

TAKING THE “HATE” OUT OF HATE CRIMES: APPLYING  
UNFAIR ADVANTAGE THEORY TO JUSTIFY THE ENHANCED  
PUNISHMENT OF OPPORTUNISTIC BIAS CRIMES

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*Should bias crime perpetrators who, for personal gain, intentionally select victims from social groups that they perceive to be more vulnerable be punished similarly to typical bias crime perpetrators who are motivated by group hatred? In this Comment, I apply unfair advantage theory to argue that enhancing the punishment of opportunistic bias crimes is proper because of the perpetrators' motivations and the crimes' harmful effects. In its most basic form, unfair advantage theory justifies punishment based on the unfair advantage that criminals obtain over law-abiding members of society by violating the law. I contend that the enhanced punishment of opportunistic bias crimes is justified because the advantages that perpetrators obtain by committing them are greater than the advantages obtained from parallel crimes. In terms of motivation, I argue that opportunistic bias crimes warrant additional punishment because perpetrators unfairly and deliberately capitalize upon perceived disadvantages stemming from their victims' group membership. In terms of harmful effects, I argue that opportunistic bias crimes warrant additional punishment because such crimes perpetuate the belief that certain victims are easier crime targets because of disadvantages stemming from victims' group membership. Perpetuating this belief enables potential offenders to continue to profit unfairly from exploiting the perceived disadvantages tied to group membership by committing opportunistic bias crimes in the future. I also posit that the application of unfair advantage theory to defend the enhanced punishment of opportunistic bias crimes is supported by all three fundamental theories of punishment: retribution, utilitarianism, and denunciation.*

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## INTRODUCTION

Consider a man who robs gay men cruising in public parks because he believes that homosexual victims who seek anonymous public sex are less likely to report the crimes.<sup>1</sup> Or, imagine a man who is looking to prove his masculinity to his friends and chooses to assault an Amish man because he believes that the Amish will not fight back by virtue of their pacifist commitments.<sup>2</sup> Finally, consider a white man who is not racist, but only robs black men and women

1. The 1997 documentary *Licensed to Kill* contains interviews with robbery suspects who targeted gay men. One interviewee, Donald Aldrich, stated:

If you can walk into a 7-11 and rob a 7-11 for 15, 20 bucks, get your face on videotape, have somebody that's gotta call the police; or if you can go to a park, rob somebody that's out in the dark, come away with a hell of a lot more . . . . Because of the fact that they're a homosexual and they don't want people to know it, they're not gonna go report it to the police. Who you gonna go rob?

*LICENSED TO KILL* (DeepFocus Productions 1997); see also Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799, 884 (1999) ("Some of the property crimes to which gay men are susceptible because they are gay . . . [play] on the victims' presumed fear of revealing their sexual orientation and thereby exposing themselves to further abuse.").

2. See Bryan Byers, Benjamin W. Crider & Gregory K. Biggers, *Bias Crime Motivation: A Study of Hate Crime and Offender Neutralization Techniques Used Against the Amish*, 15 J. CONTEMP. CRIM. JUST. 78, 83-84 (1999); see also Nancy Armour, *Assaults on Amish Shock Town*, DAILY NEWS (Los Angeles), Feb. 18, 1996, at N23 ("The Amish are seen as easy prey because their pacifist beliefs prevent them from fighting back and they are reluctant to take their problems to police.").

because he believes that racist attitudes will prevent the local police from investigating the crimes.

The prototypical bias crime is an act of violence where a perpetrator targets a victim because of animus towards the victim's group membership, usually defined by age, disability, ethnicity, gender, gender identity, nationality, race, religion, or sexual orientation.<sup>3</sup> The previous examples, which are categorized as "opportunistic bias crimes," differ from prototypical bias crimes because they are not motivated by a perpetrator's hostility towards a particular group. Rather, perpetrators intentionally select victims for personal gain, such as easy money or the respect of their friends, from groups that they perceive to be more vulnerable. Given that opportunistic bias crimes are not motivated by group animus, should these crimes be included within the purview of bias crime penalty-enhancement statutes?<sup>4</sup>

Very few scholars have considered whether opportunistic bias crimes warrant additional punishment and only one legal scholar, Lu-in Wang, has advanced a cohesive justification for their enhanced punishment.<sup>5</sup> This Comment offers a novel theoretical defense for the enhanced punishment of opportunistic bias crimes: I apply unfair advantage theory to argue that enhanced punishment is indeed proper based on the perpetrators' motivations and the crimes' harmful effects.

In its most basic form, unfair advantage theory justifies punishment based on the unfair advantage that criminals gain over law-abiding members of society by violating the law.<sup>6</sup> I contend that the enhanced punishment of opportunistic bias crimes is justified because the advantages that perpetrators obtain by committing them are greater than the advantages obtained from parallel crimes

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3. The particular characteristics included in bias crime statutes differ among states and localities. See Anti-Defamation League, State Hate Crimes / Statutory Provisions, <http://www.adl.org/99hatecrimeprovisions.asp> (last visited Nov. 2, 2008). Federal bias crime laws only permit the federal government to become involved in the investigation or prosecution of bias crimes motivated by race, color, religion, and national origin. 18 U.S.C. § 245 (2000).

4. In this Comment, I do not address whether crimes targeting poorer or richer individuals and neighborhoods should be considered opportunistic bias crimes. Although it is possible to argue that class is a central feature of one's identity, no federal, state, or local bias crime statute includes class as a protected category. This Comment focuses on the characteristics that are commonly included in bias crime statutes. Moreover, this Comment does not address crimes in which perpetrators assume that victims are wealthier (for instance, some perceive Jews to be wealthier) or carry property in more accessible fashions (for instance, women wearing purses or the stereotype that Italians always carry cash) as a result of their group membership. Some scholars assert that it is often difficult to separate social discrimination from perceptions that certain social groups are wealthier. See Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1430-35 (2000).

5. My position is distinguished from Wang's position in Part III, *infra*.

6. MIRKO BAGARIC, PUNISHMENT & SENTENCING: A RATIONAL APPROACH 86 (2001); see also Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478 (1968).

committed without bias motivations.<sup>7</sup> In terms of perpetrator motivation, I argue that opportunistic bias crimes warrant additional punishment because perpetrators deliberately exploit perceived disadvantages stemming from their victims' group membership. In terms of harmful effects, I contend that opportunistic bias crimes warrant additional punishment because such crimes perpetuate the belief that certain victims are easier crime targets as a result of disadvantages stemming from their group membership. Perpetuating this belief enables potential offenders to continue to unfairly profit from exploiting the perceived disadvantages tied to group membership by committing opportunistic bias crimes in the future.

Part I presents the two models of bias crime law that have been adopted by federal, state, and local legislatures. The Group Animus Model requires perpetrators to be motivated by animus against a victim's real or perceived group membership.<sup>8</sup> Opportunistic bias crimes cannot be punished under this model unless the crime is motivated by both opportunism and animus.<sup>9</sup> The Discriminatory Selection Model punishes crimes where the victim is selected on the basis of group membership, regardless of the reason the selection took place.<sup>10</sup> Opportunistic bias crimes can be punished under this model.

Most states and localities have adopted bias crime statutes that do not neatly fit into either model, punishing perpetrators who commit crimes *because of or by reason of*<sup>11</sup> victims' group membership, or with *malicious intent*<sup>12</sup> towards victims because of their group membership. States and localities conflict over whether these laws follow the Group Animus or Discriminatory Selection Models.<sup>13</sup> In order to allow for the enhanced punishment of opportunistic bias crimes, I urge legislatures to follow the Discriminatory Selection Model and explicitly state their intentions to do so.<sup>14</sup> I also urge courts to interpret these laws as following the Discriminatory Selection Model.

In Part II, I synthesize the relevant legal precedent and respond to challenges that the enhanced punishment of opportunistic bias crimes is unconstitutional.

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7. This point is explained in more detail in Part III.A, *infra*.

8. For a list of state bias crime laws that follow the Group Animus Model see *infra* note 24.

9. See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crime*, 93 MICH. L. REV. 320, 336 (1994) ("Discriminatory selection of a victim becomes relevant only if that selection is probative of an underlying racial animus.").

10. Wisconsin's bias crime law is the only state bias crime law which follows the Discriminatory Selection Model. See *infra* note 27 and accompanying text.

11. For a list of state bias crime laws that include this language see *infra* note 30.

12. For a list of state bias crime laws that include this language see *infra* note 31.

13. This point is fully developed in Part I.C, *infra*.

14. When legislatures enact bias crime laws without stating a preference to follow the Group Animus or Discriminatory Selection Models, law enforcement and prosecutors often only pursue bias crimes that are motivated by group animus. See *infra* note 43 and accompanying text.

I conclude that the U.S. Supreme Court's decision in *Wisconsin v. Mitchell*<sup>15</sup> establishes that bias crime laws that allow for the enhanced punishment of opportunistic bias crimes are not overbroad and do not impermissibly discriminate on the basis of viewpoint. Although the Supreme Court has not directly addressed whether laws that follow the Discriminatory Selection Model are unconstitutionally vague, the three state courts that have addressed this issue have all upheld the laws against vagueness challenges.<sup>16</sup>

In Part III, I apply unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes based on perpetrators' motivations and harmful effects. I begin by defining unfair advantage and the basic tenets of unfair advantage theory. I then show how the additional unfair advantage associated with opportunistic bias crimes can be conceptualized in terms of the perpetrators' motives and the crimes' harmful effects. Both conceptualizations separately explain why opportunistic bias crimes are distinct from parallel crimes and thus warrant additional punishment. By invoking unfair advantage theory, I present two distinct and independent justifications for the enhanced punishment of opportunistic bias crimes.

Opportunistic bias crime motivations are distinctly deplorable because they contain a rationally calculative element to exploit unjust economic and social conditions that result in group ostracism and discrimination for the criminal's economic and social gain. My position is that if these conditions are inherently unjust, then it is unfair for perpetrators to capitalize upon them for personal gain. As for opportunistic bias crime robberies, I contend that perpetrators' deliberate choice to capitalize upon perceived group disadvantages violates principles of fair market competition because perpetrators profit from unproductive labor rooted in their victims' hardships. In regard to all opportunistic bias crimes, including opportunistic bias crime robberies, I contend that it is unfair for perpetrators to deliberately take advantage of group vulnerabilities for personal gain when group membership is involuntary or is central to one's identity. The characteristics exploited by opportunistic bias criminals are uniquely associated with an extensive history of unjust discrimination, and are either unalterable or only alterable with substantial cost or difficulty to individuals who possess them. In terms of harmful effects, I contend that opportunistic bias crimes perpetuate society's perception that victims are easier crime targets because of their group membership. Consequently, these crimes

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15. 508 U.S. 476 (1993).

16. *People v. Fox*, 844 N.Y.S.2d 627 (Sup. 2007); *State v. Plowman*, 838 P.2d 558 (Or. 1992); *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991).

enable potential offenders to capitalize unfairly upon perceived group disadvantages for personal gain in the future.

In Part IV, I explain why the two unfair advantage theory justifications presented are consistent with the three main theories of punishment: retribution,<sup>17</sup> utilitarianism,<sup>18</sup> and denunciation.<sup>19</sup> Retributivists should endorse the enhanced punishment of opportunistic bias crimes because perpetrators are more blameworthy for committing opportunistic bias crimes in light of the additional unfair advantages that distinguish opportunistic bias crimes from parallel crimes. Utilitarians should endorse the enhanced punishment of opportunistic bias crimes because greater incarceration sentences isolate perpetrators who obtain additional unfair advantages over law-abiding citizens for longer periods of time. Assuming that punishment can deter crime, enhanced punishment may decrease the number of opportunistic bias crimes by influencing actual and potential offenders to become averse to committing them when faced with risk of increased criminal penalties. Alternatively, enhanced punishment could rehabilitate offenders through mandatory diversity educational and community programming. Denunciation theorists should endorse the enhanced punishment of opportunistic bias crimes because increased punishment satisfies law-abiding citizens' expectation that the criminal law will admonish citizens who attempt to obtain unfair advantages from law-abiding citizens through violating the collective values embodied in the criminal law. Denunciative punishment serves as a collective condemnation of attempts to profit unfairly by capitalizing upon unjust social ostracism and discrimination for personal gain.

Finally, I conclude by reflecting upon the broader implications of my argument for punishing bias crimes generally. I recognize that the differences between opportunistic and prototypical bias crimes may lead to different justifications for enhancing the punishment of each bias crime category. I leave this question for later discussion. My main intention in this Comment is to continue the push to expand the legal conception of a bias crime past the limited notions of what is ordinarily associated with the lay phrase hate crime.

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17. Retribution justifies punishment in terms of the desert of criminal offenders. This theory and its application to opportunistic bias crimes will be more fully developed in Part IV.A, *infra*.

18. Utilitarianism justifies punishment because of the prospective social utility of punishing offenders and measures punishment in terms of the "reduction in the likelihood of the misdeed by the perpetrator and/or by others in society." Bernard Weiner, Sandra Graham & Christine Reyna, *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 SOC. JUST. RES. 431, 432 (1997) (citing JEFFRIE F. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 117–20 (Westview Press 1990) (1984)). This theory and its application to opportunistic bias crimes will be more fully developed in Part IV.B, *infra*.

19. Denunciation justifies punishment based on the view that punishment is a mechanism to communicate society's collective disapproval of the criminal's offense. This theory and its application to opportunistic bias crimes will be more fully developed in Part IV.C, *infra*.

## I. TWO MODELS OF BIAS CRIME LAW

In the 1980s, many state and local legislatures responded to bias-motivated violence by enacting laws to enhance the punishment for bias-motivated crimes.<sup>20</sup> Today, nearly every state has a bias crime law that enhances the punishment for bias crimes or allocates resources to collect data and train law enforcement personnel to adequately handle bias crimes.<sup>21</sup> The U.S. Federal Government also has enacted similar laws focusing on bias crime punishment and statistical gathering.<sup>22</sup> Although the characteristics included in federal, state, and local bias crime laws vary substantially, the range of protected characteristics include actual or perceived age, disability, ethnicity, gender, gender identity, national origin, race, religion, and sexual orientation.<sup>23</sup>

Federal, state, and local governments have adopted two models of bias crime law: the Group Animus Model and the Discriminatory Selection Model. As demonstrated in the following subsections, only the Discriminatory Selection Model allows for the enhanced punishment of opportunistic bias crimes. Consequently, whether opportunistic bias crimes can be punished as bias crimes is contingent upon the particular model that legislatures adopt.

### A. The Group Animus Model

The Group Animus Model requires bias crimes to be motivated substantially or in part by animus against victims because of their real or perceived group membership. Many federal and state bias crime laws follow the Group

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20. Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference,"* 91 J. CRIM. L. & CRIMINOLOGY 653, 658 (2001).

21. *Id.* at 659–60.

22. In 1968, Congress enacted 18 U.S.C. § 245, the first piece of federal hate crime legislation. See Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 18 U.S.C. § 245 (2000)). This bill grants federal officers the authority to investigate and prosecute crimes motivated by color, national origin, race, or religion if the victims were engaged in certain federally protected activities when the crime was committed. *Id.* In 1990, Congress passed the Hate Crime Statistics Act (HCSA), which mandates the Attorney General to gather data about bias crimes committed on the basis of disability, ethnicity, race, religion, or sexual orientation. See Hate Crimes Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534). The bill also requires the Attorney General to “establish guidelines for the collection of such data, including the necessary evidence and criteria for a finding of manifest prejudice.” *Id.* In 1994, Congress enacted the Hate Crimes Sentencing Enhancement Act (HCSEA), which requires the U.S. Commission to increase the penalties for crimes committed on the basis of actual or perceived color, disability, ethnicity, gender, national origin, race, religion, or sexual orientation. See Hate Crime Sentencing Enhancement Act (HCSEA) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994). The HCSEA only applies to cases tried in courts where federal jurisdiction is proper. *Id.*

23. See, e.g., Anti-Defamation League, Map: State Hate Crimes Statutory Provisions, [http://www.adl.org/learn/hate\\_crimes\\_laws/map\\_frameset.html](http://www.adl.org/learn/hate_crimes_laws/map_frameset.html) (last visited Oct. 5, 2008).

Animus Model.<sup>24</sup> Under this model, opportunistic bias crimes cannot be punished as bias crimes because perpetrators select their victims for personal profit, not because of animus or hostility towards victims due to their group membership.<sup>25</sup> A bias crime motivated by opportunism may only be punished under the Group Animus Model if perpetrators also select victims because of animus arising from their victims' group membership.<sup>26</sup> For instance, say that a white man robs Mexican men based on his belief that Mexican victims are easier targets because they will not report the crimes to the police due to language barriers. The Group Animus Model would exclude the perpetrators' crimes from being punished as bias crimes unless the perpetrator was also motivated by animus towards Mexicans.

#### B. The Discriminatory Selection Model

Under the Discriminatory Selection Model, bias crimes are committed when victims are intentionally selected on the basis of their group membership, regardless of the reasons for the selection. Wisconsin is the only state with a

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24. The *Training Guide for Hate Crime Data Collection*, which provides guidance to federal officers on enforcing the Hate Crimes Statistics Act (HCSA), defines "bias" as "a preformed negative opinion or attitude toward a group of persons based on their race, religion, disability, ethnicity/national origin, or sexual orientation." U.S. DEP'T OF JUSTICE FED. BUREAU OF INVESTIGATION, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION 17 (1996), <http://www.fbi.gov/ucr/traingd99.pdf>. Florida, New Hampshire, and Pennsylvania follow the Group Animus Model. FLA. STAT. ANN. § 775.085 (West 2005) (noting that the act must be motivated by "prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim" (emphasis added)); N.H. REV. STAT. ANN. § 651:6(1)(f) (2008) (noting that the person must be "substantially motivated to commit the crime because of hostility towards the victim's religion, race, creed, sexual orientation . . . national origin, or sex" (emphasis added)); 18 PA. CONS. STAT. ANN. § 2710(a) (2008) (stating that "a person commits the offense of ethnic intimidation if, with malicious intention toward the actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals" (emphasis added)). Title 18, section 2710(c) of the Pennsylvania Consolidated Statutes defines "malicious intention" as "the intention to commit any act . . . motivated by hatred toward the actual or perceived race, color, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals." New Jersey's bias crime law used to follow the Group Animus Model by enhancing the penalties for crimes that were motivated, at least in part, by "ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation, or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (West, Supp. 1994); see also Lawrence, *supra* note 9, at 333. Section 2C:44-3(e) was deleted by amendment 2002 N.J. Session Law Serv. 443 (West), which codified New Jersey's current bias crime law, N.J. STAT. ANN. § 2C:16-1.

25. Grattet & Jenness, *supra* note 20, at 689 ("By definition, all cases falling under the rubric of the racial animus model are also cases that fall under the rubric of the discriminatory selection model, but not vice-versa.").

26. See Lawrence, *supra* note 9, at 336 ("For purposes of the FBI regulations, discriminatory . . . selection of a victim becomes relevant only if that selection is probative of an underlying racial animus.").



bias crime law that unambiguously follows the Discriminatory Selection Model.<sup>27</sup> Given that the Discriminatory Selection Model does not require animus, both opportunistic and prototypical bias crimes may be punished under this model. Since my proposal does not advocate enhancing the punishment of opportunistic bias crimes at the expense of eliminating the enhanced punishment of prototypical bias crimes,<sup>28</sup> I urge legislatures to follow the Discriminatory Selection Model.

### C. Ambiguous Bias Crime Law Statutes

Most states have adopted bias crime laws that do not explicitly refer to either the intentional selection of victims or group animus.<sup>29</sup> These statutes define bias crimes as those that occur *because of* or *by reason of*<sup>30</sup> the victims'

27. Wisconsin's bias crime law enhances the penalty for crimes where the offender "[i]ntentionally selects . . . [the victim] in whole or in part because of the actor's belief or perception regarding the [victim's] race, religion, color, disability, sexual orientation, national origin or ancestry." WIS. STAT. ANN. § 939.645(2)(b) (West 2000).

28. This Comment does not discuss whether the enhanced punishment of prototypical bias crimes is justified. I do believe, however, that penalty enhancements are justified responses to animus-driven bias crimes.

29. Lawrence, *supra* note 9, at 337 ("The *because of* or *by reason of* formulation has been adopted in some form by most states with bias crime laws.").

30. See ALASKA STAT. § 12.55.155(22) (2008) (providing for a penalty enhancement when "the defendant knowingly directed the conduct constituting the offense at a victim *because of* that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin" (emphasis added)); COLO. REV. STAT. § 18-9-121(2) (2008) ("A person commits a bias-motivated crime if, with the intent to intimidate or harass another person *because of* that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation . . ." (emphasis added)); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West Supp. 2008) ("A person commits hate crime when, *by reason of* the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct . . ." (emphasis added)); IOWA CODE ANN. § 729A.2 (West 2008) ("'Hate crime' means one of the following public offenses when committed against a person or a person's property *because of* the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability, or the person's association with a person of a certain race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability." (emphasis added)); KY. REV. STAT. ANN. § 17.1523(1) (West 2008) ("The uniform offense report shall contain provisions for obtaining information as to whether or not specific crimes appear from their facts and circumstances to be caused as *a result of* or reasonably related to race, color, religion, sex, or national origin." (emphasis added)); MD. CODE ANN., CRIM. LAW § 10-304 (West 2008) ("*Because of* another's race, color, religious beliefs, sexual orientation, or national origin, a person may not . . ." (emphasis added)); MINN. STAT. ANN. § 609.2231(4)(a) (West 2008) ("Whoever assaults another *because of* the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363A.03, age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both." (emphasis added)); MO.

group membership or with *malicious intent*<sup>31</sup> towards victims because of their group membership. States conflict however, over whether these statutory phrases follow the Group Animus or Discriminatory Selection models.

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REV. STAT. § 557.035(1) (2008) (noting that the act should be “motivated *because of* race, color, religion, national origin, sex, sexual orientation or disability of the victim or victims” (emphasis added)); MONT. CODE ANN. § 45-5-221(1) (2008) (“A person commits the offense of malicious intimidation or harassment when, *because of* another person’s race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend . . .” (emphasis added)); NEV. REV. STAT. § 207.185 (2008) (“[A] person who, *by reason of* the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of another person or group of persons . . .” (emphasis added)); N.J. STAT. ANN. § 2C:16-1(a)(1) (stating that the act must be “with a purpose to intimidate an individual or group of individuals *because of* race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity” (emphasis added)); N.Y. PENAL LAW § 240.31 (McKinney 2008) (“A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, *because of* a belief or perception regarding such person’s race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct . . .” (emphasis added)); N.C. GEN. STAT. § 14-401.14(a) (2008) (“If a person shall, *because of* race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act . . .” (emphasis added)); N.D. CENT. CODE § 12.1-14-04(2) (2008) (providing that a person is guilty of a misdemeanor if he “injures, intimidates, or interferes with another *because of* his sex, race, color, religion, or national origin in order to intimidate him” (emphasis added)); OHIO REV. CODE ANN. § 2927.12(A) (West 2008) (“No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code *by reason of* the race, color, religion, or national origin of another person or group of persons.” (emphasis added)); OR. REV. STAT. § 166.155(1)(c) (2008) (defining the crime of intimidation to include conduct where a person “[i]ntentionally, *because of* the person’s perception of race, color, religion, sexual orientation or national origin of another or of a member of the other’s family, subjects such other person to alarm by threatening” (emphasis added)); W. VA. CODE § 61-6-21(b) (2008) (“If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, *because of* such other person’s race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony.” (emphasis added)).

31. IDAHO CODE ANN. § 18-7902 (2008) (“It shall be unlawful for any person, *maliciously* and with the specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry, or national origin, to . . .” (emphasis added)); OKLA. STAT. tit. 21, § 850(A) (2008) (“No person shall *maliciously* and with the specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry, national origin or disability . . .” (emphasis added)); 18 PA. CONS. STAT. ANN. § 2710(a) (2008) (“A person commits the offense of ethnic intimidation if [he or she acts] with *malicious intention* toward the actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals . . .” (emphasis added)); S.D. CODIFIED LAWS § 22-19B-1 (2008) (“No person may *maliciously* and with the specific intent to intimidate or harass any person or specific group of persons because of that person’s or group of persons’ race, ethnicity, religion, ancestry, or national origin . . .” (emphasis added)); WASH. REV. CODE § 9A.36.080(1) (2008) (“A person is guilty of malicious harassment if he or she *maliciously* and intentionally commits one of the following acts because of his or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap . . .” (emphasis added)).

Some states that have adopted the *because of* or *by reason of* language have followed the Discriminatory Selection Model. Oregon's bias crime law for example, prohibits crimes where assailants "[i]ntentionally, knowingly or recklessly cause physical injury to another person because of the actors' perception of that person's race, color, religion, sexual orientation or national origin."<sup>32</sup> In *State v. Plowman*, the Oregon Supreme Court interpreted the statute as a discriminatory selection statute finding that "one need not hate at all to commit this crime."<sup>33</sup> Consequently, opportunistic bias crimes are punishable under this interpretation.

Moreover, in *People v. Fox*,<sup>34</sup> a New York Supreme Court recently interpreted whether New York's legal definition of a bias crime<sup>35</sup> applied to an incident in which four men lured a gay man from an online website because they thought that he would be an easy robbery target. The New York Legislature never explicitly stated that a crime could be prosecuted as a bias crime without a showing of animus.<sup>36</sup> The defendants highlighted this point and interpreted the statute to only target crimes motivated by group animus.<sup>37</sup> The *Fox* court disagreed with the defendants, holding "[t]hat the Legislature limited such offenses solely to instances where a victim in whole or in substantial part because of a protected trait, is a clear indication of its intent that no other criteria was required in order to sustain such a charge."<sup>38</sup> Although the *Fox* court read the statute as written, the court's lengthy statutory interpretation illustrates that the court did not believe that its interpretation was obvious. The fact that the *Fox* court engaged in a lengthy interpretation suggests that the court could have easily reached the opposite conclusion and held that the statute followed the Group Animus Model. Thus, the *Fox* opinion illustrates that without explicit statements from legislatures, courts could interpret bias crime laws that do not require animus in the statutory text to actually require animus.

Some courts have also concluded that bias crime laws containing malicious intent language follow the Discriminatory Selection Model. For instance, Washington's malicious harassment statute prohibits crimes where the perpetrator

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32. OR. REV. STAT. § 166.165(1)(a)(A) (2008).

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

34. *People v. Fox*, 844 N.Y.S.2d 627 (Sup. 2007).

35. New York's bias crime statute enhanced the punishment for crimes where an offender "intentionally selects the [victim] in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation of a person, regardless of whether the belief or perception is correct." N.Y. PENAL LAW § 485.05 (Consol. 2008).

36. *Fox*, 844 N.Y.S.2d at 633.

37. *Id.*

38. *Id.* at 634.

“maliciously and intentionally commits [the crime] because of his or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap.”<sup>39</sup> In *State v. Talley*, however, the Washington Supreme Court interpreted the statute as a discriminatory selection statute, holding that “[t]he statute punishes the selection of the victim, not the reason for the selection . . . The statute is triggered by the victim selection regardless of the actor’s motives or beliefs.”<sup>40</sup> Opportunistic bias crimes are thus punishable under this interpretation.

However, some states have included malicious intent language in their bias crime laws to ensure that only prototypical bias crimes are punished. The Pennsylvania legislature, for example, defined malicious intent to mean “motivated by hatred toward the actual or perceived race, color, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals.”<sup>41</sup> Under these statutory interpretations that require animus, opportunistic bias crimes can only be punished as bias crimes if they are also motivated by group animus. Scholars posit that legislatures’ reasons for equating malicious intent with animus are rooted in their explicit preference for the Group Animus Model and assumptions about the types of incidents that are motivated by group membership.<sup>42</sup>

In a majority of the states governed by bias crime laws that contain *because of, by reason of, or malicious intent* language, neither legislatures nor courts have explicitly declared that animus is required to prosecute bias crimes. Given this lack of guidance, prosecutors, and law enforcement officers often pursue only prototypical bias crimes driven by animus because they believe that these were the types of crimes that bias crime laws were intended to forbid.<sup>43</sup> Opportunistic bias crimes, therefore, are often ignored because the common conception of what constitutes a bias crime excludes opportunistic motivations. Consequently, in order to enable law enforcement to investigate—and prosecutors to prosecute—opportunistic bias crimes, it is insufficient for legislatures to adopt

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39. WASH. REV. CODE § 9A.36.080(1) (2008).

40. *State v. Talley*, 858 P.2d 217, 222 (Wash. 1993).

41. 18 PA. CONS. STAT. ANN. § 2710(c) (2008).

42. Wang, *supra* note 4, at 1409.

43. See Lu-in Wang, “Suitable Targets”? *Parallels and Connections Between “Hate” Crimes and “Driving While Black”*, 6 MICH. J. RACE & L. 209, 216 (2001) (“These assumptions are shared by law enforcement officers and lead to the tendency to treat as bias crimes only ‘prototypical’ or ‘paradigmatic’ cases involving extraordinary brutality or dramatic facts, and to eliminate from the category less sensational cases or cases in which the perpetrator appeared to have a tangible goal.” (citations omitted)); see also Susan E. Martin, “A Cross-Burning Is Not Just an Arson”: *Police Social Construction of Hate Crimes in Baltimore County*, 33 CRIMINOLOGY 303, 323 (1995) (“Hate crimes, like other types of crimes, ultimately emerge through police definitions of situations and interpretations of laws and policies.”).

laws that do not explicitly require animus to prosecute bias crimes in the statutory text. Rather, legislatures or courts should explicitly state that animus is not a requirement.

## II. THE CONSTITUTIONALITY OF THE ENHANCED PUNISHMENT OF OPPORTUNISTIC BIAS CRIMES

Although there is scholarly criticism that the enhanced punishment of opportunistic bias crimes is unconstitutional, I conclude that the Supreme Court's decision in *Wisconsin v. Mitchell*<sup>44</sup> establishes that bias crime laws allowing for the punishment of opportunistic bias crimes do not impermissibly discriminate on the basis of viewpoint and are not overbroad.<sup>45</sup> While the Supreme Court has not addressed whether bias crime laws permitting the enhanced punishment of opportunistic bias crimes are impermissibly vague under the First Amendment, the three state courts that have addressed this issue have rejected vagueness challenges.

### A. Viewpoint Discrimination and Overbreadth

In *Wisconsin v. Mitchell*,<sup>46</sup> the Supreme Court upheld the constitutionality of Wisconsin's bias crime statute, which followed the Discriminatory Selection Model.<sup>47</sup> The respondent asserted that the statute was overbroad because it discouraged free speech by permitting verbal expressions to be admitted as evidence that he chose his victim because of race.<sup>48</sup> The respondent also asserted that the statute constituted viewpoint discrimination by punishing his biased beliefs.<sup>49</sup>

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44. 508 U.S. 476 (1993).

45. Some scholars have posited that appellate courts have favored the Discriminatory Selection Model over the Group Animus Model. See Grattet & Jenness, *supra* note 20, at 690 ("Compared to the discriminatory selection model . . . the racial animus model has had a considerably more difficult time marshaling appellate court approval.").

46. In *Mitchell*, the respondent, Mitchell, was part of a young group of black men that brutally beat a white man. *Mitchell*, 508 U.S. at 479–80. Immediately prior to the assault, the group watched and discussed a scene from the movie "Mississippi Burning," in which a white man beats a young black boy while he is praying. *Id.* at 480. After the scene ended, the group asked the respondent "do you all feel hyped up to move on some white people?" *Id.* The group then moved outside and assaulted the white victim. *Id.* The jury concluded that Mitchell selected his victim because he was white and enhanced his maximum sentence from two to seven years imprisonment. *Id.* at 480. The Wisconsin Circuit Court sentenced Mitchell to four years imprisonment. *Id.* at 480–81.

47. For the text of Wisconsin's bias crime penalty-enhancement statute see *supra* note 27.

48. *Mitchell*, 508 U.S. at 488.

49. *Id.* at 483.

The Supreme Court rejected both arguments. First, it dismissed the possibility of a chilling effect on free speech as “attenuated and unlikely,”<sup>50</sup> stating that the possibility of such an effect was “too speculative a hypothesis”<sup>51</sup> to support an overbreadth assertion. The Court also rejected the idea that the statute punished the respondent for his biased beliefs, concluding instead that the statute punished the intentional discriminatory selection of a victim based on group membership.<sup>52</sup> While emphasizing the strong judicial tradition of allowing sentencing judges to consider a variety of factors when sentencing defendants, the Court affirmed that “a defendant’s motive for committing the offense is one important factor.”<sup>53</sup> The Court further reasoned that although the First Amendment “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent[,] . . . evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”<sup>54</sup> The Court noted that this logic is similar to the logic of antidiscrimination laws, which have been upheld despite repeated similar First Amendment challenges.<sup>55</sup>

In light of *Wisconsin v. Mitchell*, laws allowing for the enhanced punishment of opportunistic bias crimes are neither overbroad nor viewpoint-discriminatory.

## B. Vagueness

Critics argue that laws allowing for the enhanced punishment of opportunistic bias crimes are vague, despite unanimous agreement to the contrary among state courts. These critics argue that if bias crimes are “really committed whenever defendants simply pick their victims because of certain traits, such as gender, then all rapes are hate/bias crimes . . . as are all crimes committed by persons who use their victim’s race, religion, ethnicity, gender, or disability as proxies for other criteria (such as wealth, physical weakness, or pacifism).”<sup>56</sup> Moreover, litigants who have challenged bias crime laws have challenged specific statutory phrases, such as “intentionally selects” or “in whole or in

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50. *Id.* at 488.

51. *Id.* at 489.

52. *See id.* at 484–85.

53. *Id.* at 485 (citation omitted).

54. *Id.* at 489.

55. *See id.* at 487.

56. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1125 (2004).

substantial part” as unconstitutionally vague.<sup>57</sup> They have further contended that law enforcement officials cannot consistently enforce these laws unless the courts read in an animus requirement.<sup>58</sup>

The Supreme Court has not directly addressed whether bias crime laws allowing for the punishment of opportunistic bias crimes are impermissibly vague. However, the three state courts that have addressed this issue have all upheld the laws against vagueness challenges. In *State v. Plowman*,<sup>59</sup> the Oregon Supreme Court upheld the constitutionality of Oregon’s intimidation statute<sup>60</sup> against vagueness challenges. The court affirmed that the statute was not vague under the U.S. Constitution because it (1) gave reasonable opportunity to a person of ordinary intelligence to understand what conduct was prohibited; and (2) provided explicit standards so that the law would not be enforced arbitrarily.<sup>61</sup> In *State v. Mitchell*, a Wisconsin Court of Appeals adopted similar reasoning to uphold Wisconsin’s bias crime law against vagueness challenges.<sup>62</sup> Recently, in *People v. Fox*, a New York Supreme Court also employed similar logic to conclude that New York’s bias crime law was not unconstitutionally vague.<sup>63</sup>

### III. APPLYING UNFAIR ADVANTAGE THEORY TO JUSTIFY THE ENHANCED PUNISHMENT OF OPPORTUNISTIC BIAS CRIMES

This section applies unfair advantage theory to show that enhancing the punishment of opportunistic bias crimes is proper because of perpetrators’ motivations and the crimes’ harmful effects. Part III.A introduces unfair advantage theory and the particular definition of unfair advantage that I use

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57. See, e.g., *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991) (assessing whether the terms “intentionally selects” and “race” are unconstitutionally vague).

58. See, e.g., *People v. Fox*, 844 N.Y.S.2d 627 (Sup. 2007) (assessing whether New York’s bias crime statute provided officials with clear standards of enforcement if it did not require a showing of animus).

59. 838 P.2d 558 (Or. 1992). The defendant and three others beat two men whom they perceived to be Mexican, one inside a convenience store and the other inside his car. *Id.* at 560. During the attack, one of the assailants yelled, “Talk in English, motherfucker.” *Id.* The assailants also yelled “white pride,” and when the store clerk notified the assailants that she had called the police they stated, “They’re just Mexicans” and “They’re just fucking wetbacks.” *Id.*

60. The Oregon statute made it a crime for two or more persons to “intentionally, knowingly, or recklessly cause physical injury to another person because of the actor’s perception of that person’s race, color, religion, national origin or sexual orientation.” OR. REV. STAT. § 166.165(1)(a)(A) (2008).

61. *Plowman*, 838 P.2d at 561.

62. *State v. Mitchell*, 473 N.W.2d 1 (Wis. Ct. App. 1991). For a summary of the facts of *Mitchell* see *supra* note 46.

63. *People v. Fox*, 844 N.Y.S.2d 627 (Sup. 2007). In *Fox*, the assailants lured a gay man to an isolated beach location, believing that the victim would be an easier target because he was gay. *Id.* at 632. The victim was hit by a car on a parkway as he tried to escape the robbery scene. *Id.*

in this Comment. Part III.B conceptualizes the two unfair advantages associated with opportunistic bias crimes in terms of perpetrators' motives and the crimes' harmful effects.

Before presenting my analysis, I find it necessary to contextualize my proposal in light of previous scholarship. To date, Lu-in Wang is the only legal scholar who has forcefully advocated punishing opportunistic bias crimes as bias crimes.<sup>64</sup> Wang fully acknowledges that the motivations of both prototypical and opportunistic bias crimes are rooted in the social vulnerabilities of targeted groups.<sup>65</sup> However, she ultimately justifies the enhanced punishment of opportunistic bias crimes based on their harm.<sup>66</sup> Wang asserts that similarly to prototypical bias crimes, opportunistic bias crimes "lead the victim to suffer greater emotional and psychological trauma, other members of the victim's group to feel isolated and fearful, and society to become divided along group lines."<sup>67</sup> Punishment serves to proportion punishment to the seriousness of the crimes' consequences.<sup>68</sup>

Wang's scholarship has been instrumental in the push to expand legal conceptions of bias crimes to incorporate opportunistic behavior. My thesis serves to supplement her framework, and I intend to tackle some of the questions left unanswered.<sup>69</sup> My position expands upon Wang's work in two ways. First, Wang predominantly focuses on the harms of opportunistic bias crimes, but does not provide a comprehensive justification for enhanced punishment based on perpetrators' motives. In fairness, Wang agrees that "bias crime

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64. Lu-in Wang's position on recognizing opportunistic bias crimes as bias crimes has been predominantly developed in four law journal articles. See Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47 (1997) [hereinafter Wang, *Transforming Power*]; Wang, *supra* note 1; Wang, *supra* note 4; Wang, *supra* note 43.

65. Wang, *supra* note 4, at 1400 ("[P]rototypical and opportunistic bias crimes contribute to and take advantage of the social vulnerability of particular groups . . . [S]tate bias crime law could and should punish the defendant whose crime exploited a social group's perceived vulnerability.").

66. Wang, *Transforming Power*, *supra* note 64, at 60 ("[M]y primary endeavor is to offer a way to conceptualize the harm in bias crime, which I believe to be a critical first step in defining the range of crimes that warrant enhanced punishment.").

67. *Id.*

68. *Id.* at 59 ("[T]he asserted justification for penalty enhancement is that crimes motivated by group-based bias impose greater harms than their parallel crimes . . .").

69. In fact, Wang has explicitly acknowledged at certain points within her scholarship that her work does not address the full scope of legal issues that opportunistic bias crimes present. See, e.g., *id.* at 60 ("[M]y primary endeavor is to offer a way to conceptualize the harm in bias crime, which I believe to be a critical first step in defining the range of crimes that warrant enhanced punishment. In this [a]rticle, I do not undertake to examine the full range of important doctrinal questions that may arise from this conceptualization."); *id.* at 60 n.55 ("Such questions might include determining whether the perpetrator can justly be punished based upon his discriminatory victim selection even if he had no actual knowledge that his conduct inflicted greater harms, or whether an even less culpable state of mind than intentional selection, such as recklessness or negligence, would justify enhanced punishment where the actor creates the risk that the greater harms of bias crime will be realized.").



law[s] . . . could and should punish the defendant whose crime exploited a social group's perceived vulnerability."<sup>70</sup> However, she never comprehensively justifies this claim. By invoking unfair advantage theory, I not only provide a harm-focused normative justification for the enhanced punishment of opportunistic bias crimes, but also a normative justification for enhanced punishment based on perpetrators' motivations.

Second, Wang limits her justification for enhanced punishment to terms of retributive goals. Throughout her work, Wang keeps in mind that the dominant justification for bias crime laws is based on the view that "group-based bias impose[s] greater harms than [its] parallel crimes"<sup>71</sup> and that "[i]mposing greater punishment for more serious crimes is entirely consistent with the established principles of criminal law."<sup>72</sup> This position can only be supported by retributivist theories of punishment, which advocate that perpetrators are more culpable and thus deserve greater punishment for committing more harmful crimes. By conceptualizing the reasons for enhancing the punishment of opportunistic bias crimes in terms of unfair advantage theory, I show that enhanced punishment can be endorsed by various theories of punishment, not just those that focus on criminal desert.

Similar to my proposal, other scholars have advocated justifications for bias crime penalty-enhancement statutes on the grounds that bias crime victims are more vulnerable targets because of group membership. Alon Harel and Gideon Parchomovsky's fair protection paradigm is the best example. This paradigm treats crime protection as a state-produced good that should be equally distributed.<sup>73</sup> Harel and Parchomovsky contend that the state should "take into account disparities among individuals in vulnerability to crime when determining their entitlement to protection."<sup>74</sup> Under this view, victims "who are particularly vulnerable to crime may have a legitimate claim on fairness grounds to greater protection against crime."<sup>75</sup> The "fair protection paradigm" is grounded on the premise that the justifications for bias crime penalty enhancements focus too much on perpetrators' reprehensibility and

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70. Wang, *supra* note 4, at 1400.

71. Wang, *Transforming Power*, *supra* note 64, at 59.

72. *Id.*; see also Lawrence, *supra* note 9, at 348–68.

73. Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 *YALE L.J.* 507, 509 (1999).

74. *Id.*

75. *Id.* at 509–10. Harel and Parchomovsky recognize that states may provide greater protection to vulnerable victims by increasing resources to investigate and prosecute their attackers. *Id.* at 510. This option is often economically unfeasible, however, leaving the imposition of greater punishments as "the only way by which the state can provide vulnerable victims with more protection and consequently equalize their vulnerability to that of other potential victims." *Id.*

fail to prioritize “the role of the victim.”<sup>76</sup> Consequently, the paradigm separates concerns about bias crime victims’ vulnerability from determinations of the depravity of criminal motivations and consequences. I disagree that this separation is necessary to recognize the relevance of victims’ vulnerabilities in determining appropriate punishment for crimes, and more specifically, opportunistic bias crimes.<sup>77</sup> In fact, Parts III.A and III.B show that perceived vulnerability is an essential consideration in making these assessments.

#### A. Defining Unfair Advantage

Before applying unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes, it is necessary to explain the theory and define the term unfair advantage. Unfair advantage theory focuses on the benefits that criminals obtain from violating the law and the reasons why obtaining those benefits are unfair.<sup>78</sup> Punishment cancels out the unfair advantage associated with committing a particular crime. Unfair advantage theory has been predominately present in retributive theories of punishment.<sup>79</sup> However, tenets of the theory have also risen in denunciation theories<sup>80</sup> and can be framed in terms of utilitarian goals.<sup>81</sup>

There are two possible definitions of unfair advantage, the second of which I adhere to in this Comment. First, some scholars advocate unfair advantage theory on the grounds that all violations of the criminal law grant perpetrators an unfair advantage over law-abiding citizens.<sup>82</sup> They posit that security obtained from a just legal system is contingent upon citizens agreeing to exercise self-restraint and obey the law, even if they desire to break it.<sup>83</sup> Individuals who fail to exercise such restraint and break the law “renounce[ ]

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76. *Id.* at 509.

77. Recently, other criminologists have also constructed victim-centered theories of bias crimes that emphasize victims’ experiences and characteristics. See, e.g., PAUL IGANSKI, ‘HATE CRIME’ AND THE CITY 1–22 (2008).

78. BAGARIC, *supra* note 6, at 86.

79. In fact, some advocates claim that unfair advantage theory specifically derives from retributive principles. See, e.g., Michael Davis, *Method in Punishment Theory*, 15 L. & PHIL. 309, 311 (1996) (“The fairness theory can, I think, best be understood as deriving from a presupposition of retributivism.”); see also Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 762 (2004) (categorizing the unfair advantage theories as retributive theories of punishment).

80. See, e.g., Ronald J. Rychlak, *Society’s Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299 (1990).

81. No utilitarian theory has specifically justified punishment by exclusively invoking unfair advantage theory. In Part IV.B, *supra*, however, I demonstrate how the unfair advantage theory can be framed in terms of utilitarian goals.

82. See *infra* notes 239–240.

83. See *infra* note 237.

a burden which others have voluntarily assumed and thus gain[ ] an advantage which others, who have retrained themselves, do not possess.”<sup>84</sup>

Based on this definition of unfair advantage, some may question why opportunistic bias crime perpetrators obtain more of an unfair advantage than ordinary perpetrators who gain advantages through surprise, weapons, or superior strength.<sup>85</sup> Suppose a robber steals \$100 from a victim. Since the robber broke the law to obtain \$100, the robber has obtained precisely \$100 in unfair advantage. If the robber had picked the victim because he was gay and thus seemingly less likely to report the crime, or because the victim was disabled and thus less likely to resist the crime, the robber still has received \$100 in unfair advantage. Therefore, what is the additional unfair advantage that the opportunistic bias crime robber has obtained that justifies punishing the crime more severely than a typical robbery?

The answer to this question lies in the second definition of unfair advantage to which I adhere in this Comment. The first definition of unfair advantage erroneously measures the unfair advantage in terms of the objective monetary gain obtained from the crime (\$100 in the preceding hypothetical) as opposed to the factors that enable perpetrators to successfully commit their crimes.<sup>86</sup> An assessment of the current legal distinctions between robbery and aggravated battery highlights the flaw in this approach. For instance, a typical robbery is defined as “the illegal taking of property from the person of another, or in the person’s presence, by violence or intimidation.”<sup>87</sup> However, a robber can face more severe punishment in particular states for committing aggravated robbery

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84. Morris, *supra* note 6, at 477.

85. However, some scholars challenge the merit of this first definition on the grounds that it does not clearly explain how to measure the criminal’s unfair advantage and is thus ineffectual in serving as a mechanism to apportion punishment. See, e.g., David Dolinko, *Mismeasuring “Unfair Advantage”: A Response to Michael Davis*, 13 L. & PHIL. 493 (1994); Don E. Scheid, *Davis, Unfair Advantage Theory, and Criminal Desert*, 14 L. & PHIL. 375 (1995). But see Michael Davis, *Criminal Desert and Unfair Advantage: What’s the Connection?*, 12 L. & PHIL. 133 (1993).

86. Some scholars have also challenged this definition of unfair advantage. See, e.g., Douglas Husak, *supra* note 79, at 762 (“Many possible descriptions of this advantage have been provided. On the most obvious but least plausible account, the unfair benefit is the material gain to the offender—the fruits of his crime. He benefits, relative to citizens who do not resort to theft, for example, by not having to pay for whatever he has stolen.”).

87. *Robbery*, in BLACK’S LAW DICTIONARY 1354 (8th ed. 2004); see TENN. CODE ANN. § 39-13-401(a) (2008) (“Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.”); UTAH CODE ANN. § 76-6-301(1)(a) (West 2008) (defining robbery as when “the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property”).

by committing a robbery if he: (1) is armed with a deadly weapon;<sup>88</sup> (2) represents to the victim that he has a dangerous weapon;<sup>89</sup> (3) inflicts serious bodily injury on the victim;<sup>90</sup> (4) commits the crime with an accomplice;<sup>91</sup> or (5) victimizes a member of a protected class, such as the disabled or the elderly.<sup>92</sup>

In fairness, enhanced punishment for aggravated robbery can be seen as the government's attempt to impose greater punishment on robberies that inflict greater harm, rather than an attempt to punish criminals for gaining an additional unfair advantage. This is particularly true in the case of robberies that inflict serious bodily injury. Moreover, perpetrators who represent that they have a dangerous weapon while committing a robbery may inflict greater psychological trauma upon victims as a result of causing them to fear for their lives.

Consider state laws, however, that punish robberies as aggravated robberies if they are committed by two or more accomplices. Under these laws, if a perpetrator steals \$100 from a victim, he is charged for robbery. If the same perpetrator commits the same robbery with an accomplice and steals \$100, he will be charged with aggravated robbery. In both cases, the perpetrator gains \$100 in unfair advantage and the victim is similarly harmed, yet perpetrators receive greater punishment only in the latter scenario.

Some can contend that states may treat robberies committed by two or more accomplices as aggravated robberies under the assumption that such crimes

88. See TENN. CODE ANN. § 39-13-402(a)(1) (2008) (“[a]ccomplished with a deadly weapon”); TEX. PENAL CODE ANN. § 29.03(2) (2008) (“uses . . . a deadly weapon”); UTAH CODE ANN. § 76-6-302(1)(a) (“uses . . . a dangerous weapon”); WIS. STAT. § 943.32(2)(1) (West 2008) (“by use . . . of a dangerous weapon”); WYO. STAT. ANN. 6-2-401(c)(ii) (2008) (“[u]ses . . . a deadly weapon or a simulated deadly weapon”).

89. See TENN. CODE ANN. § 39-13-402(a)(1) (“[a]ccomplished . . . by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon”); TEX. PENAL CODE ANN. § 29.03(a)(2) (“exhibits a deadly weapon”); UTAH CODE ANN. § 76-6-302(1)(a) (“threatens to use a dangerous weapon”); WIS. STAT. § 943.32(2)(1) (“by . . . threat of use of a dangerous weapon”); WYO. STAT. ANN. 6-2-401(c)(ii) (“exhibits a deadly weapon or a simulated deadly weapon”); OR. REV. STAT. § 164.405(1)(a) (2008) (“A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person . . . represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon.”).

90. See HAW. REV. STAT. § 708-841(c) (2008) (“[t]he person recklessly inflicts serious bodily injury upon another”); TENN. CODE ANN. § 39-13-402(a)(2) (“[w]here the victim suffers serious bodily injury”); TEX. PENAL CODE ANN. § 29.03(a)(1) (“causes serious bodily injury to another”); UTAH CODE ANN. § 76-6-302(1)(b) (“causes serious bodily injury upon another”); WYO. STAT. ANN. 6-2-401(c)(i) (“[i]ntentionally inflicts or attempts to inflict serious bodily injury”).

91. See ALA. CODE § 13A-8-42(a) (2008) (“A person commits the crime of robbery in the second degree if he violates Section 13A-8-43 and he is aided by another person actually present.”); OR. REV. STAT. § 164.405(1)(b) (“A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person . . . [i]s aided by another person actually present.”).

92. TEX. PENAL CODE § 29.03(3) (defining as aggravated robbery, robbery in which a person “causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is: (A) 65 years of age or older; or (B) a disabled person”).

are more likely to result in greater physical or psychological harm to victims. However, another plausible explanation is that states are punishing perpetrators for using certain means that make it more likely for them to commit the robbery successfully. The same conceptualization applies to statutes that treat robberies against vulnerable victims as aggravated robberies. Children and the elderly are less likely to resist arrest, and thus perpetrators who target them are more likely to successfully commit their crime. Similarly, victims of robbers who represent that they have a dangerous weapon may be less likely to resist for fear of their safety.

These conceptualizations are not contingent upon the additional harm imposed upon victims. Nor do they measure unfair advantage in terms of the monetary amount that the perpetrator steals from his victim. Rather, these conceptualizations are rooted in the moral judgment that it is worse to commit robbery under certain exceptional circumstances, such as with an accomplice or in possession of a dangerous weapon, that increase the probability that the robbery will be successful.

Consequently, I do not adhere to the first approach that defines and measures unfair advantage in terms of the relative quantitative benefit that perpetrators receive from committing their crime. Rather, I adhere to the second approach that focuses on the aggravating circumstances surrounding a crime, such as victim vulnerabilities, that make the benefit obtained by perpetrators more unfair. Consider the following two examples that clarify this approach to defining unfair advantage.

The U.S. Sentencing Guidelines,<sup>93</sup> as well as many state and local laws, include a sentencing enhancement for crimes in which the defendant “knew or should have known that a victim of the offense was a vulnerable victim.”<sup>94</sup> The guidelines define a vulnerable victim as one “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.”<sup>95</sup> Many state and local legislatures have enacted similar laws.<sup>96</sup> Courts have framed the purpose of vulnerable victim

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93. E.g., ARK. CODE ANN. § 5-4-604(10) (2006) (“The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because: (A) Of either a temporary or permanent severe physical or mental disability which would interfere with the victim’s ability to flee or to defend himself or herself; or (B) The person was twelve (12) years of age or younger.”).

94. U.S. SENTENCING COMM’N, GUIDELINES MANUAL (2007), available at <http://www.ussc.gov/2007guid/GL2007.pdf> [hereinafter GUIDELINES MANUAL].

95. *Id.* at 330. The enhancement only applies if “a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.” *Id.* at 331.

96. E.g., ARK. CODE ANN. § 5-4-604(10) (“The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack

statutes and their justification in terms of victims' helplessness, defenselessness, and impaired capacity to prevent or to detect crime.<sup>97</sup> In this sense, perpetrators have an unfair advantage over these victims because the victims' physical and mental impairments likely make them easier crime targets. The unfair advantage obtained from crimes against vulnerable victims is rooted in victims' characteristics that make them more susceptible to be victims of crime.

Or, consider laws criminalizing looting.<sup>98</sup> These statutes normally impose greater penalties than those imposed for ordinary burglary and theft,<sup>99</sup> even though the tangible benefit perpetrators obtain would have been equivalent if the crime was a typical robbery. Scholars contend that natural disasters and civil disturbances, such as Hurricane Katrina or the Los Angeles race riots, often cause great loss and suffering to victims.<sup>100</sup> These events leave victims defenseless and vulnerable to crime because their damage severely inhibits law enforcement's ability to enforce the law. Since looting hits victims at a time when they are particularly vulnerable and defenseless, proponents contend that "looting . . . is deserving of even greater blame than ordinary acts of theft and trespass."<sup>101</sup>

#### B. Two Conceptualizations of Unfair Advantages Obtained Through Opportunistic Bias Crime

Parts III.B.1 and III.B.2 apply unfair advantage theory and demonstrate how the unfair advantage associated with opportunistic bias crimes can be conceptualized in terms of perpetrators' motives and the crimes' harmful effects. Both conceptualizations independently explain why opportunistic bias crimes are distinct from parallel crimes and thus warrant additional punishment.

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because: (A) Of either a temporary or permanent severe physical or mental disability which would interfere with the victim's ability to flee or to defend himself or herself; or (B) The person was twelve (12) years of age or younger.").

97. See, e.g., *United States v. Gill*, 99 F.3d 484, 486 (1st Cir. 1996); *United States v. Blake*, 81 F.3d 498, 504 (4th Cir. 1996); *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990).

98. Seven states have adopted laws criminalizing looting. These states are California, Hawaii, Illinois, Louisiana, Mississippi, North Carolina, and South Carolina. See Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1140 (2007). Looting statutes generally require perpetrators to make an unauthorized entry into a home or business and obtain, exert control over, damage, or remove any property when normal security of property is not present by virtue of a natural disaster or civil disturbance. See, e.g., LA. REV. STAT. ANN. § 14:62.5 (West 2007).

99. See Green, *supra* note 98, at 1141.

100. *Id.* at 1147.

101. *Id.* at 1148.

1. Conceptualizing Unfair Advantages Obtained Through Opportunistic Bias Crime in Terms of Motive

Opportunistic bias crimes are distinctly deplorable because unlike typical robberies, they contain a rationally calculative element to exploit unjust economic and social conditions that cause group ostracism and discrimination for personal gain. My position is that if these conditions are inherently unjust, then it is unfair for perpetrators to capitalize upon them for personal gain. This position does not hold perpetrators fully responsible for the environment of discrimination in which they act, but rather holds perpetrators responsible for their decisions to participate in that discrimination.<sup>102</sup>

The primary criticism of using unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes based on their motives challenges the relevancy of motive in determining punishment. The relevancy of motive in determining punishment is the current subject of vibrant debate in the legal community,<sup>103</sup> especially in the context of bias crime penalty-enhancement statutes.<sup>104</sup> However, an extensive discussion on this topic is beyond the bounds of this Comment; my position assumes that motive is a legitimate consideration when determining punishment. This assumption has been confirmed by the Supreme Court in *Wisconsin v. Mitchell*, where the Court upheld sentencing judges' ability to consider motive under Wisconsin's bias crime statute.<sup>105</sup>

Another potential criticism of using unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes based on their motivations

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102. Scholars have justified antidiscrimination laws on the same premise. See, e.g., Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 858 (2003) ("The moral wrong of discrimination inheres in an employer's placing his or her own interests ahead of the moral imperative to avoid participating in the system of subordination and occupational segregation. Individual employers have a moral obligation to avoid contributing to such a system because they are the only ones who can take effective action against it, and their actions, when aggregated with those of other employers, are what constitutes the system.").

103. Some scholars advocate the use of motive in determining criminal punishment. See, e.g., Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006). Other scholars, however, object to the use of motive in determining criminal punishment. See, e.g., Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

104. See Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997); Gellman, *supra* note 103; Hurd & Moore, *supra* note 56; Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 L. & PHIL. 175 (2001).

105. 508 U.S. 476, 485 (1993) ("Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. The defendant's motive for committing the offense is one important factor." (citations omitted)).

is that most criminals are motivated by the desire not to be caught.<sup>106</sup> For example, a robber may only choose victims in dark alleys because he believes that victims' and witnesses' inability to see will decrease the likelihood of him getting caught. If all criminals intend to take advantage of the circumstances to increase the likelihood of success, one may question how the advantage associated with opportunistic bias crime motives is distinct from parallel crimes. My response is that the benefit that opportunistic bias crime perpetrators receive selecting victims based on group membership is rooted in an unjust source: unjust economic and social ostracism and discrimination that victims can neither avoid nor control. Other motivating considerations, such as choosing victims in dark alleys, are not rooted in unjust social or economic conditions.

Thus, I conceptualize the unfair advantage associated with opportunistic bias crime motives in two ways. The first conceptualization specifically applies to opportunistic bias crime robberies. I contend that perpetrators' deliberate choice to capitalize upon perceived group disadvantages violates principles of fair market competition because perpetrators profit from unproductive labor rooted in their victims' hardships. The second conceptualization applies to all opportunistic bias crimes. I argue that it is unfair for perpetrators to take deliberate advantage of group vulnerabilities for personal gain when group membership is either involuntary or central to one's identity. The characteristics that opportunistic bias crime perpetrators exploit—disability, gender, race, religion, and sexual orientation—often also trigger unjust social discrimination and ostracism. These characteristics are unalterable, or can be altered only through substantial cost or difficulty. Therefore, it is unfair for perpetrators to deliberately target these characteristics for personal gain. Failing to punish opportunistic bias crimes sends the message that individuals must accept greater vulnerability to crime as a reasonable cost for involuntarily belonging to particular groups.

The group ostracism and discrimination that opportunistic bias crime perpetrators exploit is rooted in inequitable patterns of economic distribution and cultural forces that produce hierarchical status differentiations among social groups. Consider the following five characteristics that are fairly regularly

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106. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968) (“[A] person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities . . . . This approach implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables . . . .”; see also Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 519 (2006); Samuel Kramer, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 405 (1990).



included in bias crime statutes: gender,<sup>107</sup> race,<sup>108</sup> disability,<sup>109</sup> sexual orientation,<sup>110</sup> and religion.<sup>111</sup> Gender serves as a basic organizing principle of the U.S. market economy by influencing the distinction between paid and unpaid labor and producing differentials in the amount of compensation granted for performing certain jobs.<sup>112</sup> For instance, domestic labor has been almost exclusively performed by females without monetary compensation.<sup>113</sup> Although some research suggests that male participation in domestic labor has increased as more women have entered the workforce,<sup>114</sup> women continue to bear a majority of the burden of domestic labor.<sup>115</sup> Moreover, due to exclusion from male dominated professional occupations, women's work was constrained to domestic service

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107. As of 2007, twenty-six states and the District of Columbia include gender in their bias crime laws. See Anti-Defamation League State Hate Crime Statutory Provisions (2008), [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf).

108. As of 2007, forty-four states and the District of Columbia include race in their bias crime statutes. *Id.*

109. As of 2007, thirty states and the District of Columbia include disability in their bias crime statutes. *Id.*

110. As of July 2008, thirty-two states and the District of Columbia include sexual orientation in their bias crime statutes. See NAT'L GAY & LESBIAN TASK FORCE, HATE CRIME LAWS IN THE U.S. (2008), [http://thetaskforce.org/downloads/reports/issue\\_maps/hate\\_crimes\\_7\\_08.pdf](http://thetaskforce.org/downloads/reports/issue_maps/hate_crimes_7_08.pdf). Twelve states and the District of Columbia also include gender identity in their bias crime statutes. *Id.*

111. As of 2007, forty-four states and the District of Columbia include religion in their bias crime statutes. See Anti-Defamation League State Hate Crime Statutory Provisions, *supra* note 107.

112. See Nancy Fraser, *Redistribution or Recognition? A Critique of Justice Truncated*, in REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 9, 20 (2003) ("The result is an economic structure that generates gender-specific forms of distributive justice, including gender-based exploitation, economic marginalization, and deprivation."); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983) ("In the early nineteenth century, as men's work was largely removed to the factory while women's work remained primarily in the home, there came to be a sharp dichotomy between 'the home' and 'the [workaday] world.'").

113. See Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, SIGNS, Autumn 1992, at 33 (explaining the female's role in domestic labor in a historical study on race, gender, and social reproduction in the twentieth century, and specifically that "the availability of cheap female domestic labor buttressed white male privilege by perpetuating the concept of reproductive labor as women's work, sustaining the illusion of a protected private sphere for women and displacing conflict away from husband and wife to struggles between housewife and domestic").

114. SCOTT COLTRANE, FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY 52–53 (1996). But see Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1804 (2007) ("While the gap between the time men and women spend in home production has narrowed over the past century, the gap is still more substantial than the gap in paid labor hours, with women doing approximately two-thirds of the household labor as of 2000.").

115. Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455, 469–70 (2007); Silbaugh, *supra* note 114, at 1801 (noting that "women on average play a greater role in taking care of dependents within the family").

jobs,<sup>116</sup> which continue to be female dominated and receive less pay than male-dominated professional occupations.<sup>117</sup> Women have also historically received significantly less compensation for performing the same jobs as their male colleagues.<sup>118</sup> Although research suggests that the gender wage-gap is decreasing,<sup>119</sup> numerous studies indicate that women are not promoted as frequently as men<sup>120</sup> and are still granted less compensation than males who receive similar promotions and males in general.<sup>121</sup>

American culture privileges masculine traits over feminine ones and produces degrading cultural associations and representations of women.<sup>122</sup> For instance, femininity has been traditionally seen as dependent, emotional,

116. ROSEMARY CROMPTON, *EMPLOYMENT AND THE FAMILY: THE RECONFIGURATION OF WORK AND FAMILY LIFE IN CONTEMPORARY SOCIETIES* 22 (2006) (“Until the second half of the twentieth century, women did not have employment careers and were formally and informally excluded from managerial and professional occupations.”); Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP. 75, 79 (2000) (“For many decades, one of the most salient features of women’s status in the labor market was their tendency to work in a fairly small number of relatively lowpaying, predominantly female jobs. Women were especially concentrated in administrative support (including clerical) and service occupations.”).

117. CROMPTON, *supra* note 116 (“Women are now less concentrated in administrative support and service occupations, with 41 percent holding such jobs in 1999 compared to (still) 15 percent of men.”).

118. See generally Claudia Goldin, *Understanding the Gender Gap: An Economic History of American Women*, in *EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY* 17 (Paul Burstein ed., 1994).

119. See generally Andrew M. Gill & Duane E. Leigh, *Community College Enrollment, College Major, and the Gender Wage Gap*, 54 INDUS. & LAB. REL. REV. 163 (2000); Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference With Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN’S L.J. 1, 2 (2004) (noting that “the male-female wage gap, although still significant, has decreased”). But see Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. REL. REV. 45 (2006) (discussing the slowdown in the convergence of female and male wages in the 1990s compared to the 1980s).

120. See, e.g., *Women Partners*, 07-5 PARTNER’S REPORT FOR LAW FIRM OWNERS 7 (2007) (citing findings from the First National Survey on Retention and Promotion of Women in Law Firms by the National Association of Women Lawyers (NAWL)).

121. See, e.g., Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1628 (2007) (citing statistics establishing differences in compensation between men and women at Wal-Mart); see also *Women Partners*, *supra* note 120, at 7 (citing statistics from the First National Survey on Retention and Promotion of Women in Law Firms by National Association of Women Lawyers (NAWL) showing differences in compensation between male and female attorneys).

122. Fraser, *supra* note 112, at 21 (“Expressly codified in many areas of the law (including family law and criminal law), [androcentric value patterns] inform legal constructions of privacy, autonomy, self-defense, and equality. They are also entrenched in many areas of government policy (including reproductive, immigration, and asylum policy) and in standard professional practices (including medicine and psychotherapy). Androcentric value patterns also pervade popular culture and everyday interaction.”).

irrational, and passive.<sup>123</sup> Even positive feminine traits,<sup>124</sup> such as nurturing, have historically resulted in women's exclusion from professional occupations and continue to hinder their advancement.<sup>125</sup> Misogynist representations also result in cultural environments that legitimize sexual harassment,<sup>126</sup> domestic violence, sexual assault,<sup>127</sup> and degrading media depictions.<sup>128</sup>

Unjust racial discrimination is also rooted in the economic structure of society.<sup>129</sup> Race significantly influences the division between menial and nonmenial jobs.<sup>130</sup> For instance, racial and ethnic minorities have historically

123. See William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMP. RTS. & EMP. POL'Y J. 377, 379 (2003) ("[M]en are believed to be competitive, aggressive, assertive, strong, and independent, while women are thought to be nurturing, cooperative, supportive, and understanding."); Margaret Davies & Nan Seuffert, *Knowledge, Identity, and the Politics of Law*, 11 HASTINGS WOMEN'S L.J. 259, 284 (2000).

124. By positive feminine traits, I mean traits that people may associate with positive values, yet still have oppressive effects upon women by perpetuating sex stereotypes.

125. See Bielby, *supra* note 123, at 382.

126. Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99, 128–29 (2006).

127. See Krista K. Jacob, *Crime Without Punishment: Pornography in a Rape Culture*, in JUST SEX: STUDENTS REWRITE THE RULES ON SEX, VIOLENCE, ACTIVISM, AND EQUALITY 107 (Jodi Gold & Susan Villari eds., 2000) ("Misogynist and sexist attitudes about women are at the crux of a rape culture, and they are perpetuated by many factors in our society, such as the media, family, peers, and institutions. Pornography, one of the most powerful transmitters of misogyny, contributes to a culture in which violence against women is not only encouraged but accepted as the norm."). I am not arguing that domestic violence and sexual assault against women is exclusively influenced by misogynist representations. Rather, I am arguing that such representations are contributing factors to environments that legitimize such violence.

128. See generally Cheryl B. Preston, *Subordinated Stills: An Empirical Study of Sexist Print Advertising and Its Implications for Law*, 15 TEX. J. WOMEN & L. 229 (2006). Alternatively, notions of masculinity can also result in harmful stereotypes against men who do not fit stereotypical norms. See, e.g., MICHAEL F. JACOBSON & LAURIE ANN MAZUR, *MARKETING MADNESS: A SURVIVAL GUIDE FOR A CONSUMER SOCIETY* 80 (1995).

129. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 4 (1997) ("Today, over a century after the abolition of slavery, many citizens suffer from discriminatory attitudes and practices infecting our economic system . . . . The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained."); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1134 (2008) (describing racism as a structural factor in the economy). The centrality of race to the organization of the U.S. market economy was most evident during the eras of slavery and segregation. See Manning Marable, Immanuel Ness & Joseph Wilson, *Introduction: Race and Labor: The New American Paradigm in a Global Economy*, in RACE AND LABOR MATTERS IN THE NEW U.S. ECONOMY 1 (2006); see also Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329 (1990) (arguing that racial segregation is crucial to the emergence of the urban underclass during the 1970s).

130. Fraser, *supra* note 112, at 22 ("In the economy, 'race' organizes structural divisions between menial and non-menial paid jobs, on the one hand, and between exploitable and 'superfluous' labor power, on the other. As a result, the economic structure generates racially specific forms of maldistribution.").

participated in the nonmenial job market at disproportionately low rates<sup>131</sup> and continue to do so.<sup>132</sup> Moreover, racism has historically excluded certain races and ethnicities from employment in many professional occupations.<sup>133</sup> Today, federal and state laws ban employment discrimination on the basis of race<sup>134</sup> and many employers have affirmatively embraced the obligation not to discriminate on the basis of race through their own nondiscrimination policies.<sup>135</sup> Many scholars contend, however, that subconscious<sup>136</sup> and overt<sup>137</sup> racism are partly

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131. C. Michael Henry, *Introduction: Historical Overview of Race and Poverty From Reconstruction to 1969*, in RACE, POVERTY, AND DOMESTIC POLICY 1, 11 (C. Michael Henry ed., 2004) (“[O]ne of the hallmarks of the black historical experience has been limited employment opportunities, which restricted them to low-wage menial jobs. Thus, opportunities open to blacks for economic betterment through advancement on the job were practically nonexistent: hence the paucity of skills, high unemployment rates, relatively low incomes, and abject poverty among a disproportionate number of these citizens.”).

132. Fraser, *supra* note 112, at 22; see also Florence M. Margai, *Racial/Ethnic Disparities in Health and Health Care in the U.S.: A Geographic Overview*, in RACE, ETHNICITY, AND PLACE IN A CHANGING AMERICA 379, 385 (John W. Frazier & Eugene L. Tetley-Fio eds., 2006) (“[Menial job] employers are likely to take advantage of the undocumented status of some of these workers by offering them low pay with no benefits. As a result, 34 percent of Latinos are uninsured, nearly three times the rate for non-Hispanic whites.”).

133. See Henry, *supra* note 131.

134. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000); see also, e.g., California Fair Employment and Housing Act, CAL. GOV'T CODE § 12940 (West 2005).

135. See, e.g., Walmart, Statement of Ethics 12–13 (Sept. 2008), [http://walmartstores.com/media/resources/r\\_2032.pdf](http://walmartstores.com/media/resources/r_2032.pdf) (“Wal-Mart will not tolerate discrimination in employment . . . on the basis of race, color, ancestry, age, sex, sexual orientation, religion, disability, ethnicity, national origin, veteran status, marital status, pregnancy, or any other legally-protected status.”); Office of Career Servs., Harvard College & Graduate Sch. of Arts & Sciences, Recruiting Policies, [http://www.ocs.fas.harvard.edu/employers/07\\_08policies.htm#policy6](http://www.ocs.fas.harvard.edu/employers/07_08policies.htm#policy6) (last visited Oct. 5, 2008) (“Harvard University is committed to selecting faculty and staff without discrimination against individuals on the basis of race, color, sex, sexual orientation, gender identity, religion, creed, national origin, age, veteran status, or disability unrelated to job requirements.”); Citi, Careers at Citi, <http://careers.citigroup.com/careers/homepage/AdditionalTerms.aspx> (last visited Oct. 5, 2008) (“Citi is an equal opportunity employer, which means we offer equal treatment to all applicants. Citi does not discriminate, either directly or indirectly, on the grounds of sex, sexual orientation, trans-sexuality, race, ethnic origin, religion, religious belief, disability, marital status, creed, nationality, national origin, colour, age, or any other legally protected category (‘Protected Information’) in any area of recruitment.”).

136. ROBERT LANGRAN & MARTIN SCHNITZER, GOVERNMENT, BUSINESS, AND THE AMERICAN ECONOMY 138 (2d ed. 2007) (“Often the discrimination is indirect, as in testing that, although it can be a legitimate device to find out something about employee aptitudes and qualifications, may be culturally biased in favor of certain types of job applicants.”); The U.S. Supreme Court has sympathized with this view. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (“Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.”).

137. LANGRAN & SCHNITZER, *supra* note 136 (“In the case of blacks and other minorities, income differences can be explained in part by overt discrimination. Over an extended period of time, blacks have been systematically denied the same educational opportunities as whites, which is reflected in occupations and earnings of blacks. . . . There has also been discrimination in hiring and promotion policies toward other minority groups. Hispanics are an example.”).

responsible for the disproportionately low number of minorities, especially blacks and Hispanics, working in professional occupations.<sup>138</sup>

In terms of culture, Eurocentric and white privilege leads to the isolation and social denigration of racial and ethnic minorities.<sup>139</sup> Overt bigotry still prevents racial and ethnic minorities from having equal opportunities in many vital aspects of everyday life, such as housing.<sup>140</sup> Such privileges have resulted in stereotypical and degrading representations of ethnic and cultural minorities in the media,<sup>141</sup> the acceptance of violence against racial and ethnic minorities,<sup>142</sup> and political disenfranchisement.<sup>143</sup>

Congress passed the Americans with Disabilities Act of 1990 (ADA)<sup>144</sup> in response to discrimination against individuals with disabilities in vital areas of everyday life, such as education, employment, housing, public accommodations, and transportation.<sup>145</sup> Research suggests that prejudice against individuals with disabilities has resulted in lower wage and higher unemployment rates

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138. See *id.*; see also Thomas E. Kleven, *Brown's Lesson: To Integrate or Separate Is Not the Question, but How to Achieve a Non-Racist Society*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 43, 45–46 (2005) (“In addition, much overt bigotry in such areas as housing and employment continues to deny opportunities to African Americans, and the system itself, although nominally color-blind, is structured so as to impede black advancement and maintain white privilege.”).

139. BELL HOOKS, *KILLING RAGE: ENDING RACISM* 116–17 (1995) (“Even though many white Americans do not overtly express racist thinking, it does not mean that their underlying belief structures have not been saturated with an ideology of difference that says white is always, in every way, superior . . . .”); Fraser, *supra* note 112, at 23 (“Eurocentric patterns of cultural value privilege traits associated with ‘whiteness,’ while stigmatizing everything coded as ‘black,’ ‘brown,’ and ‘yellow,’ paradigmatically—but not only—people of color.”).

140. Kleven, *supra* note 138.

141. Such degrading representations influence stereotypes that affect the social roles of racial and ethnic minorities. See, e.g., Joyce Witherspoon, *The Demise and Removal of the Aunt Jemima Icon* Petition to the Quaker Oats Company, <http://www.petitiononline.com/aj461153/petition.html> (last visited Oct. 5, 2008) (petitioning to remove the Aunt Jemima icon because it perpetuates denigrating racial images that further entrench racial discrimination).

142. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1269 (1991) (“A study of rape dispositions in Dallas, for example, showed that the average prison term for a man convicted of raping a Black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of an Anglo woman. A related issue is the fact that African-American victims of rape are the least likely to be believed.”); see also Ray F. Herndon, *Victim's Race Sways Justice: Study Targets Dallas County Murder, Rape Sentences*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1.

143. See, e.g., ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA*, at xii (2000) (describing the relationship between racial discrimination and political disenfranchisement in the 2000 U.S. Presidential election).

144. 42 U.S.C. §§ 12101–12213 (2000).

145. *Id.* at § 12101(a)(3) (stating that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”).

for persons with disabilities.<sup>146</sup> Many critics acknowledge that individuals with disabilities are economically worse off, but claim that this disparity is not unjust because it results from impairments that make them less economically productive.<sup>147</sup> However, empirical studies have found comparable levels of overall productivity between disabled and nondisabled workers.<sup>148</sup> These scholars explain that lower wage and higher unemployment rates for people with disabilities stem from prejudicial assumptions about the productivity of disabled workers. Degrading cultural stereotypes and representations of people with disabilities has also resulted in society viewing people with disabilities as subordinate to people without them.<sup>149</sup> Prejudice has led to discrimination against people with disabilities in access to goods, education, employment, facilities, and services.<sup>150</sup> Disability discrimination continues to encourage verbal harassment and violence against individuals with disabilities.<sup>151</sup>

Discrimination on the basis of sexual orientation also influences inequitable patterns of economic distribution. Prohibitions on same-sex marriage prevent same-sex couples from obtaining many of the economic benefits that marriage grants to heterosexual couples. For instance, even though some states permit domestic partnerships, these arrangements do not grant the same rights and privileges as marriage.<sup>152</sup> Moreover, no same-sex partner arrangement<sup>153</sup> is

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146. Marjorie L. Baldwin, *Estimating the Potential Benefits of the ADA on the Wages and Employment of Persons With Disabilities*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 276 (Peter David Blanck ed., 2000).

147. See, e.g., Marjorie L. Baldwin & William G. Johnson, *Labor Market Discrimination Against Men With Disabilities in the Year of the ADA*, 66 S. ECON. J. 548, 560 (2000) ("The results show that workers with more functional limitations have lower wages, all else equal, than workers with fewer limitations, supporting the contention that disabled workers' wages reflect lower average levels of productivity."). *Id.* ("The results show that persons with disabilities are subject to wage discrimination, but they do not conclusively demonstrate that discrimination is caused by prejudice.").

148. For a review of these studies, see generally Reed Greenwood & Virginia Anne Johnson, *Employer Perspectives on Workers With Disabilities*, 53 J. REHABILITATION 37 (1987).

149. Jack A. Nelson, *The Invisible Cultural Group: Images of Disability*, in IMAGES THAT INJURE: PICTORIAL STEREOTYPES IN THE MEDIA 119 (Paul Martin Lester ed., 1996).

150. See 42 U.S.C. § 12101(a)(3).

151. In 2006, the U.S. Federal Bureau of Investigation (FBI) listed ninety-four incidents motivated by disability in its annual report. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, *Incidents and Offenses*, in HATE CRIME STATISTICS, 2006, <http://www.fbi.gov/ucr/hc2006/incidents.html> [hereinafter 2006 HATE CRIME STATISTICS]. Hate crime data from 2007 has not yet been released by the FBI. Like all bias crimes, disability bias crimes are severely underreported. DANIEL D. SORENSEN, *THE INVISIBLE VICTIMS* 4 (2002), [http://www.aspires-relationships.com/the\\_invisible\\_victims.pdf](http://www.aspires-relationships.com/the_invisible_victims.pdf) ("[T]here is evidence that crimes against people with substantial disabilities are often not reported (result in a crime report) . . . I estimate that less than 4.5% of serious crimes committed against people with disabilities in California have been reported compared to 44% for the general population.").

152. See YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* 263–77 (2002) (comparing the rights and privileges of domestic partnership and marriage).

recognized by the federal government,<sup>154</sup> preventing same-sex couples from having access to many tax benefits, subsidies, and privileges afforded to married heterosexual couples.<sup>155</sup> Sexual orientation also creates a division that excludes many lesbians, gays, and bisexuals from participating in certain occupations. For instance, open gays, lesbians, and bisexuals are excluded from military employment.<sup>156</sup> Many gays, lesbians, and bisexuals also face discrimination in the workplace, resulting in lower wage and promotion rates.<sup>157</sup> Some even risk being fired if they reveal their sexual orientations.<sup>158</sup> Moreover, unlike biases based on race and sex, federal law does not protect gays, lesbians, and bisexuals from employment discrimination on the basis of sexual orientation.<sup>159</sup> Many states also do not include sexual orientation in their employment nondiscrimination laws.<sup>160</sup>

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153. The relationship arrangements to which I refer here include domestic partnerships, civil unions (which states have created to confer equal legal and economic benefits to same-sex couples as to heterosexual married couples), and marriage.

154. Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 375 (2007) (“The federal government has never recognized same-sex relationships and no major legislation recognizing gay relationships has ever passed the U.S. Congress.”).

155. For a comprehensive list of federal laws that rely upon marital status to grant privileges, benefits, and rights, see Letter From Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to U.S. Representative Henry J. Hyde (Jan. 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>; see also James Alm et al., *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT’L. TAX J. 201 (2000).

156. See 10 U.S.C. § 654 (2000) (“Policy concerning homosexuality in the armed forces”); see also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.1 (2006).

157. M.V. LEE BADGETT ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), <http://www.law.ucla.edu/WilliamsInstitute/publications/Bias%20in%20the%20Workplace.pdf> (finding strong evidence of employment discrimination on the basis of sexual orientation and gender identity); Bruce Elmslie & Edinaldo Tebaldi, *Sexual Orientation and Labor Market Discrimination*, 28 J. LAB. RES. 436 (2007) (finding strong evidence of discriminatory treatment of wages for gay men, but no evidence of such discrimination against lesbians).

158. NAT’L GAY & LESBIAN TASK FORCE, FREQUENTLY ASKED QUESTIONS ABOUT THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2007) <http://www.thetaskforce.org/downloads/misc/ENDAFQAQFinal2007v2.pdf> (“[L]esbian, gay, bisexual, and transgender people face serious discrimination in employment, including being fired, being denied promotions and experiencing harassment on the job.”).

159. Due to federal exclusion from Title VII’s employment nondiscrimination provisions, congressional advocates and activists are advocating for the Employment Non-Discrimination Act (ENDA) to prohibit employers from using sexual orientation or gender identity as the basis for adverse or differential treatment in employment. *Id.*

160. *Id.* (“Twenty states currently have laws making it illegal to fire someone based on their sexual orientation and 12 states protect individuals from discrimination based on their gender identity.”).

In terms of culture, negative stereotypes and representations in the media and mainstream society<sup>161</sup> depict gays, lesbians, and bisexuals as diseased,<sup>162</sup> immoral, and sexual predators.<sup>163</sup> These discriminatory stereotypes and representations create environments where violence against gays, lesbians, and bisexuals is accepted and rationalized.<sup>164</sup> They also rationalize excluding same-sex couples from marriage,<sup>165</sup> perpetuate employment discrimination, prevent lesbians, gays, and bisexuals from obtaining immigration status for their committed romantic partners,<sup>166</sup> and serve as the basis for excluding gays, lesbians, and bisexuals from the military.<sup>167</sup>

Discrimination on the basis of religion has undoubtedly influenced economic distribution in the United States. For instance, during the first half of the twentieth century, anti-Semitism caused Jews to be excluded from colleges, professional schools, professional occupations, and housing.<sup>168</sup> Title VII of the Civil Rights Act of 1964 outlawed religious discrimination in public accommodations, employment,<sup>169</sup> and public education. Similarly, all states have adopted

161. In the past two decades, there has been a rise in positive gay-themed programming on U.S. network television. See RON BECKER, *GAY TV AND STRAIGHT AMERICA 2* (2006); see also SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* 10 (2001).

162. James Gillett, *Media Activism and Internet Use by People With HIV/AIDS*, in *HEALTH AND THE MEDIA* 92, 92 (Clive Seale ed., 2004) (“The moral rhetoric regarding gay men as deviant became a dominant motif in the way in which people with HIV/AIDS were portrayed in the media—homophobia became the foundation for a more generalized AIDS phobia.”).

163. David Eisenbach, *GAY POWER: AN AMERICAN REVOLUTION*, at vii (2006) (“Before the gay rights movement, the media commonly depicted homosexuals as insane deviants and sexual predators.”). See generally *BISEXUAL MEN IN CULTURE AND SOCIETY* (Brett Beemyn & Erich Steinman eds., 2002).

164. For instance, the gay panic defense decreases the criminal charge for a crime under the rationale that a same-sex advance provides understandable reactions of fear and rage. See Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 *PSYCHOL. PUB. POL’Y & L.* 250, 268–69 (2004).

165. See, e.g., Vincent J. Samar, *Privacy and the Debate Over Same-Sex Marriage Versus Unions*, 54 *DEPAUL L. REV.* 783 (2005).

166. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 *WM. & MARY L. REV.* 1841, 1849 n.25 (2006) (“State law, however, cannot provide same-sex couples with the federal benefits of marriage such as immigration status and tax benefits.”); see also *GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD)*, *WARNING FOR SAME-SEX BINATIONAL COUPLES*, [http://www.glad.org/rights/Binational\\_Couples\\_Warning.pdf](http://www.glad.org/rights/Binational_Couples_Warning.pdf) (last visited Oct. 5, 2008).

167. R.W. CONNELL, *MASCULINITIES* 40 (2005) (“Homophobia is not just an attitude. Straight men’s hostility to gay men involves real social practice, ranging from job discrimination through media vilification to imprisonment and sometimes murder . . .”).

168. See generally Max Menees, *American Jews and Anti-Semitism*, 10 *J. NEGRO EDUC.* 557 (1941); Edward C. Halperin, *The Jewish Problem in U.S. Medical Education, 1920–1955*, 56 *J. HIST. MED.* 140 (2001).

169. The U.S. Equal Employment Opportunity Commission explains: “The Act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee’s religious beliefs.” U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *BEST PRACTICES*



laws banning religious discrimination in these vital areas. Therefore, religion does not inequitably influence patterns of economic distribution as much as it used to. In terms of culture, however, negative stereotypes and representations of marginalized religions continue to foster pervasive discrimination<sup>170</sup> and violence. Many Arab Americans and Muslims, for example, fear discrimination due to anti-Islamic sentiment resulting from the September 11 terrorist attacks.<sup>171</sup> Since September 11, 2001, Arab Americans and Muslims have been subjected to increased violence and harassment.<sup>172</sup>

Opportunistic bias crime perpetrators recognize that ostracism and discrimination stemming from their victims' group membership grants them advantages that would not necessarily be present if they committed parallel crimes without using group membership as a criterion.<sup>173</sup> For instance, social group ostracism and discrimination may influence victims not to report crimes to the police.<sup>174</sup> Many perpetrators deliberately victimize gays because they believe that they are less likely to report the crimes in fear of exposing their sexual orientation.<sup>175</sup> Opportunistic bias crime perpetrators may also believe that even if their victims report their crimes, discriminatory attitudes may prevent police and prosecutors from seriously investigating or prosecuting the crimes.<sup>176</sup> For instance, perpetrators may select victims with physical and mental disabilities because they believe that police and prosecutors will assume that the victims are incompetent witnesses, preventing bias crimes motivated by disability from being investigated

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OF PRIVATE SECTOR EMPLOYERS (1997), [http://www.eeoc.gov/abouteeoc/task\\_reports/practice.html](http://www.eeoc.gov/abouteeoc/task_reports/practice.html) (citation omitted).

170. Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1019 (2000) ("Consideration of religion alone, like race, rarely furnishes justification for differential treatment and almost always reflects invidious discrimination.").

171. See generally Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41 (2005).

172. Jim Lobe, *Big Jump Found in US Anti-Muslim Incidents*, INTERPRESS SERVICE, Sept. 19, 2006, available at <http://www.commondreams.org/headlines06/0919-02.htm>.

173. See Grattet & Jenness, *supra* note 20, at 653.

174. Scholars posit that bias crimes are severely underreported. See William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1219 (2004) ("There are a variety of reasons that hate crime victims might not report."); see also Jeanine C. Cogan, *Hate Crime as a Category Worthy of Policy Attention*, 46 AM. BEHAV. SCI. 173, 179 (2002) ("[S]ocial science research shows that hate crimes are less likely to be reported to the police than random crimes."). One significant factor affecting underreporting is victims' fears that the police will be biased towards them because of their group membership. Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 26 (1994).

175. See LICENSED TO KILL, *supra* note 1 and accompanying text.

176. Factors that influence police to implement bias crime laws depend on subjective factors, such as "the attitudes, beliefs, and practices of individual officers, the perceived tractability of the problem, police funding and training, and public opposition to hate crime policies." Karen Franklin, *Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes*, 46 AM. BEHAV. SCI. 154, 156 (2002).

or prosecuted.<sup>177</sup> Cultural stereotypes that members of certain groups are weaker or less likely to defend themselves also cause opportunistic bias crime perpetrators to believe that targeting members of these groups will increase the probability that their crimes will be successful. For example, perpetrators may assault only the Amish because they believe that the victims will not resist attack by virtue of their pacifist commitments.<sup>178</sup>

The unfair advantage associated with opportunistic bias crime robberies can be specifically conceptualized in terms of ensuring fair market competition, and more specifically, perpetrators' deliberate choice to capitalize upon the advantages explained in the preceding paragraph that derive from unjust economic and social conditions for monetary gain. Enhancing the punishment for opportunistic bias crime robberies furthers the view that profit should only be the result of productive labor or random luck,<sup>179</sup> and further punishes criminals for taking advantage of exceptional circumstances, such as unjust economic and social conditions that increase the likelihood of their crimes being more successful.

Besides my previous example of robbery versus aggravated robbery, many other laws punish perpetrators who attempt to unfairly profit from exceptional conditions that increase the likelihood of crimes being more successful. For example, on January 7, 2008, President George W. Bush signed the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007.<sup>180</sup> The bill enhanced the punishment for fraud in connection with major disaster or emergency funds,<sup>181</sup> and was a response to numerous allegations of fraudulent use of relief funds intended for victims of Hurricanes Katrina, Rita, and Wilma.<sup>182</sup> In defending the bill, Ohio Congressman Steve Chabot said that criminals

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177. Mark Sherry, Don't Ask, Tell or Respond: Silent Acceptance of Disability Hate Crimes (Jan. 8, 2003), [http://dawn.thot.net/disability\\_hate\\_crimes.html](http://dawn.thot.net/disability_hate_crimes.html) ("Not all impairments are visible, and the officers investigating an incident may not have high levels of disability awareness, so they may not be able to recognise certain invisible impairments and may not fully investigate some possible cases of disability discrimination.").

178. See sources cited *supra* note 2.

179. The argument that individuals should only profit from productive labor or random luck, and not others' hardships is a common justification invoked for laws criminalizing blackmail. See Joel Feinberg, *The Paradox of Blackmail*, 1 *RATIO JURIS* 83, 83-84 (1988).

180. See Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110-179, § 863, 121 Stat. 2556 (codified at 18 U.S.C.S. § 1040 (LexisNexis Supp. 2008)).

181. *Id.* ("An Act To amend title 18, United States Code, with respect to fraud in connection with major disaster or emergency funds.").

182. 153 CONG. REC. H16,865 (daily ed. Dec 19, 2007) (statement of Sen. Conyers) ("Reports of fraud . . . included allegations that funds had been misused to purchase luxury goods, that noneligible persons had applied for and received benefits, and that criminals had established phony Katrina-related Web sites to swindle those who wished to contribute to legitimate disaster assistance efforts.").

who preyed on vulnerable disaster victims deserved harsher punishment.<sup>183</sup> Chabot also argued that the bill was necessary because perpetrators were more likely to commit fraud in the environment of chaos and vulnerability accompanying any natural disaster.<sup>184</sup> Congress intended to punish more harshly fraud perpetrators who gained unfair advantages by exploiting the vulnerabilities of disaster victims.

Moreover, at least nineteen states impose civil or criminal penalties for price gouging after emergencies and major disasters.<sup>185</sup> The purpose of these laws is to protect fair market competition and consumers from sellers who take advantage of vulnerability stemming from emergencies and natural disasters. Legislatures have stated that natural disasters result “in abnormal disruptions of the market”<sup>186</sup> and that “some merchants [take] unfair advantage of consumers by greatly increasing prices for essential consumer goods and services.”<sup>187</sup> Criminal penalties for price gouging prevent businesses from unfairly profiting from the increased demand for essential goods that occurs during emergencies and natural disasters.

The most basic criticism against this position is that all robberies violate the principle that profit should only be the result of productive labor or random luck. These critics deny that opportunistic bias crime robbers obtain an additional

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183. *Id.* at H16,866 (Statement of Sen. Chabot) (“S. 863 would strengthen Federal law enforcement’s ability to combat and deter those who would otherwise attempt to exploit another’s tragedy, preventing assistance from going to those who truly need it. . . . Tough penalties for criminals who prey on innocent disaster victims are long overdue.”).

184. *Id.* at H16,865. (“To no one’s surprise, almost immediately after FEMA and private charities began administering funds to victims, reports of fraud began to surface . . . .”); *id.* at H16,866 (“[I]t is clear that current criminal penalties are insufficient to deter disaster fraud. For example, in the U.S. Attorneys Office for the Middle District of Louisiana alone, 128 individuals have been charged with hurricane-related fraud.”).

185. David Nitkin, *Sticker-Shocked Maryland Drivers Voice Suspicions of Price Gouging*, BALT. SUN., Sept. 1, 2005, at 12A. For examples of state laws with criminal provisions, see ARK. CODE ANN. § 4-88-304 (2006); CAL. PENAL CODE § 396 (Deering 2008); W. VA. CODE ANN. § 46A-6J-1 (LexisNexis 2006); TENN. CODE ANN. § 47-18-5101(3) (Supp. 2007); LA. REV. STAT. ANN. § 29:734 (West 2007). Some states provide for civil liability under these circumstances. See N.Y. GEN. BUS. LAW § 396-r (McKinney 2003); see also ALA. CODE § 8-31-5 (LexisNexis 2002). For an overview of modern price gouging statutes, see Michael Brewer, Note, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1112–16 (2007).

186. TENN. CODE ANN. § 47-18-5101(3).

187. CAL. PENAL CODE. § 396(a); see also W. VA. CODE ANN. § 46A-6J-1 (“The Legislature hereby finds that during emergencies and major disasters . . . some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services.”). New York also invoked the concept of unfair advantage to impose civil penalties in unfair price gouging cases. See N.Y. GEN. BUS. LAW. § 396-r(1) (“In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.”).

economic unfair advantage by intentionally selecting their victims because of group membership. This criticism, however, erroneously frames unfair advantage purely in terms of the quantitative benefit that perpetrators receive from committing a crime. For instance, these critics would contend that a typical robber who robs a victim for \$100 will unfairly obtain the same \$100 if he had selected the victim on the basis of group membership. As explained earlier, this conceptualization ignores the fact that the punishment of a robbery can be enhanced to aggravated robbery when perpetrators take advantage of circumstances that make it more likely for them to successfully commit their crimes, such as committing a crime with a dangerous weapon or committing the crime against children or the elderly.<sup>188</sup> If robbers can be punished more harshly for targeting children or the elderly, it follows that opportunistic bias crime robbers who exploit victims who are vulnerable because of unjust social and economic conditions should receive harsher punishment as well. Additional punishment is appropriate in light of this additional economic unfair advantage that is not present in typical robberies.<sup>189</sup>

Many opportunistic bias crimes, however, are not robberies. Since principles of fair market competition do not apply to this other category of opportunistic bias crimes, an additional conceptualization of the obtained unfair advantage is necessary to justify their enhanced punishment. For all opportunistic bias crimes, including robberies, I conceptualize the unfairness of perpetrators' deliberate choices to take advantage of unjust social and economic conditions for personal gain in terms of perceived vulnerabilities arising from victims' group membership.

Federal, state, and local legislatures have created specific criminal offenses and penalty enhancements to punish perpetrators who obtain unfair advantages from their crimes by exploiting characteristics or circumstances that make victims more vulnerable and increase the likelihood of crimes being more successful. The most obvious example is vulnerable victim statutes. The U.S. Sentencing Guidelines include a sentencing enhancement for crimes in which the defendant "knew or should have known that a victim of the offense was a vulnerable victim."<sup>190</sup> The guidelines define a vulnerable victim includes one "who is unusually vulnerable due to age, physical or mental condition, or who

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188. See *supra* notes 87–92 and accompanying text.

189. I am not opposed to expanding the definition of aggravated robbery to include enhancements for opportunistic bias crime robberies. Given my argument that all opportunistic bias crimes should be punished as bias crimes, however, I believe that it is more desirable to punish opportunistic bias crime robberies under bias crime laws. I simply invoke the distinctions between robbery and aggravated robbery to support my justification for why the advantage obtained from opportunistic bias crime robberies can be conceptualized as more unfair than the typical robbery.

190. GUIDELINES MANUAL, *supra* note 94, at 330.

is otherwise particularly susceptible to the criminal conduct.”<sup>191</sup> Many state and local legislatures have enacted similar laws.<sup>192</sup> Courts have framed the purpose of vulnerable victim statutes and their justification in terms of victims’ helplessness, defenselessness, and impaired capacity to prevent or detect crime.<sup>193</sup> In this sense, perpetrators have an unfair advantage over these victims because their physical and mental impairments make it more likely for them to be easier crime targets.

Opportunistic bias crime perpetrators believe that their victims are easier crime targets because those victims are vulnerable as a result of unjust discrimination against immutable characteristics such as age, color, disability, gender, gender identity, national origin, race, sex, and sexual orientation. Immutability can be characterized in one of two ways. Some characteristics, such as age, disability, and race, cannot be altered by an individual’s voluntary act. However, other characteristics, such as religion, can only be altered with substantial cost or difficulty to the individual. Although not literally immutable, scholars contend that “the power of a constructed category can be so overwhelming, and its terms, assumptions, and normative social requirements so deeply ingrained into the members of society, that it is experienced at the individual level as immutable.”<sup>194</sup> This implies that some characteristics that are entirely possible for individuals to change, such as religion, have such a powerful impact on the construction of individual identity that they effectively operate as if they were unchangeable.

Courts, scholars, and legislatures have affirmed the unfairness of disadvantaging individuals on the basis of characteristics that are unalterable or are alterable only with substantial cost and difficulty to the individual. For instance, the unjust nature of disadvantaging individuals on the basis of immutable characteristics has arisen in equal protection jurisprudence. Immutability is one of the characteristics taken into account when determining whether laws target a suspect class, and are thus subjected to heightened scrutiny.<sup>195</sup> Moreover,

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191. *Id.* The vulnerable victim enhancement only applies if “a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.” *Id.* at 331.

192. See, e.g., ARK. CODE ANN. § 5-4-604(10) (2006) (“The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because: (A) Of either a temporary or permanent severe physical or mental disability which would interfere with the victim’s ability to flee or to defend himself or herself; or (B) The person was twelve (12) years of age or younger.”).

193. See, e.g., *United States v. Gill*, 99 F.3d 484, 486 (1st Cir. 1996); *United States v. Blake*, 81 F.3d 498, 504 (4th Cir. 1996); *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990).

194. Samuel A. Marcossan, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 650 (2001).

195. The Supreme Court has created a four-prong test to determine whether a suspect classification warrants strict scrutiny review: (1) The class has suffered a history of purposeful discrimination; (2) the

Title VII prohibits employment discrimination on the basis of an employee's race, color, religion, sex, and national origin.<sup>196</sup> Courts have interpreted Title VII to protect employees from policies that specifically discriminate on the basis of immutable characteristics that are fundamental to individual identity.<sup>197</sup> These courts have reasoned that it is unfair to let a person be tarnished by stereotypes that are inescapable because they are rooted in characteristics that are involuntary.<sup>198</sup> Because of this logic, courts have also rejected legal claims based on voluntary choices, such as hair styles or clothing, which do not implicate immutable traits.<sup>199</sup>

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class is the object of prejudice that is often a result of inaccurate prejudice as opposed to ability; (3) the class is defined by an immutable trait that is beyond individual control; (4) the class is a politically powerless minority. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

196. 42 U.S.C. § 2000e-2 (2000).

197. See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics . . ."); see also Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 389 (2007) ("Title VII typically applies to policies that discriminate on the basis of immutable characteristics, not mutable characteristics."); cf. *Hernandez-Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084, 1092 (9th Cir. 2000) ("[W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." (quoting *In re Acosta*, 19 I & N Dec. 211, 233 (1985))); *id.* at 1087 ("[G]ay men with female sexual identities in Mexico constitute a protected 'particular social group' under the asylum statute.").

198. James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 757 (2007) ("Since race is an immutable characteristic, we think it unfair to let a person be tarnished with inescapable stereotypes. The same concerns apply in most cases to gender and national origin strictly defined as the country of one's origin." (citations omitted)). See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989), for a discussion on the stigmatizing effects of racial classifications.

199. Leonard, *supra* note 198, at 757-58 ("[C]ourts have rejected Title VII claims based on rules against personal choices such as hair styles that, while culturally or ethnically expressive, are voluntary behaviors and therefore do not implicate immutable traits."); see, e.g., *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974) (rejecting plaintiff's sex discrimination Title VII claim, reasoning that "the Court was not talking in terms of hair styles or modes of dress over which the job applicant has complete control," but rather "was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter" (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971))). But see *Jones v. City of L.A.*, 444 F.3d 1118, 1137 (9th Cir. 2006) ("Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot become a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group: the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable.").

Some scholars have defended the inclusion of particular groups in bias crime penalty-enhancement legislation based on the concept of immutability.<sup>200</sup> By analogy, opportunistic bias crimes warrant additional punishment because perpetrators intentionally select their victims on the basis of discrimination against the immutable characteristics that make victims easier crime targets. Enhancing the sentences for opportunistic bias crimes punishes perpetrators who socially or economically benefit at the expense of other people's inescapable hardships.<sup>201</sup> Without recognizing this additional unfair advantage that perpetrators receive from committing opportunistic bias crimes, victims and members of targeted communities are forced to accept perceived greater vulnerability to crime as a cost for belonging to a particular group. Since group membership is often involuntary because of immutable characteristics, forcing group members to accept this cost is unjust.<sup>202</sup>

Critics could contend that some characteristics, such as physical strength and size, are also involuntary traits and are very commonly used as selection criteria by criminals. Yet, perpetrators do not receive greater punishment for intentionally selecting their victims based on size or physical strength. Physical size and strength do not have the same history of social ostracism and discrimination as other characteristics such as gender, race, sexual orientation, gender identity, and religion.<sup>203</sup> My position advocates that the very history of group ostracism and discrimination rooted in economic patterns of distribution and culture is what makes capitalizing upon them for personal gain unjust. When size and physical strength are the basis of unjust discrimination, as may be the case in instances of physical disability, then such factors may indeed justify enhanced punishment.

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200. See Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144, 160 (1999) (criticizing the exclusion of sexual orientation from bias crime legislation on the basis of nonimmutability).

201. This justification is somewhat similar to my first conceptualization in Part III.B.1 that is specific to opportunistic bias crime robberies. However, the conceptualization stated here is a broader moral argument that applies to exploitation of social group vulnerabilities for any personal gain, such as validation from peers. Therefore, unlike the first conceptualization, this one does not explicitly rely upon principles of fair market competition.

202. In this sense, I agree with Harel and Parchomovsky that "a liberal state must redress disparities in vulnerability to crime that result from certain immutable personal characteristics of the victim." Harel & Parchomovsky, *supra* note 73, at 510.

203. See *id.* ("Vulnerability to crime is a function of myriad factors such as wealth, age, attitude toward risk, life experience, and physical and intellectual prowess. Not all of these factors should be taken into account by the state. Some disparities in the vulnerability to crime depend on the investment in precautions by the victim herself. Other disparities may be grounded in luck and other factors that do not mandate interference by the state. The state cannot be reasonably expected to annul all of the disparities in the vulnerability of different potential victims of crime.").

## 2. Conceptualizing Unfair Advantages Obtained Through Bias Crime in Terms of Harmful Effects

The second part of my thesis contends that opportunistic bias crimes warrant additional punishment because of their harmful effects. Some scholars have taken similar positions by arguing that from a victim's perspective, opportunistic bias crimes are indistinguishable from prototypical bias crimes.<sup>204</sup> For example, a young adult male who violently assaults a gay man to prove his masculinity to his friends may denounce the victim by calling him a faggot, homo, or other epithet while committing the crime. Even if the perpetrator does not have animus towards gays, the victim will suffer the same consequences as he would have if the perpetrator did have animus towards gays; in both cases the victim believes that he is being targeted for being gay. Whether these harms are contingent upon victims' awareness of the perpetrators' bias motive<sup>205</sup> is a question I address later in this Subpart. The simple point I want to make here is that scholars contend that similar to prototypical bias crimes, opportunistic bias crimes have greater cumulative harms upon victims than nonbias crimes by causing greater emotional and psychological trauma to immediate victims and by instilling fear in targeted communities and generating strife between members of targeted social groups.<sup>206</sup>

Although I consider these arguments to be valid, they are not central to my thesis because perpetrators do not necessarily obtain unfair advantages by committing crimes that produce more harm to victims. Opportunistic bias crimes do create two consequences, however, that render the advantages perpetrators obtain from them to be more unfair than in typical crimes. These consequences are relevant to the underlying justifications for the enhanced punishment of opportunistic bias crimes because they contribute to the social context that enables perpetrators to take unfair advantage of group ostracism and discrimination for personal gain.

First, opportunistic bias crimes cause members of targeted social groups to internalize perceptions that they are easier crime targets on account of their group identity.<sup>207</sup> Many bias crime victims feel significantly less safe after

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204. See, e.g., Wang, *supra* note 4, at 1413.

205. Here, I am using the term "bias motive" to mean motives rooted in animus and/or opportunism.

206. Wang, *supra* note 4, at 1413.

207. See Wang, *Transforming Power*, *supra* note 64, at 104; see also IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 62 (1990) ("The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are *liable* to violation, solely on account of their group identity.").



their attack than do victims of nonbias crimes.<sup>208</sup> Many bias crime victims also have greater fears about being subjected to similar violence in the future and are more likely to feel unsafe returning to the area of the incident and to their homes alone at night.<sup>209</sup> Furthermore, bias crimes often influence victims to change their behavior in order to avoid future victimization.<sup>210</sup> For instance, bias crimes can cause a person's group membership to "be experienced as a source of pain and punishment rather than intimacy, love, and community . . . Such characterological self-blame can lead to feelings of depression and helplessness."<sup>211</sup> This internalization may influence victims of targeted social groups to refuse to fight back during the commission of opportunistic bias crimes. It may also deter victims from reporting their crimes because they fear that as a result of widespread discriminatory attitudes they will be subjected to secondary victimization, such as police insensitivity and ridicule.<sup>212</sup>

It is possible to argue that victims' reluctance to report bias crimes is a consequence of preexisting police hostility, not the direct consequence of victimization. However, this criticism leads to my second point: Opportunistic bias crimes contribute to preexisting group hostility by perpetuating society's perception that members of targeted groups are easier crime targets. Many groups are prone to being victimized by violence because of their group identity.<sup>213</sup> Many prototypical and opportunistic bias crimes become highly public acts by virtue of local and national media coverage.<sup>214</sup> For instance, the nationally

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208. Jack McDevitt, Jennifer Balboni, Luis Garcia & Joann Gu, *Consequences for Victims: A Comparison of Bias and Non-Bias Motivated Assaults*, 45 AM. BEHAV. SCIENTIST 697, 710 (2001).

209. *Id.*

210. Arnold Barnes & Paul H. Ephross, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks*, 39 SOC. WORK 247, 250 (1994).

211. Linda Garnets, Gregory Herek & Barrie Levy, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. INTERPERSONAL VIOLENCE 366, 370 (1990).

212. FREDERICK M. LAWRENCE, PUNISHING HATE 23 (1999) (noting that many victims fail to report hate crimes "[d]ue to factors such as [the victim's entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of courting exposure"); James J. Nolan & Yoshio Akiyama, *An Analysis of Factors That Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMP. CRIM. JUST. 111, 114 (1999) (concluding that gay, lesbian, bisexual, and transgender victims frequently do not report bias crimes because they fear police insensitivity and secondary victimization); Weisburd & Levin, *supra* note 174, at 26 (citing reasons for failing to report gender-motivated bias crimes to include shame, fear, distrust, embarrassment, belief that the authorities are unsympathetic, and fear of "secondary trauma" from the legal system).

213. YOUNG, *supra* note 207, at 62 ("Violence is a social practice. It is a social given that everyone knows happens and will happen again. It is always at the horizon of social imagination, even for those who do not perpetrate it.")

214. Some scholars have criticized the media's role in reporting hate crimes, claiming that "[t]he media have accepted, reinforced, and amplified the image of a nation engulfed by hate crime." James B. Jacobs & Jessica S. Henry, *Criminal Law: The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 370 (1996).

publicized murders of Matthew Shepard<sup>215</sup> and James Byrd Jr.<sup>216</sup> affirmed that violence motivated by animus on the basis of sexual orientation and race still plagues American society. Moreover, the publicized killing of Michael Sandy,<sup>217</sup> a New York gay man who was robbed by a group of men who thought that Sandy would be an easy robbery target because he was gay, demonstrates that opportunistic bias crimes can also be highly public acts.<sup>218</sup> Media coverage of opportunistic bias crimes broadcasts the perceived vulnerability of victims because of their group membership, identifying which victims are easier targets for crime.<sup>219</sup> Opportunistic bias crimes also serve as acts of affirmation to individuals who believe that such groups warrant negative treatment or that they are less worthy and can be targeted. Thus, these crimes contribute to an environment that promotes other types of discrimination and violence against targeted victims on the basis of group membership.<sup>220</sup>

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215. Matthew Shepard was brutally murdered in an antigay bias crime in Laramie, Wyoming on October 6, 1998. His murder received widespread national news coverage. See James Brooke, *Gay Murder Trial Ends With Guilty Plea*, N.Y. TIMES, Apr. 6, 1999, at A20. Matthew's parents, Dennis and Judy Shepard established the Matthew Shepard Foundation in his honor to increase education, outreach, and advocacy on bias crimes and laws. See Matthew Shepard Foundation, *Foundation's Story*, [http://www.matthewshepard.org/site/PageServer?pagename=found\\_Foundations\\_Story\\_Main\\_Page](http://www.matthewshepard.org/site/PageServer?pagename=found_Foundations_Story_Main_Page) (last visited Nov. 2, 2008). Shepard's death increased the push to expand coverage of federal bias crime legislation to include coverage of lesbian, gay, bisexual, and transgender (LGBT) people. The latest bias crime bill to be introduced in the Senate was named after Matthew Shepard. See Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong., § 249(a)(2) (2007).

216. On June 7, 1998, James Byrd was killed by three men who dragged him to his death by chaining him to a pick-up truck near Jasper, Texas. See *Third Defendant Is Convicted in Dragging Death in Texas*, N.Y. TIMES, Nov. 19, 1999, at A33. Byrd's family established the Byrd Foundation for Racial Healing in his honor to help fight racism and bias crimes motivated by race. See Byrd Foundation For Racial Healing, <http://thebyrdfoundation.org/home> (last visited Aug. 5, 2008). Byrd's death not only influenced discussions concerning national bias crime laws, but also influenced Texas to enact its own state bias crime law. See *Governor of Texas Signs a Hate Crime Bill*, N.Y. TIMES, May 12, 2001, at A8.

217. In October 2006, Michael Sandy, a twenty-nine-year-old gay man, was lured to a meeting place in Sheepshead Bay, New York and then driven to Plumb Beach, where he was beaten and chased into traffic on the Belt Parkway. Sandy died of his injuries. See Michael Brick, *No Hate Required for Hate Crime in Gay Man's Death, Judge Rules*, N.Y. TIMES, Aug. 3, 2007, at B5. Sandy's death was the basis of *People v. Fox*, where a New York Supreme Court judge ruled that animus was not required to impose bias crime enhancements. See *People v. Fox*, 844 N.Y.S.2d 627 (Sup. 2007).

218. Some scholars argue that drawing public attention to bias crimes is counterproductive to their prosecution. See, e.g., Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 570 (2003).

219. I do not argue that media coverage of opportunistic bias crimes only produces negative consequences. For instance, publicizing opportunistic bias crimes may be beneficial if it associates the intentional selection of members of particular social groups with heinous crimes. These benefits, however, do not prevent coverage from broadcasting the perceived vulnerabilities of particular groups.

220. I am not the only person advocating such a position. Lu-in Wang clearly articulates this point. See Wang, *supra* note 4, at 1413 ("[A] history of bias crimes against a particular group itself

One limitation of this harms-based approach is that the existence of the harms presupposes that victims and members of society at large are aware of perpetrators' desires to select victims intentionally on the basis of perceived vulnerabilities stemming from group membership. It is difficult to disassociate opportunistic bias crime harms from a perpetrator's motivation to select victims because of their group membership; by definition this motivation is a material element of an opportunistic bias crime. This limitation, however, does not defeat a harm-based justification for the enhanced punishment of opportunistic bias crimes. More resources are being dedicated to training law enforcement to identify bias crime motivations.<sup>221</sup> Moreover, when perpetrators commit prototypical bias crimes, they often reveal their motivations to victims in order to convey their disgust and animus towards victims.<sup>222</sup>

Although more research needs to be conducted in this area, opportunistic bias crime perpetrators have an incentive to reveal that they intentionally selected their victims because of perceived vulnerabilities arising from group membership. The only way for opportunistic bias crime perpetrators to continue to capitalize upon social ostracism and group discrimination for personal gain is by perpetuating the perception that certain members of groups are more suitable crime targets. Thus, opportunistic bias crime perpetrators want victims to internalize that they are more vulnerable and want society to accept this perception. Moreover, in some cases, revealing opportunistic bias crime motivations may increase the likelihood that the crime will succeed. For instance, a gay male may freeze or be so traumatized that he is being attacked on the basis of his sexual orientation that he fails to resist the crime. Or, the gay male may not report the crime to police to avoid having to reveal his sexual orientation and risk secondary victimization. The same male may resist the crime, however, if he believes that he is being randomly attacked for reasons other than perceived vulnerabilities associated with his sexual orientation. Or, the victim may be more likely to report the crime because there is no reason for the victim to bring up his sexual orientation to the police if he believes that it had nothing to do with the crime. Therefore, critics should not be so quick to reject a harms-based justification for the enhanced punishment

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contributes to the designation of particular groups as 'suitable victims.'). My formulation of this harm is distinct from other scholars' positions, however, because it relates the harm to the unfair advantage that criminals obtain from committing opportunistic bias crimes.

221. See Jack McDevitt, Jack Levin & Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303, 310 (2002).

222. For victim narratives that illustrate how perpetrators revealed that their criminal motivations were rooted in hatred towards gays and lesbians, see Gregory M. Herek, Jeanine C. Cogan & J. Roy Gillis, *Experiences in Hate Crimes Based on Sexual Orientation*, 58 J. SOC. ISSUES 319, 324–32 (2002).

of opportunistic bias crimes given the likelihood that perpetrators will reveal their motivations to victims.

#### IV. PUNISHING UNFAIR ADVANTAGES OBTAINED THROUGH OPPORTUNISTIC BIAS CRIME IS CONSISTENT WITH ALL THREE THEORIES OF PUNISHMENT

In general, scholars have offered three theories of punishment: retribution,<sup>223</sup> utilitarianism,<sup>224</sup> and denunciation.<sup>225</sup> Although some scholars exclusively advocate one theory, many scholars justify punishment from frameworks that combine principles from each theory.<sup>226</sup> In this Comment, I do not take a position as to which of these theories is superior. Rather, by tracking the concept of unfair advantage through retributive, denunciative, and utilitarian theories of punishment, I hope to show that applying unfair advantage theory to enhance the punishment of opportunistic bias crimes can be endorsed from a range of criminological perspectives.

In its most basic form, unfair advantage theory addresses the unfair advantage that criminals obtain over law-abiding members of society by violating the law.<sup>227</sup> Unfair advantage theory has been predominately present in retributive theories of punishment.<sup>228</sup> This Part illustrates, however, that tenets of the theory can be framed in utilitarian terms and have also risen in denunciation theories.<sup>229</sup>

##### A. Retribution

The basic tenet of retribution (or the theory of just deserts) is that punishment is justified because criminals are blameworthy and thus deserve it.<sup>230</sup> To

223. See *supra* note 17.

224. See *supra* note 18.

225. See *supra* note 19.

226. See, e.g., Hessick, *supra* note 103, at 112; Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 28–41 (1987).

227. BAGARIC, *supra* note 6, at 86.

228. See *supra* note 79 and accompanying text.

229. See *supra* note 80 and accompanying text. No utilitarian theory has specifically justified punishment by exclusively invoking unfair advantage theory. In Part IV.B, *infra*, however, I demonstrate how the unfair advantage theory can be framed in terms of utilitarian goals.

230. BAGARIC, *supra* note 6, at 38 (“[T]hose who are blameworthy deserve punishment and that . . . is the sole justification for punishment.”); JEFFRIE G. MURPHY, *Three Mistakes About Retribution*, in *RETRIBUTION, JUSTICE, AND THERAPY* 77 (1979); David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537, 542 (1991) (“The bold retributivist asserts both that lawbreakers deserve punishment and that this, all by itself, constitutes a good or sufficient reason for the state to inflict punishment on them.”).

impose punishment fairly, retributivists advocate the principle of proportionality,<sup>231</sup> which requires punishment to be equivalent<sup>232</sup> to the criminal's wrongdoing. Retributivists have generally measured wrongdoing in terms of the criminal's blameworthiness or the harm caused by the offense.<sup>233</sup> Retributivists also "maintain that criminal guilt merits or deserves punishment, regardless of considerations of social utility":<sup>234</sup> punishment is an intrinsic good. Retributivists do not deny that punishment may create beneficial ends, such as deterrence or rehabilitation, but treat them as subordinate to criminal desert.<sup>235</sup>

Retributivists advocating unfair advantage theory argue that it is a "theory of criminal desert proportioning the (maximum) legal punishment for a crime to the unfair advantage the criminal takes by the crime."<sup>236</sup> They posit that security obtained from a just legal system is contingent upon citizens agreeing to exercise self-restraint to obey the law, even if they desire to break it.<sup>237</sup> When a citizen fails to exercise self-restraint and breaks the law "he renounces a burden

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231. Utilitarians have also relied upon the principle of proportionality to justify punishment. See BAGARIC, *supra* note 6, at 39 ("Appeal to the principle of proportionality is also not distinctly retributivist. It is a virtue that has been endorsed by some utilitarians as far back as Bentham."); see also Jeremy Bentham, *Principles of Penal Law*, in *THE WORKS OF JEREMY BENTHAM* 365, 399–402 (J. Bowring ed., 1962); Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 *BUFF. CRIM. L. REV.* 755, 761 (2000) ("Among the many arguments that retributivists offered for punishing on the basis of desert, was a claim that punishment appropriately expressed blame for wrongdoing and respect for victims.").

232. To combat the notion that retribution is an antiquated theory requiring an eye for an eye, scholars have defended retribution by arguing that retributive punishment does not require the infliction of the same evil upon the criminal, but only requires an equivalent evil to be imposed. See MICHAEL DAVIS, *Harm and Retribution*, in *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* 42, 44 (1992).

233. DAVIS, *supra* note 232, at 55 ("Does the concept of harm give us insight into how much punishment a criminal deserves for what he did? The answer seems to be that it certainly does—sometimes."); Hessick, *supra* note 103, at 113 ("Gravity [of the offense] is measured in two separate ways: (1) the blameworthiness of individual defendant and (2) the loss or harm caused by the offense.").

234. MURPHY, *supra* note 230, at 77; see also BAGARIC, *supra* note 6, at 38.

235. MICHAEL DAVIS, *Relative Independence*, in *TO MAKE THE PUNISHMENT FIT THE CRIME*, *supra* note 232, at 18, 26–27 ("I have claimed only that criminal punishment can be justified even if the society instituting it does not *intend* to prevent crime. I have not claimed that deterrence is *entirely* irrelevant to justification. . . . What I do claim is that deterrence may plausibly be treated as a mere *side constraint* on the institution of criminal punishment.").

236. Davis, *supra* note 85, at 133.

237. Richard Dagger, *Playing Fair With Punishment*, 103 *ETHICS* 473, 474 (1993) ("As it applies to punishment, the principle of fair play begins with a conception of society as a cooperative endeavor secured by coercion."); Davis, *supra* note 79, at 315 ("The advantage of disobeying must exist, at least in part, because the criminal law is a system of cooperation . . . . By his crime, the criminal takes some fruits of cooperation to which he is not entitled while depending on others not to do something similar."); Dolinko, *supra* note 85, at 495 ("The fairness theory depicts the criminal law . . . as creating a cooperative practice in which each participant benefits—by obtaining security for her person, property, and other things of value—from others' obedience to the rules.").

which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess.<sup>238</sup>

According to retributive advocates of unfair advantage theory, criminals deserve punishment because they owe a debt to law-abiding members of society,<sup>239</sup> measured by the amount of the unfair advantage obtained from breaking the law.<sup>240</sup> Punishment serves to “restore the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.”<sup>241</sup> Justice requires that citizens who violate this obligation be punished.<sup>242</sup>

Punishing the unfair advantage associated with opportunistic bias crime motives can be justified from a retributivist perspective. Retributivists should endorse the enhanced punishment of opportunistic bias crimes because perpetrators recognize that the perceived vulnerabilities associated with their victims' group membership grants them an advantage that would not necessarily be present if they did not select victims because of their group membership. The previous two subsections detailed why this obtained advantage is more unfair than the advantage obtained in typical crimes. Given the increased unfairness associated with the advantage obtained from opportunistic bias crimes, their enhanced punishment is justified because perpetrators are more culpable than if they had not intentionally selected their victims on the basis of group membership.

Retribution can easily address the unfair advantage associated with opportunistic bias crime motives. Whether retribution can address the unfair advantage associated with opportunistic bias crime effects, however, is more complicated. Some retributivists could contend that unfair advantage theory does not justify enhancing the punishment for opportunistic bias crime based on the effects that enable perpetrators to commit crimes in the future. For example, if Perpetrator A robs a gay man believing that gay men are easier robbery targets, this robbery is the only robbery that Perpetrator A has and ever will commit. Retributivists could challenge holding Perpetrator A more culpable because his crime enables other perpetrators to commit similar crimes in the

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238. Morris, *supra* note 6, at 477.

239. Dagger, *supra* note 237, at 376 (“Criminals act unfairly when they take advantage of the opportunities the legal order affords them without contributing to the preservation of that order. In doing so, they upset the balance between benefits and burdens at the heart of the notion of justice. Justice requires that this balance be restored, and this can only be achieved through punishment or pardon.”).

240. Scheid, *supra* note 85, at 376 (“[T]he amount or severity of punishment should be determined by the size of the (unfair) advantage the criminal actually gains, or typically gains, by committing his crime); see also Davis, *supra* note 85, at 135 (advocating for a market model to measure the value of the unfair advantage a criminal obtains from committing a crime and stating that “[t]he unfair advantage a particular criminal takes will depend, then, on how tempting people generally find the crime in question”).

241. Morris, *supra* note 6, at 478.

242. See MURPHY, *supra* note 230, at 77–78.

future. Retributivists could contend that if this is the only robbery Perpetrator A has and ever will commit, he will not personally obtain any advantage from crimes committed by other perpetrators in the future. Therefore, how can unfair advantage theory justify enhancing Perpetrator A's punishment when only the other perpetrators directly obtain unfair advantages from committing their crimes?

The problem with this approach is that it erroneously assumes that the unfair advantage obtained by committing an opportunistic bias crime can be disassociated from its harmful effects. Opportunistic bias crime perpetrators are only able to profit unjustly from such crimes when a social environment marks their victims as easier crime targets. This environment, and thus the unfair advantage associated with opportunistic bias crimes, is recreated each time a perpetrator commits an opportunistic bias crime and marks his victim as an easier crime target. Given the high recidivism rates of opportunistic bias crime perpetrators, the inability to disassociate the unfair advantage obtained from opportunistic bias crimes from their effects is especially convincing.

## B. Utilitarianism

Utilitarians justify punishment based on its prospective social utility.<sup>243</sup> Utilitarians measure appropriate punishment in terms of the "reduction in the likelihood of the misdeed by the perpetrator and/or others in society."<sup>244</sup> In general, utilitarians have advocated three means to capture punishment's utility: incapacitation, rehabilitation, and deterrence.

Scholars posit that incapacitation has recently emerged as the principle justification for punishment in the U.S. criminal justice system.<sup>245</sup> Proponents of incapacitation argue that punishment is justified because it isolates offenders from society through incarceration.<sup>246</sup> They believe that incapacitation's social utility derives from interfering with offenders' abilities to commit

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243. Not all utilitarians argue that punishment is justified merely because it is useful. Rather, some argue that "[t]o be morally justified . . . the good it achieves must be so great that it outweigh the evil of the injustice [of the imposed punishment] involved." H.J. McCloskey, *Utilitarian and Retributive Punishment*, 64 J. PHIL. 91, 92 (1967).

244. See *supra* note 18 and accompanying text.

245. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 3 (1995) ("Incapacitation now serves as the principal justification for imprisonment in American criminal justice . . . It is only in the last fifteen years that something approaching a consensus about the priority of restraint has begun to emerge."); see also *id.* at 14–15.

246. Weiner, Graham & Reyna, *supra* note 18, at 433; see also Hessick, *supra* note 103, at 118 ("Incapacitation, as a punishment principle, aims to deal with 'dangerous' offenders or repeat offenders by making them incapable of offending again for long periods of time.").

future offenses.<sup>247</sup> Consequently, incapacitation is particularly useful to punish criminals who have high recidivism risks.

Rehabilitation was the primary goal of punishment in the U.S. criminal justice system until the 1970s.<sup>248</sup> Rehabilitation aims to discourage the commission of future criminal offenses by transforming the behavior and attitudes of offenders so they no longer desire to commit crimes.<sup>249</sup> Therefore, the social utility of rehabilitation derives from assisting individual offenders to become law-abiding members of society.<sup>250</sup> Rehabilitation advocates argue that sentences should correlate to the length of time necessary to transform the criminal into a law-abiding citizen.<sup>251</sup>

The primary goal of deterrence is to prevent future crime. Deterrence takes two forms: general deterrence and specific deterrence. General deterrence aims to persuade members of the general community to follow the law.<sup>252</sup> Through punishment, citizens come to understand that criminal behavior is socially unacceptable, and they become averse to committing crimes to avoid potential criminal penalties.<sup>253</sup> Specific deterrence focuses on the behavior of specific offenders and uses punishment as a means to persuade them not to commit future crimes.<sup>254</sup> Fear of imprisonment and social condemnation reduces the likelihood that criminals will commit future crimes.<sup>255</sup>

No utilitarian has developed a theory of punishment by relying upon unfair advantage theory. However, utilitarians do not categorically deny that criminals

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247. BAGARIC, *supra* note 6, at 128; ZIMRING & HAWKINS, *supra* note 245, at 44.

248. BAGARIC, *supra* note 6, at 153; ZIMRING & HAWKINS, *supra* note 245, at 7 (explaining the prominence of rehabilitation in the U.S. criminal justice system during the 1960s); *see also id.* at 9 (“Yet by the late 1970s, public confidence in rehabilitation had been thoroughly undermined at least with respect to adult offenders.”); Hessick, *supra* note 103, at 119 (“Rehabilitation fell out of favor with policymakers in the 1970s and 1980s, leading many jurisdictions to abandon parole.”).

249. BAGARIC, *supra* note 6, at 151; Weiner, Graham & Reyna, *supra* note 18, at 433 (“[T]he perpetrator of the misdeed is changed so that desires, values, and behaviors become consistent with those of the larger society.”).

250. BAGARIC, *supra* note 6, at 152.

251. ZIMRING & HAWKINS, *supra* note 245, at 6–7 (“According to the rehabilitation ideal . . . rehabilitation programs are supposed to provide the basis for determining when sentences should be terminated in favor of parole to the community.”).

252. BAGARIC, *supra* note 6, at 138.

253. Weiner, Graham, & Reyna, *supra* note 18, at 434.

254. BAGARIC, *supra* note 6, at 138 (“Specific deterrence aims to discourage crime, by punishing offenders for their transgressions and thereby convincing them that the crime does not pay.”).

255. Weiner, Graham & Reyna, *supra* note 18, at 433.



obtain unfair advantages over law-abiding citizens.<sup>256</sup> Rather, they criticize the use of unfair advantage as a measure of criminal desert.<sup>257</sup>

Punishment under the unfair advantage theory can be justified from a utilitarian perspective if punishing offenders for their obtained unfair advantages yields better results than not punishing them. Better results can be framed in terms of deterrence, incapacitation, or rehabilitation. Incapacitation proponents should endorse enhancing the punishment of opportunistic bias crimes because perpetrators would have greater incarceration sentences for obtaining additional unfair advantages over law-abiding citizens than if they had not used victims' group membership as a criterion. In terms of motive, opportunistic bias crime perpetrators unfairly attempt to gain over law-abiding citizens by deliberately capitalizing upon social group disadvantage for personal gain. Longer incapacitation sentences keep criminals who attempt to obtain these unfair advantages off of the streets for longer periods of time, which disenables them from committing more opportunistic bias crimes.

Similar to retributivists, incapacitation proponents could contend that enhanced punishment cannot be justified based on opportunistic bias crime consequences because perpetrators do not necessarily obtain unfair advantages by enabling future criminals to commit opportunistic bias crimes. Incapacitation proponents could respond, however, by arguing that the unfair advantages gained by particular opportunistic bias crimes cannot be disassociated from their harmful effects. This reasoning is especially relevant to incapacitation theories given the high recidivism rates of opportunistic bias crime offenders. Greater incarceration sentences would safeguard society from these repeat offenders.

Critics challenge the connection between deterring bias crimes and their enhancing punishment.<sup>258</sup> However, if assuming this connection exists, general and specific deterrence proponents should endorse enhancing the punishment of opportunistic bias crimes. In terms of general deterrence, enhancing the punishment of opportunistic bias crimes increases the likelihood that potential offenders will be averse to selecting victims on the basis of group characteristics in light of heightened criminal penalties.<sup>259</sup> In terms of specific deterrence,

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256. Dolinko, *supra* note 230, at 548–49 (“[T]he criminal enjoys the benefit conferred by the self-restraint of other people (freedom from aggression and interference) without having paid the price everyone else pays for this benefit (restraining his own aggressive impulses).”).

257. See, e.g., Dolinko, *supra* note 85, at 524 (“[W]e need to recognize that the case for the ‘fairness theory’ of criminal desert remains at best unproved.”).

258. See, e.g., James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, in *HATE AND BIAS CRIME: A READER* 409, 421 (Barbara Perry ed., 2003).

259. Sullaway, *supra* note 164, at 274 (“To the degree that discriminative behavior (including bias-motivated violence) is codetermined by individual prejudice and situational factors, hate crime laws may inhibit at least some individuals from violent manifestations of their beliefs.” (citation omitted)).

increased penalties could persuade opportunistic bias crime perpetrators to avoid committing similar crimes in the future.<sup>260</sup> By reducing recidivism, specific deterrence can reduce the number of opportunistic bias crimes committed.

It is unclear whether increasing incarceration sentences for opportunistic bias crimes will further rehabilitation goals. Requiring prisoners to receive educational and community service programming could possibly eliminate their desire to commit future opportunistic bias crimes.<sup>261</sup> Such programming may be particularly successful in rehabilitating juvenile offenders.<sup>262</sup>

### C. Denunciation

Denunciation can be distinguished from retribution and utilitarianism because it exclusively focuses on punishment's effects on law-abiding citizens, not lawbreakers or potential lawbreakers.<sup>263</sup> Denunciation theorists posit that utilitarians merely focus on discouraging crime and "do nothing to assure that the law-abiding society is satisfied with the criminal law structure that it has put into place."<sup>264</sup> They also contend that retributivists merely focus on the criminal's blameworthiness for past criminal conduct.<sup>265</sup>

Denunciative theorists focus on law-abiding citizens' satisfaction with the criminal law.<sup>266</sup> They believe that the criminal law is a set of rules that citizens mutually agree to follow, and defines the values and sentiments of society.<sup>267</sup> When citizens violate the law, law-abiding citizens become rightfully angered because they agreed to follow them.<sup>268</sup> Punishment reinforces law-abiding citizens' satisfaction in the criminal law by affirming the collective view that it is wrong to violate the criminal law.<sup>269</sup> In essence, punishment is justified because

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260. E.g., McDevitt, Levin & Bennett, *supra* note 221, at 311 tbl.2 (finding that thrill-seeking bias crime perpetrators are likely to be deterred from repeating the crime if there is a strong societal response to it).

261. CAL. PENAL CODE § 422.85(a)(1) (Deering 2008), provides that the court may order the defendant to complete a class or program on racial or ethnic sensitivity if the class or program is available and authorized. Moreover, Massachusetts law requires the completion of these programs upon conviction. See MASS. ANN. LAWS ch. 265, § 39(b) (LexisNexis 2002).

262. Robin Troup, *Juvenile Justice Reform and Treatment for Children Who Hate*, 10 RECLAIMING CHILDREN & YOUTH 106 (2001).

263. Rychlak, *supra* note 80, at 332–34 ("Denunciation . . . focuses not on lawbreakers or potential lawbreakers. Instead, it is focused on the majority of society, those people who would not be inclined to break the rules, regardless of the potential for punishment.").

264. *Id.* at 332.

265. *Id.* at 333.

266. *Id.* at 332.

267. *Id.* at 301, 303–04 ("The denunciation theory of punishment holds that punishment is justified when the offender has violated the rules that society has used to define itself.").

268. *Id.* at 334.

269. *Id.* at 331–32.

it conveys the community's condemnation of those who commit crimes.<sup>270</sup> Denunciative punishment "appropriately condemns the values asserted by the offender in committing her crime, and vindicates the law's commitment to the equal worth of every person."<sup>271</sup>

The concept of unfair advantage has arisen in denunciative theories of punishment. Denunciation theorists believe that criminals obtain an unfair advantage over law-abiding citizens when they violate the criminal law and focus on how this obtained unfair advantage affects law-abiding citizens' confidence in the criminal law. They posit that once law-abiding citizens discover that a criminal has broken the law, they become angered. Punishment restores citizen faith in the legal system by channeling their individual anger into a collective condemnation for violating the criminal law. If law-abiding citizens discover that criminals are permitted to obtain unfair advantages by breaking the law without being punished, they "rightfully feel that society has failed" them.<sup>272</sup>

Scholars have emphasized the importance of bias crime legislation as a symbolic message to denounce crimes motivated by group animus.<sup>273</sup> By analogy, denunciation proponents should endorse the enhanced punishment of opportunistic bias crimes as a collective condemnation of the unfair advantages associated with committing opportunistic bias crimes. In terms of motive, perpetrators recognize that selecting victims on the basis of group membership will give them an advantage over law-abiding citizens for personal gain. The enhanced punishment of opportunistic bias crimes is justified to restore law-abiding citizens' faith that the criminal law will punish citizens who fail to fulfill their obligation to exercise self-restraint and follow the values embodied in the criminal law.

Enhancing the punishment of opportunistic bias crimes also serves as a collective condemnation of perpetuating social attitudes that certain victims are easier crime targets because of their group membership. Given the effect that opportunistic bias crimes have on perpetuating these social attitudes, enhancing their punishment is justified from a denunciative perspective. Punishment

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270. Joel Feinberg, *The Expressive Function of Punishment*, reprinted in A READER ON PUNISHMENT 71, 75 (R.A. Duff & David Garland eds., 1994) (claiming that punishment is an "expression of the community's condemnation"); see also BAGARIC, *supra* note 6, at 68.

271. Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 57 (2002).

272. Rychlak, *supra* note 80, at 334.

273. Lawrence, *supra* note 212, at 169 ("If bias crimes are not punished more harshly than parallel crimes, the implicit message expressed by the criminal justice system is that racial harmony and equality are not among the highest values in our society."); Christopher Leon Jones, Jr., *The Protection of Democracy: The Symbolic Nature of Federal Hate Crime Legislation*, 29 T. MARSHALL L. REV. 17 (2003); see also Lara Schwartz, Ithi Toy Ulit & Deborah Morgan, *Straight Talk About Hate Crimes Bills: Anti-Gay, Anti-Transgender Bias Stalls Federal Hate Crimes Legislation*, 7 GEO. J. GENDER & L. 171, 174 (2006).

especially restores law-abiding victims and their targeted communities that the criminal law will admonish acts that enable others to unfairly capitalize upon group disadvantages that make them more vulnerable crime targets.

### CONCLUSION

In this Comment, I have applied unfair advantage theory to argue that the enhanced punishment of opportunistic bias crimes is justified because of perpetrators' motivations and the crimes' harmful effects. By tracking the concept of unfair advantage through retribution, utilitarianism, and denunciation, I have shown that applying unfair advantage theory to the enhanced punishment of opportunistic bias crimes can be endorsed from a range of criminological theoretical perspectives.

Throughout this Comment, I have drawn upon the distinction between opportunistic and prototypical crimes with the intent of expanding the legal conception of a bias crime beyond the limited ideas associated with the popular phrase "hate crime." My analysis highlights that this distinction is useful for three reasons. First, common conceptions of the lay phrase hate crime only include prototypical bias crimes motivated by animus. Therefore, when prototypical and opportunistic bias crimes are not distinguished, limited notions of what constitutes a hate crime will cause only animus-driven bias crimes to be investigated and prosecuted. Second, drawing this distinction helps to resolve ambiguity in the statutory text of bias crime laws. Affirmatively acknowledging the distinction between opportunistic and prototypical bias crimes increases the likelihood that legislatures and courts will make such a distinction and explicitly state that both categories of bias crimes are included within the purview of bias crime laws.

Finally, some may inquire how applying unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes intersects with the justifications for the enhanced punishment of prototypical bias crimes. I leave a comprehensive analysis of the justifications for the enhancement of prototypical bias crimes for later discussion. However, I believe that the assumption that the justifications for the enhanced punishment of opportunistic bias crimes can or should intersect with the justifications for prototypical bias crimes highlights a serious flaw with the current approach in advocating bias crime penalty-enhancement justifications. More specifically, the assumption demonstrates that the current approach relies upon a monolithic definition of what constitutes a bias crime and fails to acknowledge that there may be different categories of bias crimes with independent justifications for enhanced punishment. Drawing upon the

distinction between opportunistic and prototypical bias crimes is essential to develop the full range of justifications for the enhanced punishment of bias crimes.