 2, at 169.

186. Hernandez, *supra* note 176, at 852.

187. Hernandez, *supra* note 176, at 852.

188. Hernandez, *supra* note 176, at 852.

available.¹⁸⁹ However, the prosecutor must either demonstrate that there was a conspiracy against citizen's rights or a conspiracy motivated by a desire to interfere with a person's civil rights.¹⁹⁰ Though a complete discussion of these statutes is a topic for a separate article, it should be noted that by their very nature, these federal statutes are not tailored to address spontaneous violence. It is thus best left to the state legislatures to supplement the existing federal statutes with local state laws.

VI. NEW YORK STATE: PRESENT AND PROPOSED ANTI-BIAS LEGISLATION

Currently, New York utilizes already existing penal as well as non-penal statutes in response to the increase in bias-related offenses.¹⁹¹ These statutes include disturbance of religious service,¹⁹² aggravated harassment in the first degree,¹⁹³

189. Hernandez, *supra* note 176, at 846-47 (citing 18 U.S.C. §§ 241, 1985 (1982)).

190. Hernandez, *supra* note 176, at 847.

191. Abramovsky, *supra* note 18, at 888.

192. N.Y. PENAL LAW § 240.21 (McKinney 1989). Section 240.21 states that "[a] person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof. Aggravated disorderly conduct is a class A misdemeanor." *Id.*

193. N.Y. PENAL LAW § 240.31 (McKinney 1989). This section states:

A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of the race, color, religion or national origin of such person he:

1. Damages premises primarily used for religious purposes, or acquired pursuant to section six of the religious corporation law and maintained for purposes of religious instruction, and the damage to the premises exceeds fifty dollars; or
2. Commits the crime of aggravated harassment in the second degree in the manner proscribed by the provisions of subdivision three of section 240.30 of this article and has been previously convicted of the crime of aggravated harassment in the second degree for the commission of conduct proscribed by the provisions of subdivision three of section 240.30 or he has been previously convicted of the

aggravated harassment in the second degree,¹⁹⁴ and sections of the Religious Corporations Law and Civil Rights Law.¹⁹⁵ This Comment does not address the latter two.

The aggravated harassment statutes were an attempt to battle racial and religious hatred by enhancing the penal code's harassment charge where the intent is bias-related.¹⁹⁶ These statutes place an emphasis on bias incidents occurring at places of religious worship by carrying a felony charge for such a crime, but fail to do likewise for bias-motivated vandalism against a minority person's home, which is frequently the target for hate crimes.¹⁹⁷ This type of vandalism is only a misdemeanor.¹⁹⁸ Although these statutes do pass constitutional muster,¹⁹⁹ they do not seem to adequately address the problem of bias crimes.

Under aggravated harassment in the first degree, which is a felony,²⁰⁰ destruction of religious property is punished more harshly than damage to a *person* under aggravated harassment in the second degree, which is a misdemeanor.²⁰¹ For a person to be

crime of aggravated harassment in the first degree within the preceding ten years.

Aggravated harassment in the first degree is a class E felony.

Id.

194. N.Y. PENAL LAW § 240.30 (McKinney Supp. 1994). Section 240.30 states:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: . . .

. . . .

(3) Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person. . . .

Aggravated harassment in the second degree is a class A misdemeanor.

Id.

195. Abramovsky, *supra* note 18, at 889.

196. Abramovsky, *supra* note 18, at 888-89.

197. Abramovsky, *supra* note 18, at 889-92.

198. Abramovsky, *supra* note 18, at 891.

199. Abramovsky, *supra* note 18, at 893 (citing *People v. Dinan*, 118 Misc.2d 857, 461 N.Y.S.2d 724 (City Ct. Nassau County 1983) and *People v. Grupe*, 141 Misc.2d 6, 532 N.Y.S.2d 815 (Crim. Ct. N.Y. County 1988)).

200. N.Y. PENAL LAW § 240.31 (McKinney 1994).

201. N.Y. PENAL LAW § 240.30 (McKinney Supp. 1994).

convicted under harassment in the first degree for harm to a *person*, the defendant must have previously been convicted, within the past ten years, of aggravated harassment in the second degree under subdivision three which requires proof of bias.²⁰² In summation, destroying religious property is a felony on its own, while hurting a person only becomes a felony with a previous conviction for bias related aggravated harassment. Statutory reform must be enacted to place the value of human life above that of buildings and property.

Furthermore, since sexual orientation is not a protected status under the current penal law,²⁰³ when a gay man or lesbian is shoved, kicked, or struck because of his or her sexual orientation, according to the wording of the statutes, the most the defendant would be charged with is harassment in the second degree, (imposing a maximum of fifteen days in jail or a fine) which is merely a violation.²⁰⁴ Yet, the assailant in a racially motivated attack faces being charged with a class A misdemeanor, carrying a sentence of up to one year in jail, for the same bias motivated crime.²⁰⁵

Without the inclusion of sexual orientation in any current or proposed bias crime legislation, two standards would emerge. Bias crimes directed against gays and lesbians would be viewed as less significant, less pervasive and less reprehensible than similar crimes motivated by religious, racial, or ethnic hatred.²⁰⁶ This lack

202. N.Y. PENAL LAW § 240.31 (McKinney 1994).

203. Arthur S. Leonard, *Bias Motivated Crime Requires New Law*, N.Y. L.J., Sept. 25, 1989, at 2 (stating that although violence against gays and lesbians may be the biggest category of bias crimes in the U.S. no law in New York directly addresses this issue).

204. N.Y. PENAL LAW § 240.26 (McKinney Supp. 1995) which provides in part that:

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same. . . .

....

Harassment in the second degree is a violation.

Id.

205. N.Y. PENAL LAW § 240.30 (McKinney Supp. 1994).

206. Fernandez, *supra* note 13, at 274.

of inclusion, "gives permission to bigoted thugs who feel responsible to personally rid society of their personal version of undesirables."²⁰⁷

This same double standard underscored the inclusion of sexual orientation in the Hate Crimes Statistics Act of 1990. Sponsors of the Act took great pains to ensure that "nothing in this Act shall be construed to promote or encourage homosexuality and that 'the American family life is the foundation of American society,'" so as to quell the fears that this Act would open the door to the inclusion of sexual orientation as a protected status under the 1964 Civil Rights Act.²⁰⁸ Additionally, people with AIDS are not covered under existing penal law since disability is not included under aggravated harassment statutes as a protected group. Though they are counted for investigative and reporting purposes under the heading of "disability," this only makes the crime a higher priority, but there is no increased penalty.²⁰⁹

Additionally, the current statutes do not take into consideration the age of the offenders, when statistics have shown that people twenty-one or under are the majority of the perpetrators of criminal activity evincing bias against gays and lesbians.²¹⁰ Currently, conventional laws carry only minor penalties for the juvenile bias-related offender.²¹¹ Therefore, it is imperative that any reforms to the penal code contend with the relative youth of the perpetrators of hate motivated violence.

Furthermore, the current penalty scheme does not cover acts motivated by the defendant's prejudice which result in the death of the victim. The recent death of Yusef Hawkins,²¹² the not too

207. UNITED PRESS INT'L, Mar. 4, 1992, at regional news.

208. Fernandez, *supra* note 13, at 279-80, 281.

209. Jonathan Hicks, *Bias Crimes Now Include the Disabled*, N.Y. TIMES, Apr. 21, 1993, at B6 (stating that the inclusion of "disability" is due to the increasing pressure from gay and lesbian organizations, not as one would have pre-supposed, from advocates for the disabled).

210. See HEREK & BERRILL, *supra* note 4, at 29-30.

211. Levin, *supra* note 2, at 170.

212. Abramovsky, *supra* note 18, at 877 n.9 (explaining that Hawkins, who was black was attacked and killed by a gang of white youths because he was in a predominantly white neighborhood at night).

distant Howard Beach incident,²¹³ and most recently the death of Yankel Rosenbaum,²¹⁴ clearly indicates the need for statutory reform in this area.

Recently there were two central proposals in the New York State Legislature to deal with bias crimes: "The Comprehensive Bias and Gang Assault Act,"²¹⁵ and "The Bias Related Violence and Intimidation Act."²¹⁶ Each addresses the ever-mounting concern of bias related violence in its own unique way and though each has its strong points and weaknesses, the two together make an effective weapon to combat bias-motivated violence.

VII. THE COMPREHENSIVE BIAS AND GANG RELATED ASSAULT ACT

The Comprehensive Gang Act attempts to punish bias and gang-related violence in tandem by increasing penalties for all assaults across the board, regardless of motivation. They do this by expanding criminal mischief in the second degree and creating a new subdivision to existing assault provisions encompassing assault in the first, second, and third degree for those situations involving three or more assailants.²¹⁷

In order to reflect the severity of the consequences of bias and gang-related crimes, all assaults are to be elevated one penalty grade, in addition to amending existing penal law.²¹⁸ This Act also

213. Abramovsky, *supra* note 18, at 877.

214. Abramovsky, *supra* note 18, at 875.

215. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 (Sponsored by Sen. R. Marino).

216. See 215th G.A., 1st Reg. Sess., 1993 NY S.B. 1802 (Sponsored by Sen. M. Ohrenstein).

217. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424.

218. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 3. "The closing paragraph of section 120.10 of the [P]enal [L]aw is amended to read as follows: 'Assault in the first degree is [to be raised from a class C to] a class B felony.'" *Id.*; Section 4 of the Senate bill states that:

Section 120.10 of the [P]enal [L]aw is amended by adding a new subdivision 5 to read as follows:

expands criminal mischief in the second degree to cover damage to religious institutions such as churches and synagogues and its property, schools, cemeteries, community centers, or any personal property related therein.²¹⁹ However, this Act does not protect against bias-motivated vandalism directed against people's homes.

'5. With intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person.'

Id.; Section 5 of the Senate bill states: "The closing paragraph of section 120.05 of the [P]enal [L]aw is amended to read as follows: Assault in the second degree is [to be raised from a class D to] a class C felony." *Id.*; Section 6 of the Senate bill states that:

Section 120.05 of the [P]enal [L]aw is amended by adding a new subdivision 9 to read as follows:

'With intent to cause physical injury to another person and while aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person.'

Id.; Section 7 of the Senate bill states: "The closing paragraph of section 120.00 of the [P]enal [L]aw is amended to read as follows: 'Assault in the third degree is [to be raised from a class A misdemeanor to] a class D felony.'" *Id.*

219. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 8.

Section 145.10 Criminal Mischief in the Second Degree. A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he:

1. damages property of another person in an amount exceeding one thousand five hundred dollars; or
2. intentionally or recklessly damages:
 - (a) a structure used for religious worship;
 - (b) cemetery or a facility used for memorializing the dead;
 - (c) a school or community center;
 - (d) the grounds adjacent to and owned or rented in common with a structure or facility used for religious worship, as a cemetery, for memorializing the dead, as a school or community center; or
 - (e) personal property used for or in connection with religious worship, cemetery purposes, memorializing the dead or school or community center activities, contained in a structure or located at a facility used for religious worship, as a cemetery, for memorializing the dead, as a school or community center in an amount less than one thousand five hundred one dollars.

Criminal Mischief in the second degree is a class D felony.

Id.

The Comprehensive Gang Act does take issue with the group mentality that is so prevalent in bias-related crimes and responds to statistics indicating that the majority of bias incidents overall are committed by groups of four or more.²²⁰ However, not all assaults on gays are gang attacks,²²¹ and though gay men or lesbians tend to be outnumbered in these incidents, the average ratio is not clear. Furthermore, the older the assailant, the fewer the number of attackers per incident.²²² New York City officials have been calling for gang-related violence measures for years *in addition to* bias crime legislation.²²³ Therefore, where attacks are comprised of two perpetrators, the Comprehensive Gang Act is less than comprehensive.

To its credit, the Comprehensive Gang Act recognizes the grim reality of the youthful offender's participation in bias crimes and does hold fourteen and fifteen year-olds criminally liable for assault in the second degree.²²⁴

As for sentencing under the Act, the maximum sentence for a first offender would be twenty-five years for a class B felony, fifteen years for a class C felony, and seven years for a class D felony.²²⁵ Furthermore, the Act mandates that sentences handed down run consecutively with any other sentences simultaneously imposed which arise from the same criminal transaction.²²⁶ In the event the court runs the sentences concurrently, it must state on the record with specificity its reasons for doing so.²²⁷

220. Abramovsky, *supra* note 18, at 887 (noting that anonymity in numbers lessens moral responsibility while it adds to the seriousness of the attack).

221. Attorney General Robert Abrams, *Not All Bias Crime Bills are Equally Effective*, N.Y. TIMES, June 1, 1990, at A28.

222. HEREK & BERRILL, *supra* note 4.

223. M.P. McQueen, *Cuomo Urges New Bias Law; GOP Counters with Assault Measures*, N.Y. NEWSDAY, May 15, 1990, at 2 (noting that Mayor Dinkins originally introduced the group violence law in response to the Central Park Jogger attacked by a group of "wilding" teenagers).

224. *See* 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 10 (amending subdivision 2 of section 30.00 of the [P]enal [L]aw to hold persons ages thirteen through fifteen years of age criminally liable "for acts constituting murder in the second degree . . .").

225. *See* 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 10.

226. *See* 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 10.

227. *See* 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 13.

Aggregate maximum sentences under this Act are also enhanced. In the case of those convicted of class B felonies, the aggregate maximum is increased from thirty to forty years,²²⁸ and if convicted of two violent felonies (of which one is a class B felony, such as Assault in the first degree), the maximum aggregate sentence increases from forty to fifty years.²²⁹ Where a defendant is convicted of three or more violent felonies, the aggregate maximum increases from fifty to sixty years.²³⁰

This Act also restricts the court's ability to reduce charges from felony to non-felony offenses where there is reason to believe that the defendant committed assault in the first or second degree,²³¹ and it also imposes statutory limitations on plea bargain arrangements.²³²

Section 70.25 of the [P]enal [L]aw is amended by adding a new subdivision 2-E to read as follows:

2-E. Notwithstanding the provisions of subdivision two of this section or of article forty of the Criminal Procedure Law when more than one sentence of imprisonment is imposed on a person convicted of assault in the first degree . . . second degree . . . or assault in the third degree . . . and an additional offense arising from the same criminal transaction, the sentence for such assault shall run consecutive to the other sentence or sentences imposed unless otherwise prohibited by law.

Provided, however, that the court may, in the interest of justice, order the sentences to run concurrently in a situation where consecutive sentences are required by this subdivision if it finds mitigating circumstances that bear directly upon the manner in which the crime was committed. The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making this determination and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that consecutive sentences should not be ordered, it shall make a statement on the record of the facts and circumstances upon which such determination is based.

Id.

228. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 14(c)(i).

229. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 14(c)(ii).

230. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 14(c)(iii).

231. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 15(b).

232. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 16.

Yet, despite all of these penalty enhancements, one must stop at this point to question why this Act is called the Comprehensive *Bias* and Gang Assault Act.

It is only in the bill's preamble that there is mention of the main reason for this Act - that being the increase of bias related violence against enumerated classifications of individuals, including religion, race, sexual orientation, disability, national origin, etcetera, and that such acts of hatred are the "antithesis of what this nation stands for."²³³ Yet, any consideration of bias in relation to these penalties or reformed procedures dealing with such attacks do not come into play until sentencing.²³⁴ It is on this point that the Comprehensive Gang Act is too vague and clearly does not go far enough. One might even go so far as to say that this bill suffers from its own worst enemy -- prejudice.

Since most non-capital systems are infiltrated with bias, legislators should design sentencing schemes that strictly limit or eliminate discretionary procedures to reduce discrimination at

Subdivision 4 of section 180.75 of the [C]riminal [P]rocedure Law . . . is amended to read as follows:

4. Notwithstanding the provisions of subdivision[s] two and three of this section, a local criminal court shall, at the request of the district attorney, order removal of an action against a juvenile offender to the family court pursuant to the provisions of article seven hundred twenty-five of this chapter if, upon consideration of the criteria specified in subdivision two of section 210.43 of this chapter, it is determined that to do so would be in the interests of justice. Where, however, the felony complaint charges the juvenile offender with murder in the second degree . . . rape in the first degree . . . sodomy in the first degree . . . assault in the first degree . . . assault in the second degree . . . or an armed felony . . . a determination that such action be removed to the family court shall, in addition, be based upon a finding of one or more of the following factors:
 - (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or
 - (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or
 - (iii) possible deficiencies in proof of the crime.

Id.

233. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 1.

234. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 13.

sentencing. Thus, all special crimes such as bias-related violence, would receive equal treatment.²³⁵ Short of this, all factors to be considered by the sentencing judge must be specifically included in the sentencing provision itself.

The judge at the time of sentencing has the discretion to order sentences to run consecutively or concurrently based upon consideration of the circumstances attending the commission of the crime, including whether or not the offense was committed because of the victim's actual or perceived membership in an "identifiable class or group of individuals" as well as the defendant's criminal record, social history and "any other matter . . . deem[ed] relevant" ²³⁶ Without specification within the statutory language of the sentencing provision itself, the "identifiable class" could apply to any group of individuals --bankers, teachers, or lawyers. Vagueness leads one to wonder if the "homosexual panic" defense could be one of the "other matters deemed relevant." As previously noted, judges are not necessarily capable of keeping personal prejudices from influencing them at sentencing.²³⁷ By not including these categories within the sentencing procedures for bias crimes, sexual orientation (although mentioned in the findings) would not *necessarily* permit a higher maximum sentence than ordinarily imposed.

Senator Ralph Marino, sponsor of the Comprehensive Gang Act, has stated that the appropriate time to take factors such as bias into consideration is at sentencing, and not during the prosecution's case of proving that the underlying crime was bias motivated. Yet, while claiming that those categories of victims outlined in the findings are the reasons for this enhancement,²³⁸ they are not specifically provided for within the bill he sponsors. The criminal law already distinguishes acts of vandalism against a private residence and those against a house of worship within the elements

235. *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1626, 1627 (1988).

236. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 23.

237. See Don Terry, *The Supreme Court: The States and the Law: In Crackdown on Bias, A New Tool*, N.Y. TIMES, June 12, 1993, at 8.

238. *Q & A: Ralph J. Marino; Where Republicans Stand on Hate Crime Legislation*, N.Y. TIMES, Jan. 1, 1992, at 7.

of a crime.²³⁹ Why, therefore, should the penalty enhancements be any different with respect to harms to individual people based on sexual orientation, religion, or race, etcetera?

Furthermore, this proposal lists attendant circumstances that the judge may take into consideration, even though this is something judges already have implicit authority to do.²⁴⁰ Yet, the drafters of this proposal have chosen to place the *specific classifications* of victims, named in the legislative findings, outside the scope of the sentencing provision's factors that a judge is to consider. It is suspected that one reason for the exclusion stems from Republican fears of opening the floodgate to other gay rights legislation.²⁴¹ This fear of teetering on a slippery slope is unfounded. If a person commits himself or herself to securing for gays and lesbians the *first* civil right of *every* American, they do not and need not be committed to *every* civil right for gay men and lesbians.²⁴²

Senator Marino insists that to obtain the objective of fighting bias crime, the best approach is to do so without dealing with the burden of proving motivation because "all victims are the same."²⁴³ This is patently untrue since research has shown the disparate victimization rate of gays and lesbians²⁴⁴ and the differences in the types of physical injuries suffered.²⁴⁵

239. Compare N.Y. PENAL LAW § 240.31 (providing that an aggravated harassment in the first degree involving a house of worship where damage exceeds fifty dollars carries a penalty of an E felony); with N.Y. PENAL LAW § 145.05 (providing that criminal mischief in the third degree against a person's property must meet a minimum of two hundred fifty dollars in damage).

240. Matt Foreman, *Albany Republicans Show Bias on Bias Bill*, N.Y. TIMES, Feb. 15, 1992, at 22. Matt Foreman is the Executive Director of the New York City Gay and Lesbian Anti-Violence Project.

241. See Terry, *supra* note 237; see also Q & A: Ralph J. Marino, *supra* note 238. Senate Republican Guy Velella of the Bronx told newspapers, "it opens a Pandora's box. Our concern is opening up a whole area of gay rights in teaching. Teachers would have rights to be homosexuals and advocate that is an acceptable way of life." *Id.*

242. David Chang, *Beyond Uncompromising Positions: Hate Crime Legislation and the Common Ground Between Conservative Republicans and Gay Rights Activists*, 21 FORDHAM URB. L.J. 1097, 1098-99 (1994).

243. Q & A: Ralph J. Marino, *supra* note 238.

244. Levin, *supra* note 2.

245. Sherman, *supra* note 8.

In 1989, Senate Majority Leader Warren Anderson acknowledged that the general consensus among Republican Senators was that this bill would "set a precedent by creating a special protection in the criminal law for homosexuals They questioned whether that should be done."²⁴⁶ Furthermore, Anderson went so far as to invent his own bill that would deliberately exclude lesbians and gay men without having to acknowledge his motives for doing so.²⁴⁷ Failing this, Republicans lobbied proponents of the bill to remove sexual orientation.²⁴⁸ The Republican senators, in essence, are sending the message that "it is less important to protect gays and lesbians subjected to acts of violence rooted in bigotry, than it is to pander to bigotry itself."²⁴⁹

The most sweeping reform in the Comprehensive Bias and Gang Assault Act comes in the form of statutorily mandated systematic recording of bias-crimes, calling for police to collect figures and make reports and district attorneys to report the disposition of all bias crime cases to the Commissioner of Criminal Justice. This in turn is to be compiled into a quarterly report to be forwarded to the Governor.²⁵⁰ It is only through such standardized data collection pertaining to the number, type, nature, and frequency of such crimes that accurate statistics may be obtained. Then, perhaps educational programs can be designed to prevent such acts of hatred before they begin.

VIII. THE BIAS RELATED VIOLENCE AND INTIMIDATION ACT

The Bias Related Act is one of the many Democrat-sponsored approaches to the increase in acts of violence and intimidation based on bias, prejudice, and hatred which deprive citizens of their civil rights because of their race, religion, sexual orientation, etcetera and disrupt public order. This Act was proposed due to the

246. Sherman, *supra* note 8.

247. Sherman, *supra* note 8.

248. Olivier Sultan, *The Bias That Won't Speak its Name*, N.Y. NEWSDAY, June 19, 1989 at 46.

249. *Id.* (quoting author Olivier Stone).

250. See 214th G.A., 2d Reg. Sess., 1993 NY S.B. 1424 § 26.

lack of existing penal laws specifically addressing bias-motivated attacks, the recognition of the unique and serious nature of the harms inflicted, as well as the necessity to prevent their recurrence.²⁵¹

To begin, the Bias Related Act expands the crimes of aggravated harassment in the second degree²⁵² and aggravated harassment in the first degree²⁵³ to include protections for such attacks perpetrated because of the victim's sexual orientation, disability, age or sex, in addition to the existing categories. This, in turn, ends the disparity in sentences, under the existing penal code provisions,

251. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6.

252. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 4. This section "is amended to read as follows":

Section 240.30 Aggravated harassment in the second degree.

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . :

....

3. Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion, sex, disability, age, sexual orientation, or national origin of such person. . . .

Aggravated harassment in the second degree is a class A misdemeanor.

Id.

253. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 5. This section amends Penal Law section 240.31, aggravated harassment in the first degree, to read:

A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of the race, color, religion, sex, disability, age, sexual orientation, or national origin of such person he: . . .

....

2. Commits the crime of aggravated harassment in the second degree in the manner proscribed by the provisions of subdivision three of section 240.30 of this article and has been previously convicted of the crime of aggravated harassment in the second degree for the commission of conduct proscribed by the provisions of subdivision three of section 240.30 or he has been previously convicted of the crime of aggravated harassment in the first degree within the preceding ten years.

Aggravated harassment in the first degree is a class E felony.

Id.

between sentences imposed on defendants attacking a person because of his race, a class A misdemeanor, and the similar attack upon a woman because of her sexual orientation, which is a violation.

More significantly, however, this proposal adds article 490 to the existing penal law which creates the two additional felonies of bias related violence or intimidation in the second degree²⁵⁴ and bias related violence or intimidation in the first degree.²⁵⁵ In short, Bias related violence in the second degree requires that the perpetrator intend to deprive a person of a protected category of a civil right delineated in the proposal,²⁵⁶ such as enjoying the security of one's own person, and then intentionally, knowingly or recklessly causing that person physical injury. First degree bias related violence requires the same intent as second degree. However, the

254. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6. "Part 4 of the penal law is amended by adding a new title Y" Section 490.05, bias related crime or intimidation in the second degree is to read as follows:

A person is guilty of bias related violence or intimidation in the second degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, such person intentionally, knowingly, or recklessly causes damage to the property of another, engages in sexual intercourse or deviate sexual intercourse by forcible compulsion in violation of article one hundred thirty of this chapter, or causes physical injury to another individual. Bias related violence or intimidation in the second degree is a class D felony.

Id.

255. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6. Bias related violence or intimidation in the first degree is to read as follows:

A person is guilty of bias related violence or intimidation in the first degree when, with intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, such person intentionally, knowingly, or recklessly causes the death of another individual. Bias related violence or intimidation in the first degree is a class C felony.

Id.

256. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6(6). Also among the civil rights listed are attending any school or college, use of public conveyances, public streets, alleys, avenues, sidewalks, parks and public places, and housing. *Id.*

offender must intentionally, knowingly, or recklessly cause the death of that person. Thus, acts of “queer baiting” or “gay bashing” which result in the death of the victim would now be covered.

In essence, this Act is a codification of the “specific intent” mens rea, in that the defendant must have a further “particular purpose” of depriving the victim of a protected civil right, such as the right to walk along the street secure in his or her own person.²⁵⁷ The Bias Related Act specifically does not prosecute any defendant whose victim *happens* to be a member of an identified group within the provisions or where the victim and defendant are, for example, of different races, sexual orientations or other groups. In such cases, existing penal provisions are adequate and are to be enforced.²⁵⁸

Under the Bias Related Act, it is not a defense that the defendant acted under a “mistaken belief of fact as to the race, creed, color, national origin, sex, disability, age, or sexual orientation of an individual or group of individuals.”²⁵⁹ According to law enforcement personnel, numerous cases of anti-gay and lesbian violence are visited upon heterosexual victims who are mistakenly identified as gay²⁶⁰ and under this bill, the criminal act would nonetheless be covered.

Furthermore, the Bias Related Act defines disability to include a “physical . . . or . . . medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”²⁶¹ Thus, the AIDS survivor who is attacked because of his status is also covered. However, it is conceivable that age, sex, and disability categories might not belong under a bias crime bill, since crimes against these groups as a whole may not be primarily motivated by bias or prejudice, but rather because of the criminal’s opinion that such individuals are easier targets. In the

257. Abramovsky, *supra* note 18, at 901.

258. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6.

259. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6.

260. Symposium, *G.O.A.L. - Gay Officer's Action League*, Officer Tom K., Nov. 3, 1993, Touro Law Center.

261. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6.

case of the HIV-negative gay man, assaulted while his attacker shouts, "Die, plague carrier!," is it that the victim is perceived to have the AIDS virus or is it his homosexuality that sparks the incident? The references to AIDS may merely be a justification in the defendant's mind for pre-existing homophobia. Then again, should it matter?

Similar to the Comprehensive Gang Act, the Bias Related Act also contains statutory requirements for the collection of data and reporting of incidents of bias crimes.²⁶² It also goes one step further by providing penalties for failure to comply with this mandate, or aiding or inciting a violation of this provision, which include giving \$500 to \$1000 to the aggrieved party as well as an A misdemeanor.²⁶³ This demonstrates a "no-nonsense" approach towards looking for a solution to the problem of bias crimes. Accurate statistics would be obtained or those responsible for gathering such information would suffer the consequences. As in the Comprehensive Act, there is mandated consecutive sentencing where more than one sentence of imprisonment imposed upon a defendant convicted of bias related violence or intimidation arises from the same criminal transaction. Such is similar to a defendant convicted under a class B felony in the Comprehensive Gang Act. Again, if the judge determines that the sentences are to run concurrently, he or she must make a statement on the record specifying the factors comprising that determination.²⁶⁴ The critical difference between the two proposals is that under the Bias Related Violence Act, the judge's discretion enters into play only after a defendant's conviction, after he has been proven guilty of a bias crime. Any prejudice a judge may hold regarding the victim's class will become irrelevant, because a judge's decision not to run sentences consecutively would be that much harder for her to justify after the predicate offense under the sentencing provision has been proven.

This Act, however, has come under much criticism on two particular points of concern. First, it is argued that the Bias Related

262. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6.

263. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 7.

264. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 3.

Violence Act, makes some victims of violent crime more equal than others by delineating certain groups as being afforded special rights.²⁶⁵ This is a common misunderstanding of hate crime statutes such as the Bias Related Act. Anyone can become a victim of a hate crime: a Christian, an African-American, or in the case of *Wisconsin v. Mitchell*,²⁶⁶ a white American male. Even a heterosexual, for example, can be the victim since sexual orientation as defined under the Bias Related Act includes heterosexuality.²⁶⁷ These are laws for special *crimes* not special groups.²⁶⁸ This should dispel the notion that bias crime statutes are attempting to codify political correctness or provide special rights.

Secondly, and more importantly, is the criticism that the Bias Related Violence and Intimidation Act contains a “double criminal intent requirement” in that the District Attorney must not only prove that the defendant had the requisite intent to commit the underlying offense complained of, but must further prove that the defendant did so because of the victim’s actual or perceived status, all beyond a reasonable doubt.

In determining the particular intent to commit the underlying deprivation because of the victim’s status, the prosecution generally looks to common sense, language used by the attacker (“There is a faggot . . . go get him!”), the location (just off Christopher Street, Greenwich Village), lack of provocation, and the absence of any other motive.²⁶⁹ However, the prosecution is not always this fortunate to find such obvious factors. When the incident occurs on Northern Boulevard, in Bayside, Queens, New York at three o’clock in the afternoon to a lone victim, this specific intent may be present, but not as easily proven. In the Julio Rivera case, police were unaware that the locale of the murder was home

265. Stephan V. Beyer, *Hate Crimes Can Affect Any of Us*, CHI. TRIB., July 4, 1992, at 2.

266. 113 S. Ct. 2194 (1993).

267. See 215th G.A., 1st Reg. Sess., 1993-94 NY S.B. 1802 § 6. “The term ‘sexual orientation’ shall mean a person[’s] . . . actual or perceived homosexuality, heterosexuality, or bisexuality.” *Id.*

268. Beyer, *supra* note 265; see also Terry, *supra* note 237.

269. Abramovsky, *supra* note 18, at 901.

to several gay bars and a popular “cruising” area known to gay men until gay and lesbian groups brought it to their attention.²⁷⁰

Senator Marino insists that this bill undermines convictions and puts the prosecution through an unwieldy burden of proving what is in the mind of a defendant. Yet, proving a defendant’s criminal intent is standard practice for the prosecuting attorney and not an extra burden. Moreover, the New York State’s District Attorneys’ Association, “clearly in a better position to evaluate prosecutorial burdens,” favors the idea of the Bias Related Act.²⁷¹

As the Comprehensive Gang Act and the Bias Related Act complement each other, it would appear that a truly expansive approach to the rise in bias crime could be implemented by combining the best of both proposals.

A combined proposal would provide for statutory reporting of bias crime statistics, including penalties for non-compliance, as well as the mandatory consecutive sentencing as seen under the Bias Related Act. The inclusion of sex, disability, age, and sexual orientation to the provisions of aggravated harassment in the first and second degree would be adopted as would the provision barring the “Mistake of Fact” defense. The Act would incorporate the additional felonies of bias related violence or intimidation in the first and second degree to provide prosecutors with an effective tool to utilize where cases are strong enough to prove the bias intent, but would also include the increased assault penalties across the board as seen under the Comprehensive Gang Act. The number of perpetrators, however, would be lowered to reflect a person acting with “one or more others” so as to encompass more cowardly attacks where the victim is outnumbered. This Act would account for the relative youth of the perpetrators as seen in the Comprehensive Gang Act. A large number of hate-motivated criminals tend to be young middle-class white males who believe that their acts of assault serve the community morality, or even some higher morality; they are “vigilantes in pursuit of justice as

270. Tape of Touro Law Center Bias Crime Symposium, *Crimes of Hate in New York State*, Terri Maroney, HIV Related Violence Coordinator of the New York City Gay and Lesbian Anti-Violence Project (on file with author).

271. Foreman, *supra* note 240.

they see it.”²⁷² As such, social scientists believe that these young people may be particularly receptive to signals from higher authority since they are “essentially conformist and superficially rebellious.”²⁷³ If one does not see this act of hate as warranting criminal punishment, or fails to comprehend that his act is indeed criminal, then increased penalties for all assaults does nothing to address this vigilantism.²⁷⁴ It is the duty of society to unscramble any confusion one may have between right and wrong.²⁷⁵

Added to this Act would be a statutory scheme under which prosecutors would be monitored and required to notify the complaining witness when decisions are made not to prosecute under the Bias Related Violence and Intimidation Act criminal provisions and the reasons for this decision. This would force the hand of the biased or unconsciously racist prosecutor and encourage all prosecutors to fully investigate bias complaints. Only with such a provision would the victim of a bias crime feel confident that his claim is taken seriously. This would encourage more victims to come forward, which in turn, would lead to more accurate statistics and reporting.

CONCLUSION

Hate crime is a special offense with a particular harm. There is no clear answer to the current problem of hate and prejudice that cuts through our society. However, traditional laws and inaction in the face of the rising tide of bias crime can be seen as nothing less than acquiescence of elected officials by those they purportedly represent.

Penalty enhancement statutes proposed for New York specifically target this criminal conduct. Moreover, the Bias Related Act cannot be deemed a “thought crime” as it addresses the perpetrator’s intent of selecting to deprive his victim of a protected right because of the race, religion, sexual orientation, or other status of that victim. As such, these two bills, either alone or

272. Chang, *supra* note 242, at 1100.

273. Chang, *supra* note 242, at 1101.

274. Chang, *supra* note 242, at 1102.

275. Chang, *supra* note 242.

in tandem, advance New York State's interests which are unrelated to the suppression of freedom of expression without cutting into First Amendment rights any more than is absolutely necessary to protect these compelling interests. They are constitutionally sound.

Although bias crimes may never be eliminated altogether by any one act, passing of such legislation, in conjunction with the work of bias reporting agencies, community liaisons, educational programs, and special training of law enforcement personnel, in recognizing and handling bias cases, would provide the vitally necessary ammunition to protect both individuals and communities from violent bigoted attacks.

Despite recent strides made by the gay and lesbian community, society still denies them basic human rights strictly because of their sexual orientation. It cannot be debated that everyone has the right to be secure in their own person and to be free from violent assaults. As the reportedly largest and fastest growing group of victims of bias crimes in the nation, gays and lesbians must be included in any proposed hate crime legislation and not settle for token measures, lest the message be sent out more than twenty-five years after the Stonewall Rebellion, that gay-bashing is the last permitted hate crime.

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