ADDRESSING YOUTH BIAS CRIME

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Bias crime statistics legislation does not require law enforcement agencies to collect data on the ages of bias crime perpetrators, and bias crime penalty enhancements do not distinguish between youth and adult offenders. As a result, little data exists on youth bias crime, and the consequences of applying bias crime penalty enhancements to adult and youth offenders are generally the same: increased incarceration or additional fines. This Comment unveils the troublesome frequency of youth bias crimes and illustrates that the justifications underlying the application of bias crime penalty enhancements to adult offenders do not apply similarly to youth bias crime offenders. A synthesis of the limited existing data on youth bias crime reveals that, on average, one in every four bias crimes involve at least one youth offender and approximately three in every five bias crimes committed against youth victims are perpetrated by youth offenders. Rather than increase incarceration sentences or impose additional fines, I propose that bias crime penalty enhancements, as applied to youth bias crime offenders, should mandate rehabilitation programs to force youth offenders to confront the biases that motivate their crimes. I contend that requiring youth bias crime offenders to complete these programs is more consistent with the goals of juvenile justice than more punitive penalty-enhancement alternatives.

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INTRODUCTION

On February 12, 2008, Lawrence King (Larry), a fifteen-year-old student at E. O. Green Junior High School in Oxnard, California, was brutally shot and murdered by his fourteen-year-old classmate, Brandon McInerney. Larry was a confident gay teenager who had a crush on Brandon. Two days before the shooting, Larry walked up to Brandon while he was playing basketball with his friends and asked Brandon to be his Valentine. Later that day, Brandon passed by one of Larry's friends in the school hallway and told her to "say goodbye to Larry, because she would never see him again."[1]

On the day of the shooting, Larry and Brandon attended the same morning class. Thirty minutes into class, Brandon removed his parents' handgun, which he had sneaked into the school, aimed it at Larry's head, and fired two shots. Brandon then tossed the gun on to the ground, calmly walked through the classroom door, and left the school premises. Within minutes, the police arrested Brandon a few blocks from the school. Larry died two days later.[2]

The Lawrence King murder became one of the most publicized bias crimes[3] against a lesbian, gay, bisexual, or transgender (LGBT) person since the brutal murder of Matthew Shepard[4] ten years earlier. The Lawrence King murder, however, was fundamentally different from the Matthew Shepard murder; Larry's assailant was his fourteen-year-old classmate, whereas Matthew

1. Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41.

2. These facts pertaining to the Lawrence King murder are taken from Ramin Setoodeh's *Newsweek* article. *See id.*

3. I use the term "bias crime" in this Comment to refer to criminal offenses committed against persons or property on the basis of race, religion, disability, sexual orientation, ethnicity/ national origin, or gender identity.

4. Matthew Shepard was a twenty-one-year-old college student who was brutally murdered in an antigay bias crime in Laramie, Wyoming on October 6, 1998. His murder received widespread national news coverage. *See, e.g.*, James Brooke, *Gay Murder Trial Ends With Guilty Plea*, N.Y. TIMES, Apr. 6, 1999, at A20.

Shepard's assailants were both over the age of eighteen.[5] Brandon's age sparked widespread controversy over whether he should be tried in criminal or juvenile court, which would substantially affect the amount of punishment that Brandon received. If Brandon were tried and convicted as an adult, then he would face a minimum of fifty years imprisonment to life, plus an additional three years imprisonment under California's bias crime penalty-enhancement statute.[6] If Brandon were tried and found delinquent in juvenile court, then he would be free at the age of twenty-five.[7]

Prominent LGBT advocacy groups released a powerful joint statement urging the District Attorney of Ventura County, California to try Brandon in juvenile court. The statement declared that "[t]he alleged perpetrator, who turned 14 years old less than three weeks before the shooting, should be held accountable for his actions."[8] The statement also affirmed, "[W]e support the principles underlying our juvenile justice system that treat children differently than adults and provide greater hope and opportunity for rehabilitation."[9] Even though a Ventura County Superior Court Judge affirmed the District Attorney's decision to try Brandon in adult court and charge him with murder as a hate crime,[10] the joint statement was an important moment in the bias crime law movement. For the first time, prominent advocacy organizations joined forces to publicly affirm that there are differences

5. Matthew Shepard's assailants, Aaron McKinney and Russell Henderson, were both twenty-one years old at the time of Matthew's murder. *See New Details Emerge in Matthew Shepard Murder*, ABCNEWS.COM, Nov. 26, 2004, http://abcnews.go.com/2020/Story?id=277685&page=1.

6. CAL. PENAL CODE § 422.75(a) (Deering 2008); *Larry King Suspect to Be Tried as Adult*, 365GAY.COM, July 25, 2008, http://www.365gay.com/news/larry-king-suspect-to-be-tried-as-adult.

7. *Id.*

8. Joint Statement of LGBT Legal and Advocacy Groups Urging District Attorney to Try Alleged Perpetrator in Lawrence King Murder in Juvenile Court, http://data.lambdalegal.org/publications/downloads/lawrence-king_joint-statement_juvenile-suspect.pdf (last visited June 16, 2009). The statement was signed by American Civil Liberties Union of Northern California; American Civil Liberties Union of San Diego and Imperial Counties; American Civil Liberties Union of Southern California; Ally Action (CA); Children of Lesbians and Gays Everywhere (COLAGE; national); Community United Against Violence (San Francisco); Different Avenues (DC); Equality California; Gay Straight Alliance Network (CA); Gay & Lesbian Advocates & Defenders (GLAD); Human Rights Campaign; LAGAI-Queer Insurrection; Lambda Legal; LifeWorks Mentoring (Los Angeles); Los Angeles Gay and Lesbian Center; National Black Justice Coalition; National Center for Lesbian Rights; National Center for Transgender Equality; National Gay and Lesbian Task Force; Parents, Families and Friends of Lesbians and Gays (PFLAG) National; Safe Schools Coalition; San Francisco LGBT Community Center; Sylvia Rivera Law Project (New York); TGI Justice Project (CA); Transgender Law Center; The Lesbian, Gay, Bisexual & Transgender Community Center (NY); and TransYouth Family Allies, Inc. *Id.*

9. *Id.*

10. *Larry King Suspect to Be Tried as an Adult*, *supra* note 6.

between youth[11] and adult bias crime offenders and that rehabilitation should be a fundamental consideration when punishing youth bias crime offenders. The organizations made these affirmations despite the fact that many of them support bias crime penalty-enhancement legislation, which imposes harsher sentences for bias crime perpetrators.[12]

In most states, bias crime penalty enhancements are generally applied to youth offenders in two ways. First, youth bias crime offenders can be tried in juvenile court.[13] If the juvenile has committed a bias crime, then a judge may consider the bias motive to increase the length of the juvenile's detention sentence or impose an additional fine. Second, youth bias crime offenders can be tried as adults in criminal court.[14] Similar to adult bias crime offenders, the length of a youth offender's incarceration sentence may be increased or an additional fine may be imposed. Thus, the consequences of applying bias crime penalty enhancements to adult and youth bias crime offenders are generally the same: increased incarceration or additional fines.

The similar consequences of applying bias crime penalty enhancements to adult and youth offenders can be explained by the lack of attention paid specifically to youth bias crime by federal, state, and local legislatures. Bias crime statistics legislation allocates resources to facilitate the collection of data on bias crimes. Most bias crime laws, however, do not require law enforcement agencies to collect information on the ages of bias crime perpetrators, which

11. This Comment uses the terms youth and juveniles to refer to individuals under the age of eighteen years old.

12. For instance, the American Civil Liberties Union endorses the Matthew Shepard Act, which would expand federal bias crimes legislation to include sexual orientation, gender identity, gender, and disability, and allow for the enhanced punishment of bias crimes motivated by these characteristics. *See* American Civil Liberties Union, Oppose Hate Crimes, Protect Free Speech, https://secure.aclu.org/site/Advocacy?id=643 (last visited June 16, 2009); *see also* Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (amending 18 U.S.C. § 249(a)(2) (2006)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007). Human Rights Campaign (HRC) and National Gay and Lesbian Task Force (NGLTF) have also endorsed bias crime penalty enhancements. *See* Human Rights Campaign, *Senate Passage of Hate Crimes Bill Moves Bill Closer Than Ever to Becoming Law*, HRC, Sept. 27, 2007, http://www.hrc.org/7747.htm; National Gay and Lesbian Task Force, Hate Crimes, http://www.thetaskforce.org/issues/hate_crimes_main_page (last visited Mar. 29, 2009).

13. *See, e.g.*, *In re* Stephen G., No. H031563, 2007 WL 4396030, at *1 (Cal. Ct. App. Dec. 18, 2007) (involving an appeal from a youth bias crime offender who was "adjudged to be a ward of the juvenile court under the juvenile delinquency law after the court sustained a petition alleging conduct that if committed by an adult would have amounted to a misdemeanor violation of . . . a statute prohibiting hate crimes."); *In re* Akeylah P., 847 N.Y.S.2d 149 (N.Y. App. Div. 2007); *In re* Vanna W., 846 N.Y.S. 2d 354 (N.Y. App. Div. 2007).

14. For instance, California law gives express authority for district attorneys and prosecutors to try youth offenders fourteen or older as adults for committing bias crimes. *See* CAL. WELF. & INST. CODE § 707(d)(2)(iii) (West 2008).

has resulted in a dearth of statistics on youth bias crime.[15] The limited available data on the ages of bias crime perpetrators, however, reveal a disturbing frequency of youth bias crimes. On average approximately one in every four bias crimes involve at least one youth offender and approximately three in every five bias crimes committed against youth victims are perpetrated by youth.[16]

Legislatures are not the only agents to blame; scholars have also paid inadequate attention to youth bias crime. Scholars have written extensively on whether bias crime penalty enhancements are justified,[17] but surprisingly, the existing scholarship assumes that the justifications underlying bias crime penalty enhancements apply similarly to adult and youth offenders. Although some scholars have offered bias crime rehabilitation program models for youth offenders,[18] no one has provided a sound justification for why the completion of these programs ought to be required legally.

The purpose of this Comment is to unveil the troublesome frequency of youth bias crimes and to show that the justifications underlying the application of bias crime penalty enhancements to adult offenders—retribution,[19] utilitarianism,[20] and denunciation[21]—do not apply similarly to youth bias crime

15. This argument is developed *infra* Part II.A.

16. *See infra* notes 86–87 and accompanying text.

17. For scholarship in favor of bias crime penalty enhancements, see Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997); Alon Harel & Gideon Parchomovsky, Essay, *On Hate and Equality*, 109 YALE L.J. 507, 509 (1999); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crime*, 93 MICH. L. REV. 320, 325 (1994). For scholarship criticizing bias crime penalty enhancements see JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS (1998) (arguing against bias crime penalty-enhancement statutes); 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); Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

18. In fact, I build upon one model in Part IV of this Comment.

19. Retributivists argue that punishment is justified because criminals are blameworthy and thus deserve punishment. *See, e.g.*, 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.").

20. Utilitarianism justifies punishment in terms of the prospective social utility of punishing offenders and measures punishment in terms of "reduction in the likelihood of the misdeed by the perpetrator and/or others in society." Bernard Weiner, Sandra Graham, & Christine Reyna, *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 SOC. J. RESEARCH 431, 432 (1997).

21. Denunciation justifies punishment based on the view that punishment is a mechanism to communicate society's collective disapproval of the criminal's offense. *See* Joel Feinberg, *The Expressive Function of Punishment*, *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").

offenders.[22] In this sense, this Comment focuses on the need to reevaluate the penological justifications underlying the current approach to addressing youth bias crime. Rather than increase detention sentences or impose additional fines, I propose that bias crime penalty enhancements, as applied to youth bias crime offenders, should mandate rehabilitation programs that force youth offenders to confront the biases that motivate their crimes. I do not contend that youth bias crime offenders should be absolved of punishment for the crimes underlying their bias motivations; my proposal merely focuses on the penalty enhancement. I posit that requiring youth bias crime offenders to complete mandatory rehabilitation programs is consistent with the rehabilitative ideal, which should always be a primary consideration in addressing crimes committed by youth.[23] This rehabilitative consideration is absent when the consistent result of applying bias crime penalty enhancements to youth offenders is simply increased detention or additional fines.

This Comment proceeds in four parts. Part I provides a brief overview of bias crime legislation in the United States. Part II illustrates how flaws in bias crime statistics legislation have caused the disturbing frequency of youth bias crimes to be overlooked. This Part also synthesizes the limited existing data to demonstrate that youth bias crime is a widespread problem that demands specific policy attention. Part III illustrates how the ways in which the theories of punishment have been invoked to justify bias crime penalty enhancements for adult offenders (retribution, utilitarianism, and denunciation) do not apply similarly to youth offenders. Part IV then presents my proposal for the mandatory completion of rehabilitation programs for youth bias crime offenders, which I argue is more consistent with the goals of juvenile justice than more punitive penalty-enhancement alternatives. This Part also builds

22. This Comment also takes no position on whether bias crime penalty enhancements, as applied to adult offenders, should include increased incarceration. I am, however, in favor of the enhanced punishment of adult offenders who commit bias crimes. *See* Jordan Blair Woods, Comment, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489 (2008) (applying unfair advantage theory to justify the enhanced punishment of bias crime perpetrators who, for personal gain, intentionally select victims from social groups that they perceive to be more vulnerable); *see also* Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389 (2008) [hereinafter Woods, *Ensuring a Right of Access*] (arguing that Section 5 of the Fourteenth Amendment is a valid constitutional basis for the federal government to expand federal bias crime law, which includes federal bias crime penalty enhancements, to include sexual orientation, gender identity, gender, and disability).

23. Part IV.A explains why rehabilitation should always be a primary goal underlying approaches to addressing crime committed by youth. As explained *infra* Parts III and IV, support for a purely rehabilitative approach to youth crime has waned since the 1960s. In these Parts, I explain that even if rehabilitation is not the exclusive justification underlying approaches to addressing youth crime, it should always be a primary consideration.

upon the bias crime rehabilitation model of Jack Levin and Jack McDevitt, two prominent bias crime scholars, to highlight some of the characteristics that would increase the success of these programs.

I. BIAS CRIME LEGISLATION OVERVIEW

In general, two types of bias crime legislation exist on the federal, state, and local levels.[24] Part I.A discusses the first type of legislation: bias crime penalty-enhancement legislation.[25] Part I.B discusses the second type of legislation: bias crime statistics legislation.

A. Bias Crime Penalty-Enhancement Legislation

Bias crime penalty-enhancement legislation increases the penalties for bias-motivated crimes. In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act (HCSEA),[26] which requires the U.S. Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[27] As directed by the HCSEA, in May 1995, the U.S. Sentencing Commission announced the implementation of a three-level sentencing guidelines increase for bias crimes.[28]

The HCSEA only applies to bias crimes tried in courts where federal jurisdiction is proper. Since the scope of this jurisdiction is limited,[29] most

24. Ryan D. King, *The Context of Minority Group Threat: Race, Institutions, and Complying With Hate Crime Law*, 41 LAW & SOC'Y REV. 189, 192–93 (2007) ("Hate crime laws typically take one of two forms. One type of hate crime law deals with criminal sanctions, often prescribing penalties for crimes motivated in whole or in part by prejudice or bigotry based on race, religion, ethnicity, sexual orientation, or a number of other group-defining characteristics . . . . A second type of hate crime law is administrative in nature and mandates the collection of hate crime data by local law enforcement.").

25. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court upheld the constitutionality of bias crime penalty-enhancement statutes.

26. Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003 (1994) (codified at 28 U.S.C. § 994 (2006)).

27. *Id.*

28. This amendment took effect on November 1, 1995 and continues to guide bias crime federal sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL AND APPENDICES, § 3.A1.1(a) (2008).

29. Currently, federal bias crime legislation only allows the federal government to become involved in the investigation and prosecution of hate crimes if the victims were engaged in certain federally protected activities when the crime was committed. 18 U.S.C. § 245 (2006). These federally protected activities are (1) applying or enrolling for admission to a public school or college; (2) participating in benefit or service programs and facilities administered by state and local governments; (3) applying for private or state employment; (4) serving in a jury; (5) traveling in or

states have enacted their own bias crime penalty-enhancement laws.[30] Currently, forty-four states and the District of Columbia allow a penalty enhancement for bias-motivated crimes.[31] These statutes operate by increasing the range of minimum and maximum prison sentence terms, some of which also impose minimum incarceration sentences that perpetrators must serve before they are eligible for parole.[32] Some state statutes also increase the fine for bias crimes causing property damage.[33] Although an overwhelming number of states have bias crime laws, the groups that are afforded protection vary substantially by state.[34]

B. Bias Crime Statistics Legislation

Bias crime statistics legislation allocates resources to develop centralized database infrastructure to collect bias crime data and to train law enforcement personnel to obtain data on bias-motivated violence. In 1990,

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using a facility of interstate commerce or common carrier; (6) using a public accommodation or place of exhibition or entertainment, including hotels, motels, restaurants, lunchrooms, bars, gas stations, theaters, concert halls, sports arenas or stadiums. *Id.* This jurisdiction requirement has raised difficulties because 18 U.S.C. § 245 does not allow the federal government to prosecute crimes motivated by the victim's sexual orientation, gender identity, gender, or disability. If passed, the Local Law Enforcement Hate Crimes Prevention Act of 2009 (The Matthew Shepard Act) would expand the federal government's authority to prosecute and become involved in bias crimes investigations even when the victims are not engaging in federally protected activities. *See* H.R. 1913, 111th Cong. § 6 (2009) (proposing changes to 18 U.S.C. § 249(a)(2) (2006)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007) (same). On April 29, 2009, the House passed the Act by a 249 to 175 majority. *See Matthew Shepard Act*, N.Y. TIMES, May 6, 2009, at A28. At the time this Comment went to print, the Matthew Shepard Act had not yet been voted on by the Senate.

30. Many state laws were enacted in the 1980s before Congress enacted the HCSEA. *See* JACOBS & POTTER, *supra* note 17, at 42.

31. At present, Arizona, Hawaii, Indiana, New Mexico, South Carolina, and Wyoming do not have any form of penalty enhancement in their state penal codes. *See* Partnersagainsthate.org, Hate Crimes Laws Around the Country, http://www.partnersagainsthate.org/hate_response_database/laws.html (last visited Mar. 29, 2009).

32. For instance, Nevada's penalty-enhancement statute provides that "in addition to the term of imprisonment prescribed by statute for the crime, [the perpetrator] be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years." 15 NEV. REV. STAT. ANN. § 193.1675 (West 2008).

33. *See, e.g.*, MINN. STAT. ANN. § 609.595 1(a)(a) (West 2003) ("Whoever intentionally causes damage described in subdivision 2, paragraph (a), because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363.01, age, or national origin is guilty of a felony and may be sentenced to imprisonment for not more than one year and a day or to payment of a fine of not more than $3,000, or both.").

34. For a list of characteristics protected by particular bias crime laws see Anti-Defamation League, Map: State Hate Crime Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Mar. 29, 2009).

Congress passed the Hate Crimes Statistics Act (HCSA),[35] which mandates the Attorney General to gather data on bias crimes motivated by race, religion, sexual orientation, and ethnicity.[36] 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."[37]

Since its enactment, the U.S. Federal Bureau of Investigation (FBI) has gathered and published bias crime statistics every year since 1992.[38] The FBI reports, however, do not paint a completely accurate picture of the prevalence of bias crimes because local agencies' participation in submitting bias crime data to the FBI is completely voluntary.[39] The bias crime data contained in FBI reports are also imperfect because the data are generated from victim reports to the police, which is problematic given the severe underreporting of bias crimes.[40]

Bias crime statistics legislation also exists at the state level. Currently, twenty-four states and the District of Columbia have enacted bias crime statistics legislation.[41] These statutes differ in their requirements. For instance, some statutes only require the government to establish a centralized database for bias crime reporting.[42] Other statutes mandate that bias crimes

35. Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006)). Congress reauthorized the Act in 1996. *See* Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (codified at 18 U.S.C. § 247 (2006)).

36. *See* 28 U.S.C. § 534 (2006).

37. *Id.*

38. The FBI has released annual hate crime reports from 1995 to 2007 online. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, *available at* http://www.fbi.gov/hq/cid/civilrights/hate.htm (last visited July 18, 2009).

39. Jeanine C. Cogan, *Hate Crime as a Category Worthy of Policy Attention*, 46 AM. BEHAV. SCI. 173, 174 (2002), *available at* http://abs.sagepub.com/cgi/content/abstract/46/1/173 ("Although this law was highly important in that it helped recognize hate crimes as a phenomenon that needs federal attention, to date, it has been imperfect in providing meaningful data. This is partly because police agencies were not required to report hate crime data for their jurisdictions but rather did so voluntarily.").

40. William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1219 (2004) ("Even if a HCSA-covered crime is committed, the victim must report the crime. An individual who is assaulted upon leaving a gay bar, for example, might worry that reporting the crime will bring unwanted public attention to his or her sexual orientation, or that police officers whom the crime is reported may be unsympathetic, or that a jury is ultimately unlikely to convict the defendant in a gay-related assault. Similarly, people of color may significantly distrust the police and be hesitant to report hate crimes for that reason.").

41. *See* Anti-Defamation League, *supra* note 34.

42. *See, e.g.*, NEB. REV. STAT. § 28-114 (2006) ("The Nebraska Commission on Law Enforcement and Criminal Justice shall establish and maintain a central repository for the collection and analysis of information regarding criminal offenses committed against a person because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability. Upon establishing such a repository, the

be reported by local law enforcement agencies to the state,[43] while some even provide specific funding to train local law enforcement to gather and to report bias crime data.[44] Some states have even gone as far as imposing penalties for law enforcement departments that ignore these statistical mandates.[45] As with bias crime penalty-enhancement legislation, the groups that are afforded protection under the purview of these statutes vary substantially by state.[46]

II. UNVEILING THE PREVALENCE OF YOUTH BIAS CRIME

Flaws in bias crime statistics legislation have resulted in a failure to identify youth bias crime. A synthesis of the limited existing data on youth bias crime demonstrates that a significant proportion of bias crimes are committed

commission shall develop a procedure to monitor, record, classify, and analyze information relating to criminal offenses apparently directed against individuals or groups, or their property, because of their race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of their association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.").

43. *See, e.g.*, IOWA CODE § 692.15(1) (2003) (mandating the reporting of bias crimes) ("If it comes to the attention of a sheriff, police department, or other law enforcement agency that a public offense or delinquent act has been committed in its jurisdiction, the law enforcement agency shall report information concerning the public offense or delinquent act to the department on a form to be furnished by the department not more than thirty-five days from the time the public offense or delinquent act first comes to the attention of the law enforcement agency. The reports shall be used to generate crime statistics. The department shall submit statistics to the governor, the general assembly, and the division of criminal and juvenile justice planning of the department of human rights on a quarterly and yearly basis.").

44. For instance, the Illinois bias crime statistics statute mandates training for state police officers in identifying, responding to, and reporting hate crimes. 20 ILL. COMP. STAT. ANN. 2605/390(b) (West 2008) ("The Department shall provide training for State Police officers in identifying, responding to, and reporting all hate crimes. The Illinois Law Enforcement Training Standards Board shall develop and certify a course of such training to be made available to local law enforcement officers.").

45. *See, e.g.*, LA. REV. STAT. ANN. § 15:1204(5) (2008) (providing for the imposition of penalties on agencies who fail to comply with data reporting requirements) ("The commission may impose reasonable administrative sanctions as it deems appropriate against those agencies who fail to comply with the reporting requirements of the Uniform Crime Reporting System. These sanctions include the preclusion of a subject agency's participation in any of the grant programs operated by the commission.").

46. For a list of characteristics protected by particular bias crime laws see Anti-Defamation League, *supra* note 34. Some scholars posit that inconsistencies with regard to which groups are protected under bias crime legislation pose difficulties for bias crime data analysis. *See, e.g.*, Christopher Maxwell & Sheila Royo Maxwell, *Youth Participation in Hate-Motivated Crimes: Research and Policy Implications* 7 (Ctr. for the Study and Prevention of Violence, University of Colorado, Boulder, 1995), *available at* http://www.colorado.edu/UCB/Research/cspv/publications/papers/CSPV-003.pdf ("Because of inconsistencies in definitions, hate-crime data collection rules lack uniformity across jurisdictions. This shortcoming leads to significant difficulties in comparing the distribution of hate crimes across locations . . . .").

by youth offenders. Therefore, youth bias crime is not an isolated phenomenon, but rather a widespread problem that demands specific policy attention.

A. Failure to Identify Youth Bias Crime

The HCSA mandates that the Attorney General collect bias crime data,[47] and, in accordance, the FBI has published an annual report on bias crimes, *Hate Crime Statistics*, each year since 1992.[48] *Hate Crime Statistics* includes bias crime statistics and summarizes bias crime trends from the previous year.[49] The reports include information on the number of known bias crime offenders and their races.[50] Notably, however, the reports do not include information on bias crime offenders' ages.

There is also a lack of data on bias crime offender ages at the state level. Many states release bias crime data through Uniform Crime Report summaries, which are then compiled into the FBI's *Hate Crime Statistics* report.[51] The compilation of state bias crime data, however, contains no information on bias crime offenders' ages.[52]

Other states publish and release their own bias crime data reports. For instance, California has one of the most comprehensive bias crime data collection programs of any state. Each year since 1995, the Office of the Attorney General has released *Hate Crime in California*.[53] The report not only includes bias crime data and trends, but unlike many bias crime reports, also includes data on the number of bias crime prosecutions. The report, however, does not contain information on bias crime offenders' ages.[54]

In fairness, some congressional representatives recognized that youth bias crime was a problem after the HCSA's enactment in 1990. In 1992, Congress approved several bias crime and prejudice-reduction initiatives as part of the reauthorization of the Juvenile Justice and Delinquency Prevention

47. *See* 28 U.S.C. § 534 (2006).

48. *See* FED. BUREAU OF INVESTIGATION, *supra* note 38.

49. *See id.*

50. For instance, the Hate Crime Statistics report for 2007 reported 6,965 known bias crime offenders. Of the reported offenders, 4,378 were White, 1,448 Black, 69 American Indian/Alaskan Native, 50 Asian/Pacific Islander, 339 Multiple Race, and 681 Unknown Race. *Id.* (within "Hate Crime Statistics" follow "2007" hyperlink; within "Offenders" follow "Access Tables" hyperlink; within "Data Tables" follow "Table 9" hyperlink).

51. *See, e.g.*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS tbl.13 (2007), *available at* http://www.fbi.gov/ucr/hc2007/table13index.htm.

52. The compilations only include data on the number of incidents per bias crime motivation and the number of incidents per annual quarter. *See id.*

53. *See, e.g.*, EDMUND G. BROWN, JR., CAL. DEP'T OF JUSTICE, HATE CRIME IN CALIFORNIA 2007 (2008), *available at* http://ag.ca.gov/cjsc/publications/hatecrimes/hc07/preface07.pdf.

54. *Id.*

Act.[55] The Act also required the Office of Juvenile Justice Delinquency and Prevention (OJJDP) to conduct a national assessment of youth bias crime, including youth offenders' motives, the identities of their victims, and the punishments that they received.[56]

The OJJDP's assessment, however, was a failure. In August 1995, the OJJDP released a fact sheet on youth bias crimes, which simply acknowledged that "data on juvenile involvement in the perpetration of hate crimes is limited" and that "no empirical data identified the extent or impact of hate crimes on juveniles."[57] The fact sheet also noted that two researchers from West Virginia University, Dr. Richard Ball and David Curry, were performing a juvenile bias crime study.[58] The preliminary findings of the study indicated that "only six states, and seven major cities within those states, maintain crime related data that specifies the age of the offender in hate crimes."[59] The OJJDP's assessment culminated into a research report submitted to Congress in July 1996 that "failed to provide any insights into the magnitude of the problem, the characteristics of the offenders or victims, or the causes of juvenile hate violence."[60]

The exclusion of offenders' ages from bias crime statistical gathering has resulted in two problems. First, the exclusion has prevented researchers and policymakers from having a comprehensive understanding of the frequency and nature of youth bias crime. For instance, by excluding age, it is difficult to assess the proportion of bias crimes that are committed by youth and whether youth commit particular types of bias crimes more frequently than adult offenders.[61] Because of the lack of statistics on the ages of bias crime offenders,

55. Pub. L. No. 102-586, 106 Stat 4982, 4987–5001 (codified at 42 U.S.C. §§ 5633, 5651–5654, 5659–5660, 5662–5665 (2006)). This section provided for "programs designed to prevent and reduce hate crimes committed by juveniles, including educational programs and sentencing programs designed specifically for juveniles who commit hate crimes and that provide alternatives to incarceration." Anti-Defamation League, Hate Crime Laws, Current Status of Federal Hate Crime Awareness and Training Initiatives, Justice Department Programs and Initiatives, http://www.adl.org/99hatecrime/current.asp (last visited Mar. 29, 2009).

56. *See* Anti-Defamation League, *supra* note 55; 106 Stat. at 4997–5001.

57. ERIC BISHOP & JEFF SLOWIKOWSKI, OFFICE OF JUVENILE JUSTICE DELINQUENCY & PREVENTION RESEARCH & PROGRAM DEV. DIV., HATE CRIME, FACT SHEET #29 (1995), *available at* http://www.ncjrs.gov/txtfiles/fs-9529.txt.

58. *Id.*

59. *Id.*

60. Anti-Defamation League, *supra* note 55.

61. For instance, it is possible that more youth commit bias crimes against property as opposed to crimes against persons.

researchers have had to rely upon more creative and arguably more suspect sources, such as newspaper reporting, to reach conclusions on these issues.[62]

Second, the exclusion of offenders' ages from bias crime statistical gathering affects bias crime policy formation. Without data on the proportion of bias crimes committed by youth, it is difficult to conclude that developing youth-specific bias crime programs is an efficient use of taxpayers' money. Research indicating that youth bias crimes occur infrequently would support the notion that youth-specific programs are unnecessary. Moreover, data on the types of bias crimes committed by particular age groups of offenders may be useful for constructing tailored policy solutions to prevent bias crimes. If bias crime data includes offenders' ages, but does not also disaggregate youth bias crimes according to the types of crimes (such as property versus person) and their motivations (such as sexual orientation versus religion or race), then it is difficult to construct programs addressing the bias crimes that youth commit the most frequently.

B. The Prevalence of Youth Bias Crime

Although data on youth bias crime is limited, existing data indicate that a significant proportion of bias crimes are committed by youth offenders.[63] One of the first sources of youth bias crime data came from *The Juvenile Hate Study*, a research study conducted by West Virginia University's Dr. Richard Ball and David Curry from October 1993 to September 1994.[64] The study's preliminary findings highlighted that "only six states, and seven major cities within those states, maintain crime related data that specifies the age of the offender in hate crimes."[65] This limited data revealed a wide variance in the percentage of bias crimes committed by juveniles (8.5 percent to 62.6 percent).[66] Extrapolating, the researchers concluded that

62. *See, e.g.*, Jack Levin et al., *When a Crime Committed by a Teenager Becomes a Hate Crime: Results From Two Studies*, 51 AM. BEHAV. SCI. 246, 251–52 (2007) (using newspaper reports from LexisNexis Academic database to derive conclusions about the conditions under which bias crimes perpetrated by teenagers versus adults are prosecuted formally through the criminal justice system).

63. *See* Annie Steinberg et al., *Youth Hate Crimes: Identification, Prevention, and Intervention*, 160 AM. J. PSYCHIATRY 979, 983 (2003) ("Although current data on juvenile involvement in perpetration of hate crimes are limited, what is known about the involvement of youth in hate crime is unsettling. Despite the fact that hate crimes represent a small percentage of all violent crimes, a significant proportion of hate crime incidents are perpetrated by adolescents and young adults.").

64. *See* Glen David Curry, Curriculum Vita 7, *available at* http://www.umsl.edu/~ccj/pdfs/vitae/curryvitae.pdf (last visited June 16, 2009).

65. *See* BISHOP & SLOWIKOWSKI, *supra* note 57.

66. *See id.*

approximately 17 to 26 percent of all bias crime incidents recorded by law enforcement were committed by youth offenders.[67]

After the HSCA was enacted in 1990, cooperating law enforcement agencies reported bias crime data to the FBI in two formats.[68] First, an overwhelming majority of law enforcement agencies submitted quarterly incident-based forms, which were then compiled into the FBI's *Uniform Crime Report*.[69] The forms often had little to no information on bias crime offenders.[70] Second, a small percentage of law enforcement agencies submitted bias crime data through the National Incident-Based Reporting System (NIBRS).[71] Unlike the FBI's Uniform Crime Reports, the NIBRS collects information about the victim, offense, offender, arrestee, and damaged property.[72] Since most law enforcement agencies do not use the NIBRS, these data cannot be considered a national sample.[73] The NIBRS data is still probative, however, because it represents a large number of bias crimes from diverse areas of the United States.[74] In fact, the FBI's Bureau of Justice Statistics has relied upon NIBRS data to generate reports on bias crimes.[75]

The most comprehensive study to date on youth bias crimes is an analysis of reported bias crimes through NIBRS from 1995–2000.[76] The analysis revealed that approximately 29.1 percent of all bias crimes were committed by youth offenders.[77] Additionally, 65.8 percent of all bias crimes with victims under the age of eighteen were committed by youth perpetrators also under the age of eighteen.[78] Furthermore, the analysis revealed that youth

67. *See id.*

68. James J. Nolan, III et al., NIBRS Hate Crimes 1995–2000: Juvenile Victims and Offenders, http://www.as.wvu.edu/~jnolan/nibrshatecrime.html (last visited Mar. 29, 2009) (follow "More About NIBRS Hate Crime" under "Additional Information" hyperlink).

69. *See id.* Between 1995 and 2002, approximately 85 percent of the U.S. population was covered by the UCR Hate Crime Data Collection Program. *Id.*

70. *Id.* ("Most police agencies submit bias crime data using the quarterly report which has little or no information about the victim and offender.").

71. *See id.* In 1995, only 4 percent of the U.S. population was covered by the NIBRS reporting agencies. This percentage grew to 17 percent by 2002. *Id.*

72. *Id.*

73. *See id.*

74. *Id.*

75. *See generally, e.g.*, KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, HATE CRIMES REPORTED IN NIBRS, 1997–99 (Sept. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrn99.pdf.

76. Nolan et al., *supra* note 68. Due to the unavailability of NIBRS data in electronic format, the study only covered the years 1995–2000. *Id.*

77. *Id.* (follow "Analysis of NIBRS Hate Crimes (1995–2000)" hyperlink and then "Table 1.2: Number of Incidents Involving Juvenile Offenders" hyperlink). The study also revealed that 26 percent of bias crimes are committed by young adults (ages eighteen to twenty-four). *Id.*

78. *Id.* (follow "Analysis of NIBRS Hate Crimes (1995–2000)" hyperlink and then "Table 1.5: Percentage of Incidents of Age of Victim and Age of Offenders" hyperlink).

offenders committed bias crimes most frequently in (1) residences or homes (25.6 percent); (2) schools or colleges (24.2 percent); and (3) highways, roads, or alleys (22.6 percent).[79] By breaking down the number of bias crimes by age group and bias motivation, the analysis also revealed that a substantial proportion of bias crimes were committed by youth in each bias category: approximately 28.6 percent of bias crimes motivated by race in which the identities of the perpetrators were known involved youth perpetrators; 37.3 percent motivated by religion involved youth perpetrators; 32.7 percent motivated by ethnicity involved youth perpetrators; and 22 percent by sexual orientation involved youth perpetrators.[80] Of known offenders, youths committed roughly 50 percent of the bias crimes against property as opposed to roughly 30 percent of bias crimes against people.[81]

Besides the NIBRS, information on the ages of bias crime offenders is also included on the National Crime Victimization Survey (NCVS) conducted by the FBI Bureau of Justice Statistics. The NCVS is a survey of approximately 77,600 nationally representative persons who are interviewed biannually about their experiences with crime.[82] An analysis of NCVS responses from July 2000 through December 2003 by the FBI Bureau of Justice Statistics revealed that approximately 21 percent of bias crimes are

79. *See id.* (follow "Analysis of NIBRS Hate Crimes (1995–2000)" hyperlink and then "Table 1.11: Number of Incidents by Location and Offender Age Group" hyperlink). These percentages were calculated by dividing the total number of offenses committed by perpetrators under the age of eighteen in each location by the total number of bias crimes committed by perpetrators under the age of eighteen.

80. *See id.* (follow "Analysis of NIBRS Hate Crimes (1995–2000)" hyperlink and then "Table 1.17: Number of Incidents by Age Group & Number of Offenders and Bias Motivation" hyperlink). These percentages were calculated by dividing the sum of the total number of offenses by each bias type committed by a single juvenile and multiple offenders with at least one juvenile by the total number of offenses by each bias type committed by a single juvenile, multiple offenses involving at least one juvenile, a single adult, and multiple adults. It does not take into account the number of incidents involving single unknown or multiple unknown perpetrators.

81. *See id.* (follow "Analysis of NIBRS Hate Crimes (1995–2000)" hyperlink, then click on "Go to Offender Analysis" under "Analysis of Bias Crime Offenders" hyperlink, and, finally, follow "Table 2.4: UCR Offense by Age of Offender" hyperlink). The crimes against property percentage was calculated by dividing the total number of destruction/damage/vandalism-of-property offenses committed by perpetrators under the age of eighteen by the total number UCR property offenses committed by perpetrators whose ages were known. Other reports analyzing NIBRS data support these statistics. *See* STROM, *supra* note 75, at 1 ("Younger offenders were responsible for most hate crimes. Thirty-one percent of violent offenders and 46% of property offenders were under age 18.").

The crimes-against-persons percentage was calculated by dividing the total number of UCR offenses against persons (kidnapping/abduction, forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, robbery, aggravated assault, simple assault, and intimidation) committed by perpetrators under the age of eighteen by the total number of UCR offenses against persons committed by offenders whose ages were known.

82. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 209911, HATE CRIME REPORTED BY VICTIMS AND POLICE 1 (2005).

committed by perpetrators seventeen years old or younger.[83] The analysis also revealed a connection between the ages of perpetrators and victims. Approximately 61 percent of victims who were twenty years old or younger were victimized by a perpetrator who was of similar age.[84] Similarly, approximately 88 percent of victims who were twenty-one years old or older were victimized by a perpetrator who was at least twenty one years old.[85]

A synthesis of the data on youth bias crime from these sources reveals that, on average, approximately one in every four bias crimes involves at least one youth offender,[86] and approximately three in every five bias crimes committed against youth victims are perpetrated by youths.[87] As such, youth bias crimes are neither infrequent nor isolated occurrences.

III. APPLYING THE THEORIES OF PUNISHMENT TO YOUTH BIAS CRIME

Scholars, courts, and legislatures have generally relied upon three theories of punishment to justify bias crime penalty enhancements: retribution, deterrence, and denunciation. As the following analysis demonstrates, the ways in which these theories of punishment have been applied to adult bias crime offenders do not apply similarly to youth offenders. Therefore, the theoretical justifications underlying the current approach to addressing youth bias crime must be reexamined.

A. Retribution

The basic tenet of retribution is that punishment is justified because criminals are blameworthy and thus deserve punishment.[88] To impose punishment

83. *Id.* at 11. The analysis also revealed that approximately 6.2 percent of bias crimes are committed by perpetrators who are between eighteen and twenty years old. *Id.*

84. *Id.* at 9.

85. *Id.*

86. This statistic was calculated by the averaging the NCVS statistic (21 percent) and the NIBRS statistic (29 percent). *See supra* notes 77 and 82 and accompanying text.

87. This statistic was calculated by averaging the NCVS statistic (61 percent) and the NIBRS statistic (66 percent). *See supra* notes 78 and 82 and accompanying text.

88. *See* MIRKO BAGARIC, PUNISHMENT & SENTENCING: A RATIONAL APPROACH 38 (2001) ("[T]hose who are blameworthy deserve punishment and that this is the sole justification for punishment."); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 77 (1979); Dolinko, *supra* note 19, at 542 ("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.").

fairly, retributivists advocate the principle of proportionality,[89] which requires punishment to be equivalent[90] to the criminal's wrongdoing. Retributivists have generally measured wrongdoing in terms of the criminal's blameworthiness or the harm caused by the offense.[91] Retributivists also "maintain that criminal guilt merits or deserves punishment, regardless of considerations of social utility"[92]—punishment itself is an intrinsic good. Retributivists do not necessarily deny that punishment may create beneficial ends, such as deterring crime, but view these ends as subordinate to criminal desert.[93]

Part IV.A discusses the relationship between retribution and juvenile justice in more detail. Here, I simply focus on the types of arguments put forth under the retributive theory of punishment by bias crime penalty-enhancement proponents and why these arguments raise complications when they are applied to youth offenders. Proponents of bias crime penalty enhancements have put forth two main retributive arguments. First, some proponents have argued that bias crimes cause greater harms to victims, targeted communities, and society.[94] Enhanced punishment is thus justified

89. Utilitarians have also relied upon the principle of proportionality to justify punishment. *See* BAGARIC, *supra* note 88, 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, *The Principals of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM, 1838–43, at 165–74 (Bowring, J. 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.").

90. To combat the notion that retribution is an antiquated theory that requires 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, TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE 44 (1992).

91. *See id.* 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."); Carissa Bryne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 113–14 (2006) ("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.").

92. MURPHY, *supra* note 88, at 77; *cf.* BAGARIC, *supra* note 88, at 38.

93. *See* DAVIS, *supra* note 90, at 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 . . . [I] do claim . . . that deterrence may plausibly be treated as a mere *side constraint* on the institution of criminal punishment.").

94. Three strains of arguments have been advanced on this point. The first argument is that bias crimes result in greater physical and mental harm to bias crime victims. *See, e.g.*, Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 342–43 (1994). The second argument is that bias crimes result in greater harm to third parties than in other crimes. *See, e.g.*, *id.* at 345. The Supreme Court has sympathized with both of these arguments. For instance, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Supreme Court upheld the constitutionality of Wisconsin's state bias crime statute. In *Mitchell*, the Court accepted the state's contention that "bias-motivated crimes are more likely to provoke retaliatory crimes,

in order to ensure that the punishment is proportionate to the harm, and to ensure adequate accountability. Second, proponents have focused on the greater depravity of bias motives compared to other criminal motives.[95] These proponents contend that the enhanced punishment of bias crimes takes into account the increased culpability associated with biased motives. These two arguments rely on the retributive concept of proportionality—the enhanced punishment of bias crimes is justified because of the greater harms to victims or increased culpability of bias crime offenders.[96]

Both of these arguments raise complications when determining punishment for youth bias crime offenders. The criminal justice system relies upon the presumption that offenders have the moral capacity to be held fully responsible for the crimes that they commit, and only exculpates or decreases the punishment for crimes if offenders can invoke a legitimate excuse, justification, or mitigating circumstance.[97] The first argument, that bias crimes create greater harms than do nonbias crimes, assumes that bias crime perpetrators have full autonomy over their decisions and thus should be held responsible for the consequences of the crimes that they commit. The second argument, that bias crime perpetrators are more culpable for committing bias crimes because of their depraved motives, assumes that

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inflict distinct emotional harms on their victims, and incite community unrest." *Id.* at 487–88. The third argument is that bias crime victims are harmed beyond the general right not to be physically injured, but are also injured by being treated discriminatorily. *See* Dillof, *supra* note 17, at 1037–49 (discussing bias crime penalty-enhancement justifications based on the right not to be discriminatorily harmed).

95. *See, e.g.*, Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992–1993 ANN. SURV. AM. L. 485, 491–94; Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 513 (1999) ("[P]roponents of bias crime laws argue that offenders who act out of hate or prejudice are more blameworthy than otherwise motivated offenders and therefore deserve more severe punishment. On this view, crimes motivated by prejudice are, by their very nature, morally worse than similar crimes not motivated by prejudice, and the punishment for such crimes must reflect their heinous nature.").

96. *See* Janine Young Kim, *Hate Crime and the Limits of Inculpation*, 84 NEB. L. REV. 846, 851–52 (2006) ("The level of harm and/or culpability determines the relative gravity of crimes and, accordingly, the appropriate amount of punishment is inflicted. . . . Under this view, if committing a hate crime is considered to be more culpable than committing a parallel crime, it is legitimate to punish more harshly for the hate crime.").

97. "An excuse typically combines an admission that the thing done was illegal with a denial of responsibility sufficient for liability." CHRISTINE T. SISTARE, RESPONSIBILITY AND CRIMINAL LIABILITY 32 (1989). The duress defense is an example of an excuse. *Id.* "Justifications, on the other hand, are admissions of responsibility conjoined with denials of legal fault." *Id.* Self-defense is the prototypical example of a justification. *Id.* "Mitigation is appropriate when special circumstances or limitations are insufficient to justify or excuse conduct but do indicate that the agent has encountered unusual difficulty in conforming to law." *Id.* Provocation is an example of a mitigating circumstance. *Id.*

bias crime offenders have the moral capacity to be held fully responsible for the reasons that they commit bias crimes.

These assumptions, however, do apply to juveniles in the same way that they apply to adults. The juvenile justice system presumes that there are mental and emotional differences between youth and adult offenders that cause youths to be less likely to understand the reasons why they commit, and the consequences of, their crimes.[98] Scientists have further supported the notion that there are meaningful differences between youth and adult criminal agency through studies showing that youths do not have the same understanding of the consequences of their actions as adults.[99] The U.S. Supreme Court seems to agree, relying recently, in *Roper v. Simmons*,[100] on the mental and emotional differences between youths and adults to declare unconstitutional the application of the death penalty to youth offenders.[101]

It is possible to argue that, due to these differences, youths should be tried only in juvenile courts and that rehabilitation should be the exclusive consideration in addressing youth delinquency. Proponents of this view would support my proposal to replace increased detention sentences or fines with mandatory rehabilitation programs for youth bias crime offenders. Other scholars, however, argue that these differences can be acknowledged within a retributive framework. For instance, prominent juvenile justice

98. Barry C. Feld, *Rehabilitation, Retribution and Restorative Justice: Alternative Conceptions of Juvenile Justice*, *in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 17–39, 33 (Gordon Bazemore & Lode Walgrave eds., 1999) ("[T]he criminal law regards young actors differently from adults exactly because they have not yet had sufficient opportunity to fully internalize moral norms, to develop sufficient empathic identification with others, to acquire adequate moral appreciation, or to fully develop the capacity—nor the self-control—volitional capacity—to equate their criminal responsibility with that of adults."); Mark R. Fondacaro & Lauren G. Fasig, *Judging Juvenile Responsibility: A Social Ecological Perspective*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 357 (2006) ("Although the criminal and juvenile justice systems do not consider children to have the same capacity for free choice as adults, juveniles are considered to be 'works in progress,' on their way to developing a mature capacity for free choice. Thus, our legal system presumes the capacity for free choice in adults and presumes that children gradually develop this capacity as they mature.").

99. *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000); *see id.* at 759 ("Our finding that adolescents are less psychologically mature than adults in ways that affect their decision-making in antisocial situations lends scientific credibility to the argument that juvenile offenders may warrant special treatment because of diminished responsibility.").

100. 543 U.S. 551 (2005).

101. *Id.* The *Roper* Court relied specifically upon three general differences between juveniles under the age of eighteen and adults to reach its holding: first, juveniles' susceptibility to immature and irresponsible behavior, which often results in unwise decisions; second, juveniles' vulnerability and susceptibility "to negative influences and outside pressures, including peer pressure"; third, juveniles' immature character development, which the Court viewed as "not as well formed as that of an adult." *Id* at 569.

scholars, such as Barry Feld, have proposed integrating youth offenders into the criminal justice system, where retribution and proportionality are the primary considerations in determining punishment.[102] According to Feld, integration can occur while recognizing the meaningful differences between youths and adults. Due to their diminished capacity to understand the consequences of their actions, age would simply become a mitigating factor for determining punishment in the criminal justice system.[103] Put more simply, youths would not be considered as culpable as adults for their crimes because of their age.

Feld's approach, however, is problematic when applied to youth bias crimes because sentencing judges may not consider age at the penalty-enhancement stage. For instance, consider a bias crime that carries a penalty of one to three years imprisonment for the underlying offense and an additional mandatory one to three years imprisonment if the crime is motivated by bias. A fifteen-year-old bias crime offender may only receive a one-year sentence for the underlying offense after his age is taken into account as a mitigating factor, but still receive an additional three-year sentence after the bias crime enhancement is imposed. This result may take into account the developmental differences between youths and adults for the underlying crime, but it still fails to consider how these differences are relevant when the crime is motivated by bias.

In fairness, under Feld's approach, it is possible for age to be taken into account as a mitigating factor when determining the sentencing enhancement. For instance, revisit the previous example about the fifteen-year-old bias offender. Instead of receiving the maximum three-year incarceration enhancement for committing a bias crime, sentencing guidelines could recommend imposing the minimum penalty enhancement of one year. This approach is preferable to the prior approach, which fails to take age into account as a mitigating factor under the bias crime penalty enhancement.

This approach, however, is still not ideal. Although it recognizes the mental and emotional differences between youths and adults, it finds them relevant only to determine proportional sentences. Feld explains the punitive nature of this proposal:

> [T]he proposal here would adopt a punitive rationale as the basis for intervention, and explicitly provide for a differential scale based on age. A 14 year old offender, for example, might receive 25 to 33 percent of

102. Feld, *supra* note 98.
103. *Id.* at 31–32.

> the adult penalty, a 16 year old defendant, 50 to 66 percent, and an 18 year old adult, the full penalty, as presently occurs.[104]

Therefore, these differences are still conceptualized within a punitive framework where rehabilitation is not a primary consideration, or even a consideration at all. As discussed in Part IV, the fact that youth offenders' mental and emotional capacities are still developing increases the likelihood of rehabilitative success. Therefore, mandating rehabilitation programs for youth bias crime offenders seems preferable to enhancing the sentence lengths for committing bias crimes, even if the enhancements are proportional to the ages of bias crime offenders.

B. Utilitarianism

Utilitarianism justifies punishment based on its prospective social utility[105] and measures appropriate punishment in terms of the "reduction in the likelihood of the misdeed by the perpetrator and/or by others in society."[106] In general, proponents have put forth two utilitarian justifications for bias crime penalty enhancements: incapacitation and deterrence.

1. Incapacitation

Incapacitation has recently emerged as the primary justification for punishment in the U.S. criminal justice system.[107] In many respects, the increased acceptance of incapacitation as a justification for punishment has coincided with the retributive "get tough on crime" attitude that undermines the rehabilitative ideal. Proponents of incapacitation argue that punishment is justified because it isolates offenders from society through imprisonment.[108]

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104. *Id.* at 34.

105. 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, 91–92 (1967).

106. Bernard Weiner et al., *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 SOC. JUST. RES. 431, 432 (1997).

107. 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.

108. *See* Weiner et al., *supra* note 106, at 433; *see also* Hessick, *supra* note 91, at 118–19 ("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.").

They believe that incapacitation's social utility derives from interfering with an offender's ability to commit future offenses.[109]

Some proponents of bias crime legislation have relied upon incapacitation to justify bias crime penalty enhancements. According to these scholars, bias crime penalty enhancements provide greater social protection than do non-enhanced sentences by isolating bias crime offenders from society for longer periods of time. The longer bias crime offenders are in prison, the longer they are prevented from committing bias crimes.[110]

However, relying on incapacitation theory to address youth bias crimes is problematic. The inherent assumption underlying incapacitation is that certain offenders are inherently dangerous and that society is safer when these offenders are isolated from the public. The presumption that youths' mental and emotional capacities are not as developed as adult capacities weighs against the conclusion that youth bias crime offenders are inherently dangerous. Incapacitation also does not recognize, nor prioritize, the rehabilitative potential of offenders. If youth bias crime offenders have the potential to respond positively to bias crime rehabilitation programs because of their developing agencies, then it does not make sense to rely exclusively upon incarceration to address youth bias crimes.[111]

2. Deterrence

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.[112] Through punishment, citizens learn that criminal behavior is socially unacceptable, and thus follow the law in order to avoid the consequences stemming from criminal penalties.[113] Specific deterrence focuses on the behavior of specific offenders and uses punishment as a means to persuade them not to commit future crimes.[114] Fear of punishment and public censure reduce the

109. *See* ZIMRING & HAWKINS, *supra* note 107, at 43; BAGARIC, *supra* note 88, at 128.

110. *See* Laura Pfeiffer, Note, *To Enhance or Not to Enhance: Civil Penalty Enhancements for Parents of Juvenile Hate Crime Offenders*, 41 VAL. U. L. REV. 1685, 1722 (2007) ("Enhanced penalty statutes further protect the public via increased periods of incarceration. Such increases are necessary to promote a sense of security, and are justified by a decrease in the social harms of retaliation, a breakdown in community cohesiveness, and disassociation among society.").

111. This point is developed in more detail at *infra* Part IV.

112. *See* BAGARIC, *supra* note 88, at 138.

113. *See* Weiner et al., *supra* note 106, at 433–34.

114. BAGARIC, *supra* note 88, at 138 ("Specific deterrence aims to discourage crime, by punishing offenders for their transgressions and thereby convincing them that crime does not pay.").

likelihood that criminals will commit future crimes.[115] In the context of bias crime penalty enhancements, proponents have argued that "[i]ncreased sentences function as deterrents because hate crime offenders are less likely to feel remorse and more likely to be repeat offenders."[116]

Both critics and proponents of bias crime penalty enhancements, however, have doubts about the deterrent potential of bias crime laws. For instance, prominent critic Susan B. Gellman argues that, "in terms of deterrence, bias-crimes laws have been a failure. They appear to have made little difference in the incidence of bias crimes."[117] Prominent advocate Frederick M. Lawrence does not completely discount the importance of deterrence, but recognizes that statistical-gathering flaws render it difficult to measure whether bias crime laws are effective, and "concedes that the data that do exist have not demonstrated an effective deterrent effect."[118] Moreover, the number of reported bias crimes may actually increase as understanding of bias crime increases[119] and thus reporting may not provide an accurate depiction of the deterrent force of bias crime penalty enhancements.

Due to the lack of convincing evidence that bias crime penalty enhancements deter bias crimes, this theory is not a particularly convincing justification to address youth bias crime.

C. Denunciation

Denunciation theorists believe that the criminal law is a set of rules that citizens mutually agree to follow.[120] This set of rules defines the values and sentiments of society.[121] Punishment reinforces law-abiding citizens' satisfaction in the criminal law by affirming the collective view that it is wrong to violate the values embodied in the criminal law.[122] Put more

115. Weiner et al., *supra* note 106, at 433.

116. Pfeiffer, *supra* note 110, at 1721–22.

117. Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 428 (2004).

118. *Id.* at 440.

119. *See id.*

120. *See* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 301 (1990).

121. *See id.* ("The denunciation theory of punishment holds that punishment is justified when the offender has violated the rules that society has used to define itself.").

122. *See id.*

simply, punishment is justified because it conveys the community's condemnation of those who commit crimes.[123]

Bias crime penalty-enhancement proponents have relied upon denunciation to argue that such laws are justified because of their symbolic nature.[124] Under this view, bias crime penalty enhancements are necessary because without such laws, the government tacitly approves of bias-motivated violence, and thus enables it.[125] By passing bias crime legislation, the government sends the message to the criminal and society that bias-motivated violence will not be tolerated.[126]

Using denunciation as a means to justify the enhanced punishment of youth bias crime offenders is problematic. Denunciation operates by attaching a stigma to offenders,[127] which runs contrary to the many aspects of the juvenile justice system that are designed to preserve the privacy of youths and to minimize the stigma attached to their sentences. For instance, juvenile proceedings and records are often concealed in order to shield youths from the stigma attached to having an existing criminal record.

In fact, courts have specifically upheld shielding juveniles from public scrutiny when they have committed bias crimes. In *United States v. Three Juveniles*,[128] the First Circuit Court of Appeals held that the confidentiality provisions of the Federal Juvenile Delinquency Act[129] authorized, but did not mandate, the closure of juvenile proceedings. The First Circuit's decision upheld the district court judge's restriction of media access to proceedings during which the three juveniles were being tried for committing a bias crime.[130] The Court of Appeals upheld that "the primary purpose of the Act is to facilitate the rehabilitation of juvenile delinquents" and that "[p]rotection of the juvenile from

123. Joel F. Feinberg, *The Expressive Function of Punishment*, *reprinted in* A READER ON PUNISHMENT 75 (R.A. Duff & David Garland eds. 1994) (claiming that punishment is an "expression of the community's condemnation."); *see also* BAGARIC, *supra* note 88, at 67–68.

124. *See, e.g.*, Christopher Leon Jones, Jr., *The Protection of Democracy: The Symbolic Nature of Federal Hate Crime Legislation*, 29 T. MARSHALL L. REV. 17, 22 (2003).

125. *Id.* ("If crime is a violation against society as much as a violation against an individual, then one might infer that when government fails to pass hate crime legislation, it enables hate-motivated violence to continue.").

126. *See, e.g.*, *id.* at 54 ("As a message about behavior that will be tolerated, hate crime legislation may serve as little more than a representation of . . . societal ideals . . . ; however, that message has an importance in the order of society.").

127. MICHAEL D. BAYLES, PRINCIPLES OF LAW: A NORMATIVE ANALYSIS 290 (1987) ("The point of denouncing wrongdoing, thereby attaching a stigma to the convicted person and bolstering social values (educative effect), is at least to confirm law abiding denizens in their conduct.").

128. United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995).

129. 18 U.S.C. §§ 5031–5042 (2006).

130. *Three Juveniles*, 61 F.3d at 86–87.

the stigma of a criminal record by preserving the confidentiality of proceedings is an essential element of the Act's statutory scheme."[131]

Three Juveniles highlights that the considerations involved in relying upon denunciation to punish adult bias crime offenders are not the same as the considerations involved in addressing youth bias crime. For denunciation to work, sensitive information, such as youth offenders' names, pictures, and the details of the offenders' proceedings, must become public knowledge. Releasing this information to the public is particularly stigmatizing to youth offenders because the information becomes a matter of public record for the rest of the youth offender's life. Even if the symbolic effect of penalty-enhancement legislation justifies placing this stigma upon adult bias crime offenders, juvenile justice requires extra sensitivity towards the privacy of youth offenders in order to shield them from the very stigma of criminality that denunciation requires. The permanent stigma attached to an existing criminal record serves as a hindrance later in life and inhibits youth rehabilitation.[132]

IV. PROPOSAL: MANDATORY COMPLETION OF REHABILITATION PROGRAMS FOR YOUTH BIAS CRIME OFFENDERS

For youth bias crime offenders, I propose the mandatory completion of rehabilitation programs rather than increased incarceration or additional fines. This proposal embraces rehabilitation as a primary, although not exclusive, goal of the juvenile justice system and diminishes the emphasis on more punitive methods of punishment. The following analysis demonstrates that my proposal is more consistent with the goals of juvenile justice than increased incarceration or additional fines. It also discusses some of the obstacles that are hindering the effectiveness of rehabilitation programs currently offered to youth bias crime offenders. Finally, it builds upon the rehabilitation model of Jack Levin and Jack McDevitt, two prominent bias crime scholars, to highlight some of the characteristics that should be incorporated into these programs in order to increase their success.

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131. *Id.* at 90.

132. David Teasley & Charles Doyle, *Juvenile Justice: Opening Juvenile Records, Pro and Con*, *in* JUVENILE CRIME: CURRENT ISSUES AND BACKGROUND 95, 96 (Lawrence V. Moore, ed. 2003) ("Since the establishment of the modern juvenile justice system around the turn of the century, the confidentiality of juvenile records has remained a standard component of the juvenile justice system's rehabilitation model for juvenile offenders. To support efforts to protect juveniles from the stigma of public knowledge about their youthful indiscretions, states limited access to juvenile records."). Scholars have noted, however, that many states have recently "questioned . . . the wisdom of maintaining the confidentiality of juvenile records specifically." *Id.*

A. Mandating Youth Bias Crime Rehabilitation Programs and Juvenile Justice Goals

The juvenile justice system was founded on the "rehabilitative ideal," and thus retribution was not a consideration in addressing youth delinquency.[133] In fact, the first American juvenile court, established in Cook County, Illinois in 1899,[134] was created out of growing concerns over the punitive treatment of children who came into contact with the state and law enforcement.[135] Consequently, the juvenile justice system was initially focused on rehabilitating juveniles who became wards of the state.[136] Unlike the criminal justice system, juvenile courts operated under the theory of *parens patriae*:[137] Proceedings and adjudications of the juvenile courts served to foster the best interests of children[138] and to ensure that they had the opportunity to become productive members of society upon reaching adulthood.[139]

During the mid-twentieth century, however, confidence in the rehabilitative ideal began to decrease.[140] This skepticism culminated into the infamous *In re Gault*[141] decision by the U.S. Supreme Court, which transformed the operation of juvenile proceedings and required due process procedural safeguards

133. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 150 (1989) ("This influenced reformers to advocate for nonpunitive measures and an emphasis on individualized diagnosis and treatment of children based on the medical model, a concept more popularly known as the 'rehabilitative ideal.'"); RICHARD A. SPURGEON HALL ET AL., THE ETHICAL FOUNDATIONS OF CRIMINAL JUSTICE 253 (2000) ("The idea that juvenile offenders should be treated differently from adult criminals emerged in the United States during the first quarter of the 19th century . . . . It was believed that children, because of their youth, should not be held in close proximity to adult criminals and that the courts should make every effort to protect and rehabilitate them.").

134. SCHWARTZ, *supra* note 133, at 150–51; *cf.* CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 30 (1991) ("Juvenile courts grew across the nation and by 1919 juvenile court legislation was a reality in all but three states; by 1932 there were estimated to be over 600 independent juvenile courts in the United States. By 1945, there were juvenile courts in every state in the country.").

135. SCHWARTZ, *supra* note 133, at 150 ("The reformers were also concerned about the ways in which children who came to the attention of the authorities were dealt with. For example, they were outraged because juvenile law violators were treated no differently than adult criminals. These children were often subjected to harsh punishments and were confined in jails and prisons with adult offenders."). As stated by the Supreme Court in *In re Gault*, "[t]he early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals." 387 U.S. 1, 15 (1967).

136. *Id.* at 15–16.

137. *Parens patriae* is the legal doctrine that authorizes states to protect those who cannot care for themselves. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

138. SCHWARTZ, *supra* note 133, at 150 ("The result was the creation of a special court in which children were denied due process and adversarial proceedings in exchange for informal and confidential hearings and dispositions based on what was felt to be in the "best interests of the child.").

139. *Gault*, 387 U.S. at 15–16.

140. *See supra* notes 135–139 and accompanying text.

141. 387 U.S. 1.

in the juvenile justice system.[142] These due process reforms were patterned after the criminal justice system, an adversarial and punitive framework.

Confidence in the rehabilitative ideal continued to wane during the 1970s, when social scientists began to synthesize already existing research and perform their own empirical studies to assess the effectiveness of rehabilitation programs.[143] One widely cited report, by Robert Martinson, known as the *Martinson Report*, concluded that, "with few isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation."[144] Consequently, retribution gained significant force as the proper approach to addressing juvenile crime during in the 1980s.

Retribution's acceptance as a proper approach to addressing juvenile crime was partially motivated by the perceived dramatic increase in crimes committed by youths.[145] Conservative Republicans politicized the fight against crime with "law and order" and "get tough" campaigns.[146] Legislatures also changed the way in which youth crime was handled by passing legislation mandating minimum detention sentences and requiring that certain youths be tried as adults.[147] The current effect of the shift from rehabilitation to retribution is also evident in the evolving language of juvenile codes, which have increasingly invoked language of "accountability, responsibility, punishment, and public safety rather than the best interests of the child."[148]

How then does mandating rehabilitation programs for youth bias crime offenders relate to the goals of juvenile justice? My proposal embraces rehabilitation as a primary goal of juvenile justice and diminishes the emphasis on more punitive methods of punishment. In *Roper v. Simmons*,[149] the U.S. Supreme Court relied upon three differences between youth and adults to render the application of the death penalty to youth unconstitutional. First, the Court acknowledged that youths' susceptibility to immature and

142. These procedural safeguards included the rights to formal notice, appointed counsel, confrontation, cross-examination, and the privilege against self-incrimination. *Id.* at 33–34, 41, 55–57.

143. Francis T. Cullen & John Paul Wright, *Criminal Justice in the Lives of American Adolescents: Choosing the Future*, *in* THE CHANGING ADOLESCENT EXPERIENCE 88, 110 (Jaylen T. Mortimer & Reed Larson eds., 2002).

144. Robert Martinson, *What Works: Questions and Answers About Prison Reform*, 35 PUB. INT. 22–25 (1974). The report consisted of a review of over two hundred studies of rehabilitation programs conducted from 1945 to 1967. *Id.* at 24.

145. *Cf.* SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 16 (2005) ("Moral and legal differences between juveniles and adults notwithstanding, policymakers became convinced during the 1980s that serious juvenile crime was not significantly different from serious crimes committed by adults.").

146. *Id.*

147. *Id.* at 116.

148. *Id.*

149. 543 U.S. 551 (2005).

irresponsible behavior often harms their powers of decisionmaking.[150] Second, the Court recognized that youth are vulnerable and susceptible "to negative influences and outside pressures, including peer pressure."[151] Third, the Court viewed youths' character development as "not as well formed as that of an adult."[152]

I draw upon these differences to argue that bias may manifest itself differently in youth and adult offenders.[153] The biases underlying youth bias crimes are not inherent biases. Rather, youth develop these biases from multiple environmental sources including family, friends, schools, the media, communities, and adult role models.[154] Youths' vulnerable minds may influence them to tacitly accept[155] and act upon these biases. Youths' immature character development may also cause them not to fully understand the harm that they inflict upon victims and communities by committing bias crimes.

The susceptibility and weakness of the youth mind increases the potential success of bias crime rehabilitation programs. More specifically, youths' immature character development provides a point of intervention for rehabilitation programs to counteract the biases harbored by youth that motivate their crimes. Given the lack of bias crime rehabilitation programs, no data exists on their success rates. Empirical assessments of juvenile rehabilitation

150. *Id.* at 569.

151. *Id.*

152. *Id.*

153. It is important to note that in relying upon *Roper* in this Comment, I do not endorse the view that the decision should be extended to limit the autonomy of youths outside of criminal justice contexts. For a more comprehensive discussion on how reliance upon *Roper* in non-criminal contexts may lead to negative results see generally Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and* Roper v. Simmons, 56 UCLA L. REV. 725 (2009). *See also id.* at 753 ("If courts blindly cite *Roper* for the proposition that youth are immature, and fashion legal rules accordingly, the result will be restriction for the sake of restriction. Such rules not only lack justification, they do more harm than good.") (footnote omitted).

154. In fact, these biases do not always manifest themselves as explicit biases. *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning the Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.") (footnotes and citations omitted).

155. *See id.*

efforts in other criminal contexts, however, support the notion that bias crime rehabilitation programs are likely beneficial.[156]

Additionally, mandating youth bias crime offenders to complete rehabilitation programs is a more desirable penalty-enhancement alternative than increased incarceration or additional fines because the potential benefits derived from mandating rehabilitation programs outweigh the benefits obtained from other penalty-enhancement alternatives. A penalty enhancement that takes the form of increased incarceration or additional fines does nothing to address the underlying biases that motivate youth to commit bias crimes. If anything, given the existence of sexism, racism, and homophobia in juvenile detention and adult incarceration facilities, these biases may only be further reinforced by lengthening their sentences. Although similar bias reinforcement may occur when the incarceration sentences of adult bias crime offenders are increased, the fact that youths' character is still developing puts youth in a different position than adults. Youths continuing character development increases the likelihood that concerted efforts by the state and social communities will counteract the biases that motivate youths to commit these crimes.

While my proposal embraces rehabilitation, it also has qualities that could appease advocates who support more punitive measures to addressing youth crime. My proposal only applies to the penalty enhancement and not the sentence for the underlying offense. For instance, although I call for the completion of mandatory rehabilitation programs for youth bias crime offenders, I do not reject the idea that particular youth offenders should serve time in juvenile detention centers for their underlying crimes, especially if the crimes are violent.[157] Consequently, my proposal is not a purely rehabilitative solution,

156. *See* Carol J. Garrett, *Effects of Residential Treatment on Adjudicated Delinq.: A Meta-Analysis*, 22 J. RES. CRIME & DELINQUENCY 287 (1985); Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry Into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLORATION: A CASEBOOK (T.D. Cook et al. eds., 1992); *cf.* Clive R. Hollin, *Treatment Programs for Offenders: Meta-Analysis, "What Works," and Beyond*, 22 INT'L J. OF L. AND PSYCH. 361, 363 (1999) ("In the field of offender treatment, there have been a number of meta-analytic studies . . . with several syntheses also available . . . . Two main consequences have emerged from this burgeoning field of research. First, given a substantial variability in criminogenic outcome, there is an overall positive net gain to be seen when treated offender groups are compared to nontreatment groups. It is difficult to derive the exact magnitude of this overall treatment effect, but it is taken to be in the region of a 10% reduction of offending . . . . The second conclusion, and perhaps the more significant, is that not all interventions have the same effect on recidivism: the meta-analyses have shown that some interventions have a significantly higher effect than others. Lipsey estimates that these high effect studies can produce decreases in recidivism in excess of 20% over and above the baseline levels from mainstream criminal sanctioning of offenders.") (internal citations omitted).

157. Nor do I advocate that juvenile offenders should be tried as adults for crimes. Since this position, however, is not the main focus of my Comment, I leave this debate aside.

and thus leaves room for punitive measures to be applied to the underlying offense. At the same time, my proposal embraces rehabilitation by questioning the effectiveness of increased detention sentences or additional fines over programs that target the specific reasons why youth offenders commit bias crimes. In this sense, although my proposal is not a purely rehabilitative solution, it does embrace the importance of rehabilitation as a primary goal in constructing strategies to address youth bias crimes.

B. Impediments to Youth Bias Crime Rehabilitation Mandates

Two major impediments must be addressed in order for youth bias crime rehabilitation mandates to gain force. The first major impediment is the separation between community service mandates and the communities affected by bias crimes. Some judges require youth bias crime offenders to complete a particular number of hours of community service while on probation, instead of serving any or additional time in juvenile facilities, jail, or prison.[158] The purpose of community service is to transform perpetrators into ethical and productive members of society by requiring them to give back to the communities affected by their crimes.[159]

Judges, however, are not required to match community service sentences with the communities affected by particular bias crimes. It is also not always

158. *See, e.g.*, Barbara Polichetti, *Four Teens Who Defiled High School Building Find No Leniency*, PROVIDENCE J. BULL., Dec. 21, 2007, at D3 (noting that four teens accused of a property bias crime were sentenced to a three-month suspended sentence, one year probation and 200 hours' of community service, and ordered each to make restitution of as much as $5,000); Joe Mozingo, *Probation for Halloween Hate-Crime Teens*, L.A. TIMES, Feb. 6, 2007 (noting that four youth bias crime offenders who beat three white women on Halloween night were sentenced to probation, sixty days house arrest, mandatory classes in anger management and racial intolerance, and 250 hours community service); Art Barnum, *2 Teenagers Acquitted of Hate Crime: Boys, 15, Convicted of Vandalism*, CHI. TRIB., Aug. 30, 2006, at Metro 3 (noting that one fifteen-year-old youth who pleaded guilty to criminal damage to property and a hate crime was sentenced to one year probation and twenty hours community service). In some areas, community service is mandated when judges sentence bias crime offenders to probation. *See, e.g.*, City of Chicago.org, Hate Crime Reporting and Prosecution, http://egov.cityofchicago.org/city/webportal/home.do? (last visited June 16, 2009) (follow "For Residents" hyperlink; then follow "Health & Human Services" hyperlink; then follow "Consumer Protection & Legal Services" hyperlink; then follow "Hate Crime Reporting and Prosecution" hyperlink) ("Hate crime is a Class 4 felony. If a convicted hate crime offender receives a probationary sentence, the court must also impose community service hours.").

159. Another purpose of community service, however, is to benefit society through the offender's work performed during the service while saving society the cost of incarcerating the offender. Although there is disagreement on this issue, some studies conclude that community service rehabilitates offenders better than short-term imprisonment. *See, e.g.*, Martin Killias et al., *Does Community Service Rehabilitate Better Than Short-Term Imprisonment?*, 39 HOWARD J. CRIM. JUST. 40 (2000).

possible for judges to make these arrangements.[160] For instance, consider a bias crime committed against a black man in a secluded region that is populated by mostly white individuals. In order for community service to match the affected community, there must be some organized body, such as a nonprofit organization promoting racial tolerance, to host the community service of the bias crime perpetrator. However, limited resources, fears of social ostracism for being affiliated with particular identity-based associations, and intragroup tension and bias many inhibit local-based advocacy groups from organizing.[161] Consequently, youth bias crime perpetrators may be sentenced to community service projects that are completely unrelated to issues of bias or the communities that were targeted by their crimes.[162]

As such, whenever possible, it is advisable for judges to mandate youth bias crime offenders to complete their service with local nonprofit organizations or community groups that serve the communities affected by their crimes. These assignments ensure a connection between the mandated community service and the communities affected by particular bias crimes.

The second major impediment is the lack of rehabilitation programs that focus specifically on youth bias crime offenders. One potential source for

160. *See* JACK LEVIN & JACK MCDEVITT, HATE CRIMES REVISITED: AMERICA'S WAR ON THOSE WHO ARE DIFFERENT 201 (2002) ("A major limitation of the community service sentencing approach is its lack of formal treatment programs.").

161. To illustrate this point, take community groups that organize predominately around sexual orientation issues as an example. Gays, lesbians, bisexuals, and closeted individuals may be reluctant to join political or community groups that organize around sexual orientation issues in order to avoid social ostracism or stigma stemming from their sexual orientations by their communities, families, friends, or employers. *Cf.* William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN'S L.J. 379, 390 (1998) ("[M]any people who have experienced sexual orientation bias are not members of gay organizations . . . .") (discussing some limitations of sampling methodologies in sexual orientation empirical research); *see also* Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 162 (2007) (noting that many LGBT individuals "may be reluctant to join a gay or lesbian organization"); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 181 n.149 (1993) ("Lesbians, gay men, and bisexuals who have not come to terms with their own sexuality, or who are afraid to be identified publicly as homosexual, will be reluctant to join and support organizations committed to ending discrimination based on sexual orientation.") (discussing the relationship between the presence of antidiscrimination protections and the participation of gays, lesbians, and bisexuals in political groups that organize around sexual orientation issues). Moreover, intragroup discrimination, such as racism and sexism, may also alienate particular segments of lesbian, gay, and bisexual communities from being included in sexual orientation organizing efforts. *See, e.g.*, Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 390 (providing a personal account illustrating the lack of antiracist and antisexist perspectives in one premier gay and lesbian advocacy organization).

162. In fact, some scholars have acknowledged that bias crime rehabilitation efforts are ineffective when the community service work does not address the misconceptions that led to the bias crime. *See id.* at 201–02.

the lack of rehabilitation programs is the strong emphasis on bias crime prevention programs at schools.[163] The U.S. Department of Justice and the U.S. Department of Education have identified schools as important intervention locations to preventing youth bias crimes.[164] Many advocacy organizations have also united to train school administrators and to develop curricular programs designed to prevent bias-motivated violence committed by youth.[165]

It is undeniable that schools are important sites of intervention in the effort to prevent youth bias crimes. These preventative programs, however, are not designed specifically to rehabilitate youth offenders who have been convicted of committing bias crimes. Rather, the goal of these programs is to deter potential youth bias crimes through educational advocacy and awareness. As illustrated in Part IV.C, a successful rehabilitation program cannot be grounded in general deterrence because the program will fail to address the specific issues of bias that motivated particular youths to commit bias crimes. Therefore, the exclusive investment of resources in these preventative efforts is an incomplete strategy to combat youth bias crimes.[166]

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163. For instance, the U.S. Department of Education and Department of Justice jointly released a manual targeting schools on preventing youth bias crime. *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, PREVENTING YOUTH HATE CRIME: A MANUAL FOR SCHOOLS AND COMMUNITIES (1998), *available at* http://www.usdoj.gov/crs/pubs/prevyouhatecrim.pdf. The manual includes several examples of school districts and individual schools from various cities throughout the United States that have implemented bias crime prevention programs. *See id.*

164. *Id.* at 2 ("Educators have a tremendous opportunity to reduce or eliminate hate-motivated crime and violence. A number of school districts and individual schools have already taken action to create comprehensive anti-hate policies and programs that involve every facet of the school community, students, parents, teachers, staff, and administrators. These schools have worked to create a school climate where hateful acts are not tolerated, and to provide an equitable, supportive, and safe environment for all students.").

165. For instance, "Stop the Hate," is a collaborative effort between the Anti-Defamation League, Association of College Unions International, Campus Pride, The Southern Poverty Law Center, the Center for the Prevention of Hate Violence, the Matthew Shepard Foundation, Wilbron Institute and the Napa Valley College Criminal Justice Training Center. The program "allows top administrators, student affairs professionals, faculty and students to learn new innovative tools to take action on hate crimes and bias-motivated violence issues on his/her campus and region." *See* Train the Trainers Program, Stop the Hate, http://www.stophate.org/trainthetrainer.html (last visited June 16, 2009). Another prominent program, called "Healing the Hate," is a collaborative effort between the U.S. Department of Justice and the National Center for Hate Crime Prevention to prevent bias crimes from occurring in middle schools nationwide. *See* KAREN A. MCLAUGHLIN & KELLY J. BRILLIANT, EDUC. DEV. CTR., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, HEALING THE HATE: A NATIONAL HATE CRIME PREVENTION CURRICULUM FOR MIDDLE SCHOOLS (1997), *available at* http://www.ncjrs.gov/pdffiles1/165479.pdf.

166. In fact, bias crime scholars have distinguished between preventative and rehabilitative programs. *See* LEVIN & MCDEVITT, *supra* note 160, at 202 ("Programs to combat hate can be seen as either preventative or rehabilitative. Prevention programs are intended to increase awareness of the dangers posed by hate crimes and thus stop hate violence before it occurs, while prevention programs are specifically intended to alter the behavior of offenders in order to deter future acts of violence.").

Although the thesis of this Comment is that it makes legal sense to mandate youth bias crime offenders to complete rehabilitation programs, the impediments to the successful implementation of these programs cannot be eliminated solely through judicial action. Eliminating these obstacles necessitates cooperation between law enforcement, targeted communities, and legislative bodies that allocate funding. Therefore, even if courts accept my proposal and mandate youth bias crime offenders to complete rehabilitation programs, more work must be accomplished for these programs to be successful.[167]

C. Constructing Successful Youth Bias Crime Rehabilitation Programs

What steps can legislatures and advocacy organizations take to construct successful programs? Jack Levin and Jack McDevitt, two prominent proponents of bias crime laws, have developed a particular model that includes the following elements: assessment, discussion of impact on victims, cultural awareness, restitution/community service, delineation of legal consequences, participation in a major cultural event, and aftercare.[168] I agree with Levin and McDevitt that these elements provide the basic framework for a potentially successful approach to rehabilitate youth bias crime offenders.

The first element of a youth bias crime rehabilitation program is an initial comprehensive assessment. According to Levin and McDevitt, this assessment should be conducted by trained professionals (psychologists, sociologists, or social workers) in order to determine a youth offender's history of committing violence and his disposition toward particular minority groups.[169] Levin and McDevitt also note that these professionals should also assess whether a history of violence exists in the youth offender's home.[170] I agree that a proper assessment includes an examination of these issues. However, to better lay out the reasons explaining why a youth offender committed a bias crime, I would also include some discussion of the bias crime itself.

Second, Levin and McDevitt posit that "[a] model hate crime offender program should also explain to offenders how their actions have harmed the victim."[171] Levin and McDevitt conclude that many hate crime offenders do not see their victims as human, and thus do not take the harms associated

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167. It is important to emphasize that this work is outside the scope of my main legal argument in this Comment.

168. LEVIN & MCDEVITT, *supra* note 160, at 203.

169. *See id.* at 203–04.

170. *Id.* at 204.

171. *Id.*

with their crimes seriously.[172] In their view, "[i]t is therefore important in treatment programs to seek to reverse [the] dehumanization of the victims by having the offenders meet their victims and see, in unequivocal terms, just how much pain and suffering they have caused *another human being*."[173] I agree with Levin and McDevitt that forcing youth bias crime offenders to face their victims directly is critical to helping offenders realize the harms that they have caused to their victims. Another helpful source would be statements from the victim's family, friends, and community members to demonstrate how the harms of the crime extend beyond the victim to third parties.

Third, Levin and McDevitt assert that cultural awareness is an important element of bias crime rehabilitation programs. According to Levin and McDevitt, rehabilitation programs should be designed to eliminate the stereotypes about identity groups that many bias crime offenders believe.[174] Moreover, they contend that these programs should also emphasize the positive contributions made by members of different minority groups.[175]

Levin and McDevitt do not, however, go into much depth about how to eliminate these stereotypes. One obvious solution is to include members of the social groups targeted by the youth's crime in the rehabilitation program. Through face-to-face interaction, youth bias crime offenders can learn how they harbor biased misconceptions from actual members of the targeted groups. A less obvious, yet important, solution is to also include participants that belong to the same identity group as the offender. Ideally, these participants could connect with youth bias crime offenders by telling their own stories of how they harbored similar biases in the past, yet learned that acting violently upon them was wrong.

Fourth, Levin and McDevitt claim that offenders must give something back to the community that they targeted.[176] Levin and McDevitt posit that the "service component should be tied to the harm [caused] to the victim and not simply [be] the dirty work that no one else wants to do."[177] They suggest that one strategy is to have offenders participate in a major cultural event in the victim's community.[178] For the reasons discussed in Part IV.B, it is not always possible for groups targeted by bias crimes to organize or help construct

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

rehabilitation programs for bias crime offenders. Whenever possible, however, this should be done.

Additionally, when part of a rehabilitation model, community-service mandates achieve more than punitive ends. In this sense, I posit that there is a difference between a judge mandating thirty days of community service as punishment for a youth bias crime offender versus integrating community service into a mandatory rehabilitation program. In the latter situation, community service is part of a system with multiple components aiming to eliminate the biases held by youth that motivate their crimes. In the absence of organized rehabilitation programs, community service sentences do not provide a forum for youth bias crime offenders to work through the issues that drove them to commit a bias crime. Therefore, integrating community service into a structured rehabilitation program might be more effective in preventing youth bias crime offenders from committing similar future crimes.

Fifth, Levin and McDevitt suggest including a session describing the legal consequences of committing bias crimes.[179] According to Levin and McDevitt, many bias crime offenders assume that they will go unpunished for their crimes because they believe that law enforcement officers share their biases.[180] To combat this assumption, Levin and McDevitt recommend that bias crime offenders be presented with actual cases where bias crime perpetrators were sentenced to prison for committing their crimes.[181]

This suggestion by Levin and McDevitt is partially grounded in specific deterrence because it uses fear of imprisonment to persuade youth bias crime offenders of the potential legal ramifications of their crimes. This tactic, however, is ineffective if youth offenders who participate in bias crime rehabilitation programs believe that local law enforcement officers and prosecutors will share their biases and thus not enforce bias crime laws.[182] Therefore, whenever possible, it is important for law enforcement officers and prosecutors from the victims' communities to participate in rehabilitation programs to eliminate the perception that law enforcement and prosecutors will approve of the youth offenders' crimes.

Finally, Levin and McDevitt posit that an aftercare plan is essential in model bias crime rehabilitation programs.[183] The plan would provide offenders

179. *Id.* at 205.
180. *Id.*
181. *Id.*
182. For a comprehensive discussion on the role that biases harbored by law enforcement and prosecutors play in the reporting, enforcement, and prosecution of bias crime laws see Woods, *Ensuring a Right of Access*, *supra* note 22, at 417–26.
183. *See* LEVIN & MCDEVITT, *supra* note 160, at 205.

with ongoing treatment on an as-needed basis. If needed, offenders could return to the program if new issues arise or former issues were not resolved through prior participation in the program.

Limited resources may inhibit this bias crime rehabilitation model from being implemented. Some states and localities, however, have prioritized alternative sentencing for youth bias crime offenders. For instance, New Jersey has implemented a statewide alternative sentencing program that incorporates psychological assessments of youth bias crime offenders and individualized sessions to increase cultural understanding and reduce discrimination.[184] Similar programs have been successfully implemented in regions of Maryland and Massachusetts.[185] The existence of these bias crime rehabilitation programs supports the notion that their implementation is possible, and may even be less costly than incarcerating youth bias crime offenders in juvenile detention centers, jails, or prisons for longer periods of time.[186]

CONCLUSION

This Comment has unveiled the troublesome frequency of youth bias crimes and illustrated that the justifications underlying the general application of bias crime penalty enhancements—retribution, deterrence, and denunciation—do not apply similarly to youth bias crime offenders. Therefore, legislators, communities, and advocates must reevaluate their current approach to addressing youth bias crime. This Comment proposed that bias crime penalty enhancements, as applied to youth offenders, should mandate rehabilitation programs that force youth offenders to confront the biases that motivate their crimes. Requiring youth bias crime offenders to complete these programs is consistent with the rehabilitative ideal, which should always be a primary consideration in addressing crimes committed by youth.

184. *See id.* at 203.

185. *Id.* at 202–03.

186. No empirical studies on the relative costs of bias crime rehabilitation programs currently exist. In other contexts, however, such as drug rehabilitation programs, studies confirm that rehabilitation is less costly than imprisonment. *See, e.g.*, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUM. UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 17–19, 154–64 (1998), *available at* http://www.casacolumbia.org/absolutenm/articlefiles/379-Behind%20Bars.pdf (providing a cost-benefit analysis supporting that substantial savings would result by enrolling drug offenders into treatment programs rather than keeping them in idle incarceration without treatment).